

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 14/2009 OF 8 APRIL, 2009

BETWEEN

LINS CONSULT ARCHITECTS & INTERIOR

DESIGNERS.....APPLICANT

AND

HIGHER EDUCATION LOANS BOARD..... PROCURING ENTITY

Appeal against the decision of the Tender Committee of the Higher Education Loans Board dated 30th March, 2009 in the matter of Tender No. HELB/02/2008-2009 for Consulting Services for Project Management, Architectural Designs, Quantity Surveying, Electrical/Mechanical/Civil & Structural Engineering Services, Physical Planning, Land Surveying and Landscaping.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter K. Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

- Mr. C.R Amoth - Secretary to the Board
Mr. Gilbert Kimaiyo - Secretariat

PRESENT BY INVITATION

Applicant, Lins Consult Architects & Interior Designers

- Mr. Mutua Molo - Advocate
Arch. M. Koech - Architect
Mr. F.J. Mulli - Board Member

Procuring Entity, Higher Education Loans Board

- Ms. B.N.Masinde - Lawyer
Dr. Richard B. Kipsang - Head of Operations
Ms. Phyllis Kipruto - Procurement Officer

Interested Candidates

- Mr. C. Wekesa - Advocate, Kenchuan Architects
Leonard Manyonge - Advocate, Kenchuan Architects
Eng. P.N. Otaba - Structural Engineer, Kenchuan Architects
Eng. A.M. Mango - Structural Engineer, Kenchuan Architects
Mr. Z.M. Bukama - Principal Partner, Kenchuan Architects
Mr. James Kimathi - Managing Director, K&M Archplans
Qs.Robinson Karigoh - Quantity Surveyor, Quanti-Bell Consult
Mr. C. Moi - Quantity Surveyor, Mathu & Gichuiru Associates
Ms. Ann Muthoni - Administrative Assistant, Studio Partners Architects
Arch. Samuel R.J.Ndeda - Senior Architect, Joel Ed Nyaseme & Associates

BOARD'S DECISION

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

BACKGROUND

The Request for Proposals (RFP) was advertised by the Procuring Entity on 19th November, 2008. The RFP was for Consultancy Services for Project Management, Architectural Designs, Quantity Surveying, Electrical/Mechanical/Civil & Structural Engineering Services, Physical Planning, land Surveying and Landscaping. The closing/opening date was first scheduled for 4th December 2008 but was extended to 11th December, 2008. The bids were opened in the presence of the bidders' representatives and a total of nineteen (19 No.) bid documents were submitted as listed below:

1. M/s Edon Consultants International Ltd
2. M/s Mathu & Gichuri Associates
3. M/s Joel E.D. Nyaseme & Associates
4. M/s Symbion International
5. M/s E.D.G & Atelier
6. M/s Pinnacle Projects Ltd
7. M/s University of Nairobi Enterprise and Services Ltd.(UNNES)
8. M/s Tarakibu-Miwa-Designs (TMD)
9. M/s Kenchuan Architects
10. M/s Lins Consult Architects & Interior Designers
11. M/s Triad Architects
12. M/s Arpland Architects
13. M/s Rimba Planning Systems Ltd

14. M/s Promarc Consultancy
15. M/s Genesis Architects
16. M/s K & M Archiplans Ltd
17. M/s Skair Associates
18. M/s Studio Partners Architects
19. M/s SK.Archplans

TECHNICAL EVALUATION

The technical evaluation was conducted in two phases. In the first phase, the bids were checked against the mandatory requirements which were stipulated in the tender advertisement notice. The mandatory requirements were as follows:-:

- (i) Company Background & Registration
- (ii) Five Assignments of similar nature
- (iii) Detailed company profile
- (iv) Professional Indemnity
- (v) Proof of Project Financing ability
- (vi) Valid Bid Bond

Out of the 19 bidders who responded to the tender, the following six (6) firms met the mandatory requirements and were considered for the detailed technical evaluation:

1. M/s Kenchuan Architects
2. M/s Arpland Architects
3. M/s Lins Consult Architects & Interior Designers
4. M/s Mathu & Gichuri Associates

5. M/s Genesis Architects
6. M/s Pinnacle Projects Ltd

DETAILED TECHNICAL EVALUATION

The Request for Proposal Document stipulates the criteria to be used in the evaluation of technical proposals as follows:-

