

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 67/2010 OF 10<sup>TH</sup> DECEMBER, 2010**

**BETWEEN**

**TECTURA INTERNATIONAL LTD.....APPLICANT**

**AND**

**MULTIMEDIA UNIVERSITY COLLEGE OF KENYA.....PROCURING  
ENTITY**

Review against the decision of the Tender Committee of the Multimedia University College of Kenya dated 10<sup>th</sup> December, 2010 in the matter of Tender No. NMU/MP/01/2010 for Prequalification for Consortium Consultancy Services for Development of the University Master Plan.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Amb. C. M. Amira	-	Member

## **IN ATTENDANCE**

Mr. C. R. Amoth - Secretary  
Ms. Florence Okumu - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Tectura International Ltd**

Mr. Mukele - Advocate, Mukele & Co. Advocates  
Dr. Mutiso - Architect  
Mr. P. S. Kisin - Quantity Surveyor

### **Procuring Entity, Multimedia University College of Kenya**

Mr. Patrick Rugo - Advocate, Chiuri Kirui & Rugo Advocates  
Mr. David Ikiao - Project Manager  
Mr. E. A. Magomere - Estate Manager  
Mr. Caleb Oboch - Registrar

### **Interested Candidates**

Ms. Catherine Wanjiru - Project Manager, Pinnacle Projects  
Mr. Robert Gichohi - Project Manager, Pinnacle Projects  
Mr. Peter Nganga - Project Manager, Triad Architects  
Ms. Irene Mbiti - Architect, Symbion  
Mr. Martin Murimi - Architect, Joel E. D. Nyaseme  
Mr. Gome Steve - Architect, Joel E. D. Nyaseme  
Mr. R. A. Malala - Quantity Surveyor

## **BOARD'S DECISION**

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

## **BACKGROUND**

This tender was advertised in the Daily Nation of 12<sup>th</sup> August, 2010, inviting interested eligible and registered building contractors for the Prequalification for Consortium, Consultancy Services for Development of the University Master Plan. Tender No. NMU/MP/OI/2010.

### **Closing/Opening:**

The Tender closed and opened on 16<sup>th</sup> August 2010. The tender started with a request for Expression of Interest (hereinafter "EOI") which attracted 23 firms who submitted their bids.

Out of the twenty three firms that participated in the EOI, Eleven (11) bidders were pre-qualified and only eight bidders submitted their bids which were opened at the Tender Opening meeting of 16<sup>th</sup> August 2010. The Eight Firms were;-

1. F1 - Triad Architects
2. F2 - Tectura International
3. F3 - Mutiso Menezes International
4. F4 - Conte Design Team
5. F5 - Joel D. Nyaseme & Associates
6. F6 - Symbion Kenya Ltd

7. F7 - Pinnacle Projects Ltd
8. F8 - Arprim Consultants

## **Evaluation**

Tender Evaluation was done in the three stages, namely the Preliminary, Technical and the Financial stages.

### **PRELIMINARY STAGE**

Bidders were assessed at this stage using the following mandatory parameters. ( )

1. Certified copy of Certificate of Registration Incorporation.
2. Certified Copy of Valid Trade License from the Local Authority
3. Practicing License
4. Registration with Ministry of Public Works
5. Registration with Professional Body
6. Three years financial statements including Audited accounts (2006, 2007 & 2008).
7. Professional Indemnity cover of Kshs. 5 million from reputable Insurance Company. ( )

At this stage of evaluation, bidder No. F7 Pinnacle Projects Ltd, was not responsive as it failed to attach a copy of their Registration with the Ministry of Works. Bidders F1 and F2, Triad Architects and Mutiso Menezes International respectively were also found unresponsive as they had presented the same structural and Civil Engineer Sub-Consultant **M/S Otieno Odongo & Partners.**

The Applicant and bidder No. 5, Joel E. O. Nyaseme & Associates were disqualified at this stage as they shared the same Consultant Electrical Sub-Consultant **M/S Kaigutha & Partners**.

Three bidders were found to be responsive. They were:-

F4 – Conte Design Team

F6 – Symbion Kenya Ltd

F8 – Aprim Consultants

### **TECHNICAL STAGE**

The following Parameters were used to determine responsiveness at this stage.

- i. Relevant References
- ii. Professional Qualification and experience
- iii. Methodology of work plan.

The summary results of the evaluation was as tabulated below:

NO	CRITERIA/ ATTRIBUTES	MAX SCORES	FIRMS		
			F4	F6	F8
1	Mandatory Requirements	5	5	5	5
2	Relevant References	20	11	14	8
3	Qualification of Professional Staff	30	23	20	20
4	Methodology & work plan	30	19.20	26.10	21.65
	<b>TOTAL</b>	<b>85</b>	<b>58.20</b>	<b>65.10</b>	<b>54.65</b>

From the evaluation firm No. 6, Symbion Kenya Limited was the only one found to be responsive with 65.10 points and moved to the financial stage.

