

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO. 18/2006 OF 28TH APRIL 2006.

BETWEEN

BUILECON ASSOCIATES (APPLICANT)

AND

**NYAYO TEA ZONES DEVELOPMENT CORPORATION
(PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Nyayo Tea Zones Development Corporation in the matter of Expression of Interest for the provision of consultancy services for the proposed Kipchabo Tea Factory

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Paul M. Gachoka	-	Member
Ms. Phyllis N. Ng'ang'a	-	Member
Mr. Joshua W. Wambua	-	Member
Ms. C. A. Otunga	-	Holding brief for Secretary

BOARD'S DECISION

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

BACKGROUND OF AWARD

Advertisement

This was an open, tender advertised in the local dailies in March 2006 for expression of interest for provision of consultancy services for Kipchabo Tea Factory. The tender closing date was 3rd April 2006. Fifty-five firms bought tender documents but only forty-three firms submitted their completed bids, which were opened.

The firms had submitted expression of interest for the various disciplines of the consultancy services as follows:

Architectural Services

No.	Name of firm
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- | | |
|-----|---|
| 1. | U Design Architects, Planners, Interior Designers & Project Managers. |
| 2. | Promarc Consultancy |
| 3. | Aprim consultants |
| 4. | AAKI Consultants, Team Architects and Urban Designers. |
| 5. | Nyaundi Architects |
| 6. | Joel E.D.Nyaseme & Associates |
| 7. | Rayplan Architects |
| 8. | Spatial systems architects |
| 9. | Axis Architects |
| 10. | Arch Concepts |
| 11. | Edon Consultants International |
| 12. | Baseline Architects |

Quantity Surveying Services

No.	Name of firm
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- | | |
|----|------------------------------|
| 1) | Kanjumba Consultants Limited |
| 2) | Masterbill Kenya |
| 3) | M&M Construction Consultants |

- 4) Waiganjo & Associates, Quantity surveyors and Project managers
- 5) Songa Ogoda & Associates
- 6) Shaque Associates
- 7) FM Project Consultants
- 8) Quanyman Consultants
- 9) Armstrong & Duncan, Quantity Surveyors and Building Economists.
- 10) Gituamaba Associates
- 11) Builecon Associates
- 12) Gachagua, Kahoro & associates
- 13) Fredmar Quantity Surveyors
- 14) Cost care Consultants
- 15) Ngahu Associates

Electrical and Mechanical Engineering Services

No. Name of firm

1. Maiteri & Associates
2. Runji & Partners
3. MAK Consulting Engineers
4. Mecoy associates Consulting Electrical & Mechanical Engineers
5. Manpro Engineering Services
6. Synchroconsult Associates

Civil and Structural Engineering Services

No. Name of firm

- 1) Runji & Partners
- 2) Gath Consulting Engineers
- 3) Wanjohi Consulting Engineers
- 4) Baseplan Associates
- 5) KIRI Consult Limited
- 6) CAS Consultants
- 7) Maiyo & Partners
- 8) Ochieng Abuodha & Associates Consulting Engineers
- 9) Katoconsult and Associates Consulting Engineers
- 10) Span Engineers Consultants
- 11) Multiscope Consulting Engineers

THE TECHNICAL EVALUATION

RESPONSIVENESS

Ten firms were not evaluated for being non-responsive as shown below:

No.	Name	Reason for non responsiveness
1.	U Design Architects, Planners, Interior Designers & Project Managers	Failed to complete appendix A1, A2 and C
2.	Promarc Consultancy	Failed to complete confidential business questionnaire
3.	Aprim Consultants	Did not attach evidence of Registration from Ministry of Public works
4.	Joel E.D.Nyaseme & Associates	Failed to complete confidential business questionnaire
5.	Waiganjo & associates Quantity Surveyors	Did not attach evidence of Registration from Ministry of Public works
6.	Gituamba Consultants	Failed to complete appendix A1, A2 and C
7.	Armstrong & Duncan quantity Surveyors and Building Economists	Did not attach evidence of Registration from Ministry of Public works
8.	Wanjohi Consulting Engineers	Failed to complete confidential business questionnaire
9.	KIRI Consult Limited	Did not attach evidence of Registration from Ministry of Public Works
10.	Manpro Engineering Services	Did not attach evidence of Registration from professional body and the Ministry of Public Works

THE EVALUATION CRITERIA

The information provided by the bidders was evaluated and weighted as follows:

No.	Parameter	Maximum score
1.	Personnel	30 points
2.	Projects undertaken	30 points
3.	Audited accounts	5 points
4.	Litigation status	2 points
5.	Presentation	15 points
6.	Tools and equipments	4 points
7.	Premises	6 points
8.	Registration with professional body	8 points
	Total	100 points

For Architects, this score would then be weighted to 80% of the evaluation score. The remaining 20% would be scored from the following parameters.