CRITERIA	POINTS
(i) Qualifications of proposed Staff	20 - 30
(ii) Specific experience of the proposed staff Related to the assignment	10 - 30
(iii) Adequacy of methodology and work plan in response to terms of reference	<u>10 - 40</u>
Total Points	100

Only bidders who attained 75% of the points in the detailed technical evaluation proceeded to the financial evaluation stage. The following four bidders attained the required pass mark:

1. M/s Kenchuan Architects
2. M/s Arpland Architects
3. M/s Lins Consult Architects & Interior Designers
4. M/s Mathu & Gichuri Associates

FINANCIAL EVALUATION

The Financial Proposals for M/s Kenchuan Architects, M/s Arpland Architects, M/s Lins Consult Architects & Interior Designers and M/s Mathu & Gichuri Associates were opened on 3rd March, 2009 in the

presence of the bidders' representatives. The prices quoted by the bidders' were as follows:-

TOTAL FEES QUOTED PER COMPANY

Name	Stated grand total (Kshs)	Corrected grand total (Kshs)
M/s Lins Consult Architects & Interior Designers	59,283,913.00	56,627,536.00
M/s Kenchuan Architects	97,756,833.41	109,429,333.41
M/s Arpland Architects	124,200,752.50	118,756,525.20
M/s Mathu & Gichuri Associates	141,484,930.00	141,484,929.00

The corrected grand totals were subjected to the formula for determining the financial score (SF) as follows:

$$Sf = 100 \times \frac{f_m}{f}$$

Where: Sf is the financial score
Fm is the lowest fees quoted and
F is the fees of the quotation under consideration.

The lowest fee quoted was to be allocated the maximum score of 100% for the financial evaluation which translates into 30 marks.

ESTIMATES BY RELEVANT BOARDS OF REGISTRATION

The Evaluation Committee had stated that in a normal high-rise building, 25% of the cost goes to specialized services while 75% goes to builder's component. The estimated percentage cost for the works as per the feasibility study was Kshs. 805,000,000.00. The estimated percentage fees for major consultancy work i.e. architectural, quantity surveying, structural, civil electrical mechanical as set by the relevant boards of registration was as outlined below.

The value of the builder's content, i.e. 75% of the cost is Kshs. 603,750,000.00. Fees for Architectural, Quantity Surveying, Structural/Civil Engineering will be based on this figure while fees on Electrical/ Mechanical was based

on the value of specialized services (CCTV, electrical, plumbing, drainage, cabling e.t.c), i.e. 25% of the cost which was Kshs.201,250,000.00

It was observed that Project Managers do not have an umbrella professional body and therefore they do not have guidelines in rates of professional charges. It may be noted that there was a big range between the lowest and the highest bidders. These observations were made after consultation with an appointed Officer from the Ministry of Public Works.

● The Minimum service charges as per the Architects and Quantity Surveyor Act cap 525 based on the estimated value of the consultancy works that was to be done were as follows:-

Architect	Quantity Surveying	Structural/Civil Engineering	Electrical/Mechanical
6%	3%	3%	6%
36,225,000.00	18,112,500.00	18,112,500.00	12,075,000.00

Corrected figures for each bidder per service in Kenya shillings -VAT inclusive was as detailed below:

S/no	Bidder	Lins Consult	Kenchuan Architects	Arplad	Mathu & Gachuri
1	Architect	15,415,704.00	37,457,966.00	40,874,476.88	42,021,000.00
	<i>Deviation from the estimate</i>	-57.44%	3.40%	12.83%	16.00%
2	Quantity Surveying	9,635,076.00	20,276,046.00	20,276,048.32	23,345,000.00
	<i>Deviation from the estimate</i>	-46.80%	11.95%	11.95%	28.89%
3	Structural/Civil Eng.	7,708,084.00	19,169,429.20	9,338,000.00	24,819,940
	<i>Deviation from the estimate</i>	-57.44%	5.84%	-48.44%	37.03%
4	Electrical/Mechanical	6,744,588.00	16,134,579.20	18,676,000.00	16,359,464.92
	<i>Deviation from the estimate</i>	-44.14%	33.62%	54.67%	35.48%

It was observed by the Evaluation Committee that Lins Consult Architects & Interior Designers, deviated by a big margin far below the expected charge as laid down by the-by-laws under section 45(3)r of Cap 525. In view of this, Lins Consult was considered non responsive and disqualified at this level. Based on the financial evaluation that was done, the scoring was as follows:

Financial Scoring Per bidder:

Name	Marks	Rank
M/s Kenchuan Architects	30.00	1
M/s Arpland Architects	27.64	2
M/s Mathu & Gichuri Associates	23.20	3

Technical Scoring per bidder:

Name	Marks	Technical Score
M/s Kenchuan Architects	100.00	70.00
M/s Arpland Architects	84.00	58.80
M/s Mathu & Gichuri Associates	81.50	57.05
M/s Lins Consult Architects & Interior Designers	84.00	58.80

The technical score had a weight of 70 points while the financial score had a weight of 30 points. The Evaluation Committee combined both the technical and financial scores for each bidder to determine the candidate with the highest combined scores and the results were as follows:

Name	Financial Score	Technical Score	Total score%	Rank
M/s Kenchuan Architects	30	70.00	100.00	1
M/s Arpland Architects	27.64	58.80	86.44	2
M/s Mathu & Gichuri Associates	23.20	57.05	80.25	3

The Tender Committee in its Meeting No.9 held on 25th March 2009 awarded the tender for Provision of consultancy services for Project Management,

Architectural Designs, Quantity Surveying, Electrical/Mechanical/Civil and Structural Engineering services, physical planning, land surveying and landscaping to M/s Kenchuan Architects, at a total cost of Kshs.109,429,333.41 inclusive of 16% VAT and 5% withholding tax.

On 30th March, 2009, the Procuring Entity notified both the successful and the unsuccessful bidders.

THE REVIEW

● This Request for Review was lodged on the 8th day of April, 2009 by Lins Consult Architects & Interior Designers against the decision of the Tender Committee of the Higher Education Loans Board dated 30th March, 2009 in the matter of Tender No. HELB/02/2008-2009 for Consulting Services for Project Management, Architectural Designs, Quantity Surveying, Electrical/Mechanical/Civil & Structural Engineering Services, Physical Planning, Land Surveying and Landscaping.

● The Applicant was represented by Mr. Mutua Molo, Advocate, while the Procuring Entity was represented Ms. B.N Masinde, Lawyer.

The Applicant in its Request for Review raised five (5) grounds of Review and the Board deals with them as follows:-

Grounds 1 - 5, Breach of Section 82(5) of the Public Procurement and Disposal Act, 2005

These grounds have been consolidated because they raise similar issues.

In these grounds, the Applicant alleged that the decision by the Procuring Entity to determine its bid as unsuccessful was arrived at without due regard to the evaluation procedure and criteria set out under Clause 2.8 of the Request for Proposal documents and thus in breach of Section 82 (5) of the Act.

The Applicant argued that its financial proposal was the lowest at Kshs 59,283,913 against the assigned weight of 30 points as per the terms of reference in the Request for Proposal documents and its technical proposal assessed at 84% against the assigned weight of 70 points. Therefore, its combined score calculated on the basis of the formulae set out in Clause 2.8 of the Request for Proposal and in terms of the provisions of Section 82 (5) of the Act, was the highest among the four (4) technically responsive candidates. It further argued that its proposal should thus have been successful.

In response, the Procuring Entity stated that its decision to consider the Applicant's bid as unsuccessful was arrived at with due regard to the evaluation procedure and criteria set out under clause 2.8 of the Request for Proposal and was not in breach of Section 82(5) of the Act as alleged.

The Procuring Entity submitted that the formula for financial evaluation, set out under clause 2.8.3 of the Request for Proposal, and the provisions of Section 82 (5) of the Act were only applicable to bidders whose financial quotations complied with both the relevant laws governing their professions as well as the terms set out in the Request for Proposal.

The Procuring Entity argued that the Applicant's financial quotation was found to have contravened the guidelines set by the Architects and Quantity Surveyors Act, Cap 525 of the Laws of Kenya and those of the Institute of Engineers. It further argued that the Applicant was thus disqualified because it did not comply with clause 2.4.5 of the Request for Proposal which stated that the financial quotation must comply with the law governing the profession of the candidate.

The Successful Candidate, M/s Kenchuan Architects, fully supported the submissions of the Procuring Entity.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes the requirement for the preparation of the Financial Quotation under Clause 2.4.5 of the Request for Proposals provided as follows:-

"The financial quotation must comply with the law governing the profession of the candidate."

The Board also finds that Clause 2.4.5 of the Request for Proposals did not provide procedures and criteria in the Request for Proposal on how a bidder would calculate fees in line with the law governing its profession.