### **FINANCIAL STAGE**

The Procuring Entity's budget for the tender was estimated at Kshs 25,000,000 to Kshs 30,000,000. Symbion Kenya Limited was found to be responsive at this stage as it offered to provide the consultancy for the Development of Master plan for the sum of Kshs. 22,843,858.00 (Twenty Two Million Eight Hundred and Forty Three Thousand, Eight Hundred and Fifty Eight only and Zero cents)

### **THE TENDER COMMITTEE DECISION**

The Tender Committee in its meeting held on 25<sup>th</sup> November, 2010 concurred with the recommendations of the Evaluation Committee and awarded the Tender to Firm 6, M/S Symbion Kenya Limited at their tender sum of Kshs.22,843,858.00

### **THE REVIEW**

This Request for Review was lodged on 10<sup>th</sup> December, 2010 by Tectura International Ltd against the decision of the Multimedia University College of Kenya dated 26<sup>th</sup> November, 2010 in the matter of tender no. NMU/MP/01/2010 for consultancy services for development of the University Master plan. The Applicant was represented by Mr. A. Mukele while the Procuring Entity was represented by Mr. Patrick Rugo, both advocates of the High Court of Kenya.

The Applicant has raised three grounds of appeal and requests the Board for the following orders:

1. *"The Applicant's Technical Proposal submitted on 16<sup>th</sup> August 2010 conformed to the requirements set out under clause 2.3.3 of the bid.*
2. *The Respondent's finding of the minutes of the 8<sup>th</sup> Meeting of the Respondents Tender Committee held on 25<sup>th</sup> November 2010 Min 02/08/2010 items 17 and 18 (annexed marked RM 3), more particularly, that the Applicant was disqualified, be set aside.*
3. *The Applicant be prequalified to proceed to the next level of evaluation."*

### **Ground 1**

The Board notes that this is a general statement that is not supported by any breach of the Act or the Regulations as required under Regulation 73(2) (a) of the Public Procurement and Disposal Regulations, 2006 (Hereinafter "the Regulations"). The Board therefore need not make any finding on this ground.

### **Grounds 2 and 3**

These grounds have been consolidated as they raise similar issues on the way the technical evaluation was done.

The Applicant submitted that the Procuring Entity had erred at the Technical Evaluation stage by stating that the Applicant had submitted the name of Otieno Odongo and Partners as its Structural and Civil Engineering Consultant which was not the case.

The Applicant further submitted that it had not associated with any of the other ten consultants who had been invited by the Procuring Entity to participate in this tender. It stated that it had not breached the requirements of clause 2.3.3(i) of the Request for Proposal which barred the eleven consultants who had been invited from associating with each other. It argued that Clause 2.3.3(i) did not give any direction as to the manner in which the invited consultants were to associate with the sub-consultants. It further argued that it was therefore wrong for the Procuring Entity to disqualify its proposal as a result of its association with Kaigutha and Partners who were not part of the eleven consultants that the Procuring Entity had invited to participate in this tender.

The Applicant challenged the Procuring Entity to state what prejudice it had suffered or risked suffering by the inclusion of Kaigutha and Partners in its Request for Proposal and that of J D Nyaseme and Associates.

The Applicant stated that some of the engineering specialties were highly limited in terms of qualified consultants. It added that it was not practicable for the Procuring Entity to bar any two or more of the invited consultants from associating with the same specialist sub-consultants. In any event, it concluded that the Procuring Entity should have stated expressly in the request for proposal that no sub consultants would associate with more than one consultant.

In response, the Procuring Entity submitted that the Applicant had been disqualified as a result of associating with Kaigutha and Partners as a services Engineer who had also associated with J D Nyaseme and Associates contrary to



requirements of clause 2.3.3(i) of the Request for Proposal. It admitted that its initial minutes had erroneously stated that the Applicant had submitted the name of Otieno Odongo and Partners as its Civil and Structural Engineering Consultants. It stated that this error was rectified in the final minutes had rectified the error and therefore this should not be an issue under review.

The Procuring Entity further submitted that the Request for Proposal at Clause 2.3.3(i) applied equally to all members of the consortium presenting a bid whether as a main consultant or as a sub-consultant. It argued that it was wrong for the Applicant to state that this clause only applied to the eleven consultants who had been invited to bid. It further argued that the Applicant should have requested for clarification at any time during the preparation of its proposal if the matter was not clear.

The Board has carefully considered the submissions of the parties and examined the documents presented before it which included the tender documents, the evaluation reports, tender notice and minutes of the Tender Committee.

The Board notes that the Procuring Entity advertised in the local media on 10<sup>th</sup> February, 2010 calling for Expression of Interest from qualified competent and registered firms for the development of the University Master plan.

The Board further notes that twenty three firms including the Applicant responded to the Expression of Interest which was opened on 12<sup>th</sup> March, 2010.

The Board notes that evaluation of the twenty three firms was carried out and that eleven firms, including the Applicant, were pre-qualified. Subsequently, the