9.	Technical understanding of tea factory	15 points
10.	Programme conducive of client expectations	5 points
	Total	20 points

The detailed analysis of points as scored by the bidders.

Architectural firms:

OPENING MARK	NAME OF FIRM	1	2	3	4	5	6	7	8	9	10	TOTAL
5	U Design Architects, Planners, Interior Designers & Project Managers.											Non responsive
7	Promarc Consultancy											Non responsive
9	Aprim consultants											Non responsive
11	AAKI Consultants, Team Architects and Urban Designers.	20	30	2	2	11	4	5	8	4	3	66.2%
15	Nyaundi Architects	10	30	2	0	15	4	3	8	13	5	75.6%
19	Joel E.D.Nyaseme & Associates											Non responsive
20	Rayplan Architects	19	30	0	2	6	4	3	8	5	1	63.6%
21	Spartial systems architects	15	30	1	2	7	3	3	8	5	4	65%
33	Axis Architects	21	30	2	0	14	4	5	8	14	5	86.2%
34	Arch Concepts	10	27	0	0	6	4	2	7	0	3	48.6%
39	Edon Consultants International	12	30	3	2	10	4	5	8	5	1	63.6%
43	Baseline Architects	12	14	2	0	6	4	3	3	2	1	38.2%

Quantity Surveying Firms

OPENING MARK	NAME OF FIRM	1	2	3	4	5	6	7	8	TOTAL
3	Kanjumba Consultants Limited	14	27	2	0	11	4	6	8	72%
6	Masterbill Kenya	7	23	4	0	10	4	6	8	62%
8	M&M Construction Consultants	12	30	0	0	5	4	3	8	62%
10	Waiganjo & Associates Quantity surveyors and Project managers									Non Responsive
12	Songa Ogoda & Associates	18	23	1	0	9	4	5	8	68%
13	Shaque Associates	14	30	2	0	11	4	2	8	71%
18	FM Project Consultants	14	30	0	0	7	3	2	8	64%
22	Quantyman Consultants	8	30	0	0	4	3	2	8	55%
23	Armstrong & Duncan quantity Surveyors and Building Economists.									Non Responsive
24	Gituamaba Associates									Non Responsive
26	Builecon Associates	12	30	5	0	2	3	3	8	63%
27	Gachagua, Kahoro & associates	9	30	1	2	5	4	3	8	62%
31	Fredmar Quantity Surveyors	10	30	2	0	5	3	3	8	61%
37	Cost care Consultants	10	30	2	2	12	3	2	8	69%
41	Ngahu Associates	12	30	4	0	14	4	6	8	78%

Electrical & Mechanical Engineering Firms

OPENING MARK	NAME OF FIRM	1	2	3	4	5	6	7	8	TOTAL
2	Maiteri & Associates	20	30	5	2	14	4	4	8	87%
16	Runji & Partners	19	30	2	2	12	4	3	8	80%
25	MAK Consulting Engineers	12	30	0	0	10	4	2	8	66%
29	Mecoy associates Consulting Electrical & Mechanical Engineers	21	30	2	0	10	4	3	8	78%
30	Manpro Engineering Services									Non responsive
40	Synchroconsult Associates	14	30	2	0	5	4	3	8	64%

Civil & structural engineering Firms

OPENING MARK	NAME OF FIRM	1	2	3	4	5	6	7	8	TOTAL
1	Runji & Partners	17	30	1	2	12	4	3	8	77%
4	Gath Consulting Engineers	16	30	3	2*	10	4	3	8	76%
14	Wanjohi Consulting Engineers									Non Responsive
17	Baseplan Associates	12	30	1	0	5	4	3	8	63%
28	KIRI Consult Limited									Non responsive
32	CAS Consultants	13	23	1	0	5	4	3	8	57%
35	Maiyo & Partners	16	30	5	0	5	4	3	8	71%
36	Ochieng Abuodha & Associates Consulting Engineers	8	30	3	0	10	4	3	8	64%

38	Katoconsult and Associates Consulting Engineers	10	27	3	0	12	4	2	8	66%
42	Span Engineers Consultants	18	30	0	0	10	4	1	8	71%
44	Multiscope Consulting Engineers	15	30	3	2	12	4	4	8	78%

* Has litigation in the High court of 1993 Gath Consulting Engineers vs. Central Bank of Kenya and Howard Humphreys (K) Ltd. Disputed amount is Kshs. 12.5 Million

TECHNICAL EVALUATION COMMITTEE RECOMMENDATIONS

Architectural services

The technical evaluation committee recommended the highest weighted expression of interest from M/s Axis Architects of P.O. Box 76635-00508 Nairobi.