The Board finds that the Procuring Entity provided procedures and criteria for the evaluation and assigning of scores to responsive bidders' financial proposals under clause 2.8 of the Request for Proposal. Clause 2.8.3 provided the formula for determining the financial score, where the lowest

quoted fees was to be allocated the maximum score of 100. Clause 2.8.4 provided a formula for ranking the bidders' quotations according to their combined technical and financial scores. These two Clauses facilitated the evaluation of financial bids under Section 82(3) of the Act.

With regard to the law governing the professions in respect of fees, the Board notes that By-law Clause 45(3)(r) to the Architects and Quantity Surveyors Act, CAP 525, Revised Edition 1978, states that an Architect or Quantity Surveyor may be deemed by the Board (of Registration of Architects and Quantity Surveyors) to be guilty of professional misconduct if he deviates from charging less than the charges laid down in the Fourth or Fifth Schedule without notifying the Board of his intention to do so and receiving the Board's sanction thereto.

The Board also notes the following By-laws to CAP 525 in respect of determination of unprofessional conduct:

"45(2); Unprofessional conduct or professional misconduct in relation to a charge against a registered person shall be conduct which the Board (of Registration of Architects and Quantity Surveyors) deems after due enquiry to be such; and

46(1) Inquiry into the conduct of a registered person may be instituted by the Board (of Registration of Architects and Quantity Surveyors) upon the Board's initiative or upon complaint addressed to the Board in writing, made by or on behalf of any person alleging unprofessional conduct on the part of a registered person".

The Board finds that the Architects and Quantity Surveyors Act makes ample provision for complaints arising under that Act. It would therefore be contrary to the provisions of that statute for this Board to purport to take up jurisdiction over alleged wrongs under that statute. The Board has dealt with a similar matter and held the same in its decision in **Application No. 24/2006 between Kinyua Koech and Local Authorities Pension Trust dated 21st June, 2006.**

The Board further notes the following relevant provisions for evaluation of proposals under Section 82 of the Act:-

“(1).....

(2).....

(3) For each proposal that is determined, under subsection (2) to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.

(4) If the request for proposal provides for additional methods of evaluation, the Procuring Entity shall conduct such methods in accordance with the procedures and criteria set out in the Request for Proposals.

(5) The successful proposal shall be the responsive proposal with the highest score determined by the Procuring Entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and

financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4)."

Taking the above matter in the instruction to bidders and the Act into consideration, the Board finds that the disqualification of the Applicant was not proper and its financial proposal should have been evaluated.

Accordingly, these grounds of appeal succeed.

Before concluding, the Board wishes to make the following observations:

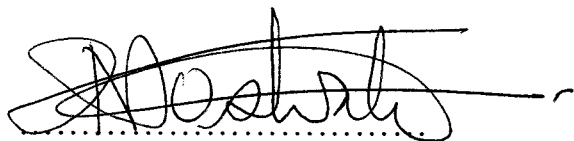
- (i) The Board notes that clause 2.4.4. of the Request for Proposals states that the financial quotation must remain valid for 30 days after the submission date. The Board further notes that tenders were closed/opened on 11th December, 2008, and thus the 30 day tender validity period as stated in the RFP expired on 10th January, 2009. There is no evidence provided to the Board that the tender validity period was extended. The notification of Award was done on 30th March, 2009, after the tender validity had expired. The Board observes that this is contrary to Section 67(1) which requires that before the expiry of the period during which tenders must remain valid, the Procuring Entity shall notify the person submitting the successful tender that his tender has been accepted.
- (ii) The Board further notes that tenders were closed/opened on 11th December, 2008, and that the technical evaluation was concluded on 27th February, 2009 which was 78 days after the tender opening. The Board observes that the Procuring Entity breached Regulation 46 by

failing to evaluate the tenders within prescribed period of 30 days, after the opening of the tender.

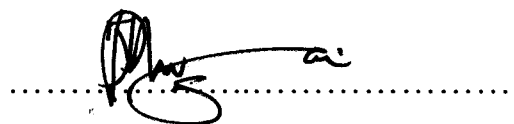
In view of the foregoing, the Board orders, pursuant to Section 98 of the Act, the Request for Review succeeds and therefore the decision to award the tender to the successful tenderer is hereby nullified.

The Procuring Entity may re-tender through restricted tendering method using the Standard Tender Documents.

Dated at Nairobi on this 4th day of May, 2009



fr : **Chairman, PPARB**



fr : **Secretary, PPARB**

