

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD**

**APPLICATION NO. 23/2006 OF 19<sup>th</sup> MAY, 2006**

**BETWEEN**

**WANJOHI CONSULTING ENGINEERS (APPLICANT)**

**AND**

**NATIONAL IRRIGATION BOARD (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the National Irrigation Board (Procuring Entity) dated 10<sup>th</sup> April, 2006 in the matter of Tender for the Feasibility Study for the Expansion and Development of Ahero and West Kano Irrigation Schemes.

#### **BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information in all documents before it, the Board decides as follows: -

## **BACKGROUND**

The tender for provision of Engineering Services for the feasibility study for the Expansion and Development of Ahero and West Kano Irrigation Schemes was closed and opened on 14<sup>th</sup> February, 2006. Five firms had been invited to submit Technical and Financial Proposals after qualifying in the pre-qualification stage. Four firms namely, CAS Consultants in Association with Sabbour Associates, Samez Consultants in association with Runji and Partners, Wanjohi Consulting Engineers in association with Fintecs Consultants and Coda and Partners responded.

## **EVALUATION**

The evaluation was carried out by a committee chaired by Eng. F. K. Njoroge. The Evaluation criteria was based on the following key components :

<b>No.</b>	<b>Parameter</b>	<b>Points</b>
i.	Consultants experience	20
ii.	Methodology	25
iii.	Key personnel	25
iv.	Transfer of technology	5
v.	Financial considerations	25
	<b>Total</b>	<b>100</b>

The summary of the results of the technical evaluation are tabulated below: -

No.	Name of firm	Results of technical proposal	
		Score	% of maximum score
1	CAS Consultants / Sabbour Associates	75	100
2	Coda and Partners	64	85
3	Wanjohi Consulting Engineers / Fintecs Consultants	58	77
4	Samez Consultants/Runji and Partners	56	75

The four firms attained the 75% cut off point and qualified for their Financial Proposals to be opened. The Financial Proposals were opened on 10<sup>th</sup> March, 2006 before the representatives of the bidders. The evaluation was based on man-months and worked out with the overall project cost in order to establish the unit cost referred to as shillings per man-month. The lowest unit cost of input score was 25 points and the rest were weighted against that score. The results are as summarized below:

No.	Firm	Staff category	Staff input (man months)	Total project cost – (vat inclusive) in Kshs	Cost of project per man-month of key staff Kshs/MM	Score
1	Coda and Partners	Key	31.5	17,630,100	559,685.7	25.0
		Support	30			
2	Samez in association with Runji	Key	37.75	26,852,797	711,332.4	19.7
		Support	18			
3	Wanjohi in Association with Fintecs	Key	43.25	35,241,960	814,843	17.2
		Support				
4	CAS in Association with Sabbour Associates	Key	49.5	51,332,900	1,037,028.3	13.5
		Support	25.5			

The Technical scores were then combined with the financial scores and the results are tabulated below

	Coda and Partners	CAS in Association with Sabbour Associates	Samez in association with Runji	Wanjohi in Association with Fintecs
Technical evaluation score	64	75	56	58
Financial evaluation score	25	13.5	19.7	17.2
Aggregate score	89	88.5	75.7	75.2
<b>Rank</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>

Coda and Partners were recommended for the award at a cost of Kshs. 17,630,100. The Tender Committee in its meeting held on 31<sup>st</sup> March, 2006 resolved to award the tender to Coda and Partners but observed that the World Bank was funding a similar study in the same area and there was need to check if the study would incorporate the scope required by the Procuring Entity. The notification of award was therefore withheld. The Procuring Entity's Full Board meeting held on 10<sup>th</sup> April, 2006 gave the go ahead for the tender to be awarded since the outcome of the World Bank initiative would take long and the tender validity period might expire.

The successful bidder was notified vide a letter dated 10<sup>th</sup> April, 2006 while the unsuccessful bidders letters of notification were erroneously dated 10<sup>th</sup> January, 2006.

### **THE APPEAL**

This appeal was lodged on 19<sup>th</sup> May, 2006 by Wanjohi Consulting Engineers. The Applicant was represented by Mugambi Gathungu, Advocate, I. G. Wanjohi and J. M. K. Wanjohi. The Procuring Entity was represented by Eng. Francis K. Njoroge, Gitonga Mugambi and Mary M. Chomba. The Interested Candidate, Coda and Partners, was represented by Fred Mwangi, P. M. Kuria and James Miano.

The appeal is based on 13 grounds, which we deal with as follows: -

#### **Ground 1**

This is not a ground of appeal but a citation of the Regulations that were allegedly breached by the Procuring Entity. The Regulations cited are 4, 24 (1), 30 (7) & (8), 33 and 47

## **Grounds 2,3,4,5,6 and 7**

These grounds raise common issues and we shall deal with them together.

The Applicant alleged that the Procuring Entity breached regulations 4, 24 (1) and 30 (7) &(8) and clause 5.6 of the Standard Request for Proposals for Selection of Consultants. It submitted that during the opening of the Financial Proposals, the Procuring Entity failed to read aloud the Technical Proposals scores. The Applicant argued that Clause 5.6 of the Standard Request for Proposal for Selection of Consultants made it mandatory for the Procuring Entity to read out the technical scores and failure to do so rendered the whole evaluation process a nullity. It further argued that the reading out of the scores would enable the process to be conducted in a transparent way and would not give room for manipulation of the final results. The Applicant therefore alleged that the Procuring Entity breached Regulation 4 that requires fairness and transparency in the procurement process.