Quantity surveying services

The technical evaluation committee recommended M/s Ngahu Associates having obtained the highest weighted score of 78%.

Electrical & Mechanical Engineering Services

The technical evaluation team recommended the highest weighted bidder M/s Maiteri & Associates; Building Services Consulting engineers of P.O. Box 75437-00200 Nairobi.

Civil and Structural Engineering Services

The technical evaluation team recommended the highest weighted expression of interest received from Multi Scope Consulting Engineers of P.O. Box 12012-00100 Nairobi.

TENDER COMMITTEE'S RECOMMENDATIONS

The tender committee in its meeting of 12th April 2006 approved all the recommendations of the technical evaluation committee.

THE APPEAL

The Applicant filed the appeal on 28th April 2006 against the Procuring Entity's award of the tender for expression of interest.

The Applicant was represented by Mr. J.M.Mathenge, and the Procuring Entity was represented by Dr. Ann Kinyua, Managing Director, Mr. David Magomere, Project Engineer attached from the Ministry of Roads and Public Works, Mr. Peter Kirigua, Director, and Mr. Felix M. Wambugi, Senior Supplies Officer. Interested candidates were represented by Eng. Runji Ngware, Mr. D. Njuguna, Mr. S.N. Maugo, Mr. P.N. Ngahu and Mr. Fred Ngunjiri.

The Applicant sought orders of the Board that the awards be nullified and re-tender ordered, that the Evaluation Committee used by the Procuring Entity be disbanded and that he be reimbursed the costs of filing the appeal.

The Applicant raised five grounds of appeal, which we deal with the grounds of appeal as follows: -

Grounds 1 and 2

The Applicant submitted that the Procuring Entity advertised for Expression of Interest through the press expecting responses from professionals in various fields. In its understanding, the Applicant expected that Expression of Interest was meant to be a process whereby the Procuring Entity would shortlist a few candidates who would then be asked to prepare bids. To the Applicant this was like a pre-qualification of consultants. The Applicant was later surprised that the Procuring Entity had treated this as an open tender, and awarded the tender. Even if the Procuring Entity had adopted an open tender process, as alleged, it still failed to adhere to the provisions of Regulation 24(2)(j) which required that the Procuring

Entity include the criteria of evaluation of tenders in the tender documents. The Applicant stated that it was not aware that there would be financial proposals and that statutory Standard Scale of Fees would be used.

In response, the Procuring Entity stated that it advertised for the Expression of Interest for the provision of consultancy services and not for pre-qualification of consultants. Further it had adopted the open tender method as required by the Regulations and the process did not prejudice the Applicant in any way. The bidders were requested to submit a technical proposal for the design, tender action and contract supervision. However, it should be noted that this was not a tender, as price offers were not sought from the bidders the Standard Scales of professional Fees would be applied for the services rendered by consultants.

In addition, the advertisement and the tender documents indicated the intention of the Procuring Entity to select the successful candidate in accordance with criteria set out by the Corporation. Thereafter, the pre-qualified firms would be selected to provide services to design, document and supervise the tea factory project. The procuring entity argued that the criteria for evaluation were well stated in the advertisement notice and this formed part of the tender documents. Further, the tender documents had schedules where bidders were required to state their various levels of qualifications including staff, projects completed, equipment and registration status, among other things. These were the criteria that were used to evaluate the proposals. The only thing missing was the score attached to each parameter, which was readily available from the Procuring Entity at a bidder's request.

Three successful candidates; Ngahu Associates (Quantity Surveyors) Axis Architects and Multiscope Consulting Engineers supported the submissions of the Procuring Entity though they did not articulate the difference between "Expression of Interest", "Request for Proposal, "Open National Tender" and/or "Prequalification".

Three unsuccessful candidates; Runji & Partners (Structural, Civil, Mechanical & Electrical Services), Armstrong & Duncan (Quantity Surveyors) and FM Project Consultants (Project Consultants and Quantity Surveyors) understood Expression of Interest to mean that successful bidders would be invited to submit proposals at the end of the exercise. Appointment to provide consultancy services would not be the immediate outcome of the evaluation under the Expression of Interest.

From the submissions to the Board, the Procuring Entity appears to have mixed up various procurement processes by adopting and combining various procurement methods resulting into a hybrid system of procurement. From its submissions, it did not differentiate whether it applied Request For Proposal, Prequalification, Expression of Interest or Open Tender method. The Board observed that since the Procuring Entity was sourcing for consultancy services it should have utilised the standard documents for Request For Proposals for Selection of consultants. As this was not adopted, the Procuring Entity risked not following the provisions of Regulation 36 as alleged by the Applicant.

The Board after scrutinising the documents submitted by the parties, noted that the Procuring Entity did not follow the procurement procedures for Request for Proposals as provided for in Regulation 36. The procedure requires that the Procuring Entity advertise for bidders to express interest. The potential candidates are then required to demonstrate that they possess the necessary qualifications to render the required services. The candidates that meet the qualifications set forth in the advertisement for Expression of Interest would then be short listed and issued with suitably customised Standard Tender Documents for request for proposals containing inter alia:

- Name and address of the Procuring Entity
- Terms of reference
- Criteria for evaluation
- Place and deadline for submission of proposals

The Board has also scrutinised Evaluation Reports, Minutes of the Tender Committee that awarded the tender, and considered the Applicant's and Procuring Entity's arguments. It has noted that Regulation 24(2)(j) is framed in mandatory terms and states that: "..... the Tender Documents shall include: the criteria of evaluation of tenders and award of contract". Equally, Regulation 30(7) states that " the Procuring Entity shall evaluate and compare the tenders that have been held responsive in order to ascertain the successful tenderer in accordance with the procedures set forth in the tender documents but no criterion shall be used that has not been set forth in the tender documents." Further, the advertisement and the schedules to be filled by candidates as stated in the tender document did not amount to evaluation criteria. The Procuring Entity should have summarised the evaluation criteria as used in its evaluation report and inserted them in the tender document. In addition, in the Evaluation Report, the Procuring Entity evaluated "Presentation" with a score of 15 points. This parameter of evaluation was totally new to the tender process, as it was neither stated in the advertisement nor in the tender documents.

It is also observed that the Procuring Entity asked for the financial positions of the bidders. However it did not specify the form of their presentation, whether by audited accounts or bank statements or otherwise, and their duration of coverage. However, in the evaluation it awarded graduated marks with those who submitted 5 years audited accounts getting a maximum of 5 marks. This was not fair since some of the bidders may not have known that audited accounts were required for the past five years.

The Board finds that the Procuring Entity wrongly applied a procedure of tendering that it could not explain, thus defeating the whole spirit of transparency and accountability, which the Regulations are supposed to promote. Further it employed criteria not stipulated in the tender documents to evaluate the expression of interest.

From the above submissions the Board finds that Regulations 24(2)(j), 36(1), 36(2)(b) and 36(2)(d) were breached by the Procuring Entity.

Accordingly, grounds 1 and 2 succeed.

Ground 3

The Applicant submitted that no official notification of award was made to it and only learnt from unofficial sources that the tender had been awarded. It had made several calls to the office of the Procuring Entity's Managing Director and the Senior Supplies Officer to know about the outcome of the Expression of Interest. Nothing came out of these phone enquiries, and up to the time of hearing it had not been notified although the Procuring Entity alleged that it posted and or emailed the notifications. This was a breach of regulation 33(1), which requires the Procuring Entity to notify all the candidates simultaneously. It further submitted that out of eight participating firms it contacted to find out whether or not they had been notified of the outcome of the Expression of Interest, all confirmed that they had not received any communication/notification from the Procuring Entity.

In response, the Procuring Entity submitted that the tender committee met to adjudicate on the tender on 12th April 2006 and wrote letters to the unsuccessful candidates on 13th April 2006. It also e-mailed letters on 18th April 2006 to all bidders with e-mail addresses. Further, official signed letters were dispatched to the other candidates without e-mail addresses, and the successful candidates were notified by phone on 18th April 2006 whilst, the official communication to them was on 20th April 2006.