Finally, the Applicant alleged that the Procuring Entity failed to use the standard tender documents in accordance with Regulation 24 (1) and that it did not follow the evaluation criteria that was set out and therefore breached Regulation 30 (7) & (8).

In response, the Procuring Entity stated that it had used the standard tender document as required under Regulation 24(1). It submitted that the bidders had an opportunity to seek for more information or clarification regarding the tender documents. Therefore the Applicant should have sought clarification from it in the event that it felt that the tender document was not compliant to the provisions of Clause 5.6 of the Standard Request for Proposals for Selection of Consultants. The Procuring Entity further argued that the evaluation was done in accordance with the criteria set out in the

tender documents. In the premises, it denied breach of Regulation 30(7) and (8) as alleged by the Applicant.

On the allegation that it was requested to read out the technical scores at the opening of the Financial Proposals, the Procuring Entity confirmed that it did not do so. However it argued that the bidders representatives who were present at the opening were informed that the technical scores could not be read out, as this was not part of the criteria set out in the tender documents. The bidders representatives were further informed that the technical scores had already been released to the Staff Tender Committee before the opening of the Financial Proposals.

Finally, the Procuring Entity submitted that it had conducted the whole process in a fair and non-discriminatory manner and that the Applicant was not prejudiced in any way by the failure to read out the technical scores.

The Board has carefully considered the representations of the Applicant, the Procuring Entity and the interested candidate, and examined the documents submitted before it. The Board notes that the evaluation was done in accordance with the criteria set out in the tender documents. However, as admitted by the Procuring Entity, the technical scores were not read out aloud as required in the Standard Request for Proposal for Selection of Consultants. The Board has further noted that announcing of the technical scores is fundamental to enhance transparency and fairness in the tender process. In the present case, the tender document had not specified that the technical scores would be read out at the opening of the Financial Proposals. This is a serious omission on the part of the Procuring Entity. The issue that arises is whether this omission was fatal and prejudicial to the Applicant. The Board has observed that the minutes of the opening of the Financial

Proposals of 10<sup>th</sup> March, 2006 clearly show that the parties were informed that the technical scores had already been released to the Staff Tender Committee. As the results were not in the exclusive domain of the Evaluation Committee, there was no likelihood for manipulation as alleged by the Applicant.

We further note that in a Memo dated 10<sup>th</sup> March 2006 from the Chairman of the Evaluation Committee inviting the members of the Staff Tender Committee to the Financial Opening, the Chairman set out the technical scores of each consultant.

Whereas it is crucial that technical scores should always be read out aloud as set out in the Standard Request for Proposals, in this particular case the Applicant has not adduced any evidence to show that there was manipulation of the technical scores or that they were prejudiced by the failure to read out the scores. Indeed the Board has observed that it was the interested candidate's representative who had requested for the technical scores to be read out at the opening of the Financial Proposals. The Board has noted that the Applicant was ranked 4<sup>th</sup> after the combined technical and financial scores. The Applicant had a price of Kshs. 35,241,960 whereas the successful candidate had a price of Kshs. 17,630,100 and the estimated cost of the project was Kshs. 20,000,000. While price is not the only consideration, the Board is convinced that there is no breach that goes to the root of Regulation 4.

Accordingly, these grounds of appeal fail.



### **Ground 8**

In this ground of appeal the Applicant alleged that it received its notification letter dated 10<sup>th</sup> January, 2006 on 2<sup>nd</sup> May, 2006. It therefore argued that its appeal was filed within time since there was a mistake in the dates.

The Procuring Entity conceded that there was a typographical error in the letters sent to the unsuccessful candidates and that the appeal was within time.

Nothing turns on this ground as the Applicant's Memorandum of Appeal was accepted and argued by the Applicant.

### **Ground 9**

This is not a ground of appeal but a mere statement to the effect that the process of tendering by the Procuring Entity was governed by the Regulations.

### **Grounds 10, 11 and 12**

In these grounds, the Applicant alleged that if the award of the tender is not revoked, it would cause it to incur loss to the tune of Kshs. 750,855 being the cost of preparing the proposal, and a further Kshs. 18, 000,000 being the equivalent of the value of the tender less the expenses that would be incurred in carrying out the assignment. Ground 12 is an indication that the Appeal fee had been paid.

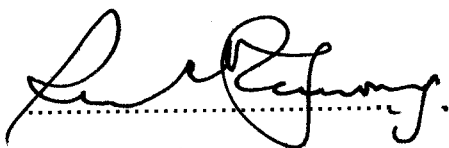
In response, the Procuring Entity stated that in the pre-qualification documents the candidates were informed that they would bear the costs of preparation of all requisite documents.

The Board notes that these grounds are statements of perceived losses arising from anticipated profits, which the Applicant would have made if it were awarded the tender. The tendering process is a business risk. Further, in open competitive bidding there is no guarantee that a particular tender will be accepted and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim the costs associated with the tendering process, which resulted in the award of the tender to another bidder.

In conclusion, the Board observes that it is crucial for technical scores to be read out aloud in public, and all Procuring Entities should ensure that this condition is followed to remove perceptions of lack of transparency in the procurement process. However, in the circumstances of this case and considering the fact that the technical scores had been released to the Staff Tender Committee prior to opening of Financial Proposals, the Board notes that there is no prejudice to the Applicant. Further, an examination of the evaluation process shows that the Procuring Entity followed the criteria set out in the tender documents.

Accordingly this appeal is dismissed and the procurement process is ordered to proceed.

Dated at Nairobi on this 16<sup>th</sup> day of June, 2006

  
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Signed Chairman

  
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Signed Secretary