The Board has noted that the Applicant, and many other candidates who were represented at the hearing may not have received their notification of award. The Board further observes that the list of e-mail messages submitted by the Procuring Entity indicated that communication was sent to the candidates. However it is not possible for the Board to conclusively establish whether the emails were received or not. Further the Procuring Entity has not demonstrated to the Board that it made an attempt to notify the bidders simultaneously since it alleged that it notified the unsuccessful bidders on 18th April 2006 and the successful ones on 20th April 2006.

Nevertheless it has not submitted any evidence to the Board to show that any letters other than emails were sent to any of the candidates. Interested candidates Runji & Partners (Structural & Civil, Mechanical & Electrical), Armstrong & Duncan (Project Managers & Quantity Surveyors) and FM Project Consultants (Project Managers and Quantity Surveyors) indicated that they were yet to receive any communication/ notification on the result of the Expression of Interest.

The email sent to Multiscope Consulting Engineers' Civil and Structural, who was one of the successful bidders, was also notified as being unsuccessful. This displays confusion in the matter of notification of bidders by the Procuring Entity. The Board therefore finds that Regulation 33(1) was breached by the Procuring Entity.

Accordingly this ground of appeal also succeeds

Grounds 4 and 5

The Applicant alleged that the Procuring Entity applied discriminatory criteria by seeking current litigation information from candidates and using it in the evaluation, thus breaching Regulation 11. It asserted that the Evaluation Committee was biased against its candidature given its professional qualifications and experience in similar projects.

In response, the Procuring Entity submitted that candidates were subjected to the same requirements. Further, there was no bias imposed on any candidate. Moreover, candidates with exemplary performance in specific areas were recognised including the applicant whose experience in documentation of factories was even highlighted and brought to the attention of the Tender Committee.

The Board observed that Regulation 11 prohibits the Procuring Entity from discriminating against any candidate in the tender process on any criteria other than its qualifications. We note that the applicant was not discriminated in any way as he was allowed to participate in the tendering process. The fact that the Procuring Entity had requested candidates to submit litigation information was in order considering that the Procuring Entity would want to deal with

reputable firms. In our opinion, disclosure of such information by bidders did not amount to discrimination within the meaning of Regulation 11.

Finally as the Applicant has not produced any evidence to support the allegation of bias, the Board finds that these two grounds have no merit.

Accordingly these grounds fail.

Losses to be suffered

The Applicant had argued that it would suffer losses

The Board's view is that this was an open expression of interest, which was expected to attract interested bidders. There was no guarantee from the outset of the tendering process that the Applicant was going to win. This is competitive Expression of Interest and we do not consider that the Applicant can fairly claim, at this stage, that it would suffer financial loss as these are considered to be necessary tendering risks.

The Board wishes to comment on the prayer sought by Axis Architects, the successful Architect, that the Board should only interfere with the award to the Quantity Surveyors if it finds that the process was flawed. On this, the Board observes that this was a single tender process for offers of various services to the Kipchabo Tea Factory. The Board noted that most firms, all across the professions, were equally affected by the flawed evaluation process. It would therefore be illogical for the Board to exclude other services from the decision rendered on the appeal by the Applicant since all the consultancies are interrelated and complementary. Further the Expression of Interest underwent the same process and had common parameters of evaluation and must thus be treated as one. In the circumstances, and considering that the flaws in the process are exhibited across all the services, the Board finds it inappropriate to divorce the evaluation of one service from the others.

As already stated above the Applicant succeeded in some critical grounds of appeal. The Procuring Entity used "Expression of Interest" as a tender and evaluated it with an evaluation criteria known only to itself and not to bidders as required by the Regulations. It did not seem to distinguish the differences between "Expression of Interest", "Request for Proposal", "Open National Tender" and "Prequalification" each of which require different tender documents and evaluation procedures. The Board also would like to state that since grounds 4 and 5 of the Appeal failed due to lack of evidence on the alleged bias and discrimination against the Applicant, the Board declines to grant the relief sought of disbanding the Evaluation Committee used by the Procuring Entity.

The tender evaluation process was therefore seriously flawed. Accordingly we hereby annul all the tender awards covered under the Expression of Interest for the provision of consultancy services to Kipchabo Tea factory.

In the circumstances, we order the Procuring Entity to tender afresh using appropriate advertisement and properly drawn up tender documents incorporating a comprehensive and objective evaluation criteria stating all the parameters and stages of evaluation and award as required by the Public Procurement Regulations.

Dated at Nairobi this 23rd day of May 2006



**CHAIRMAN
PPCRAB**



**SECRETARY
PPCRAB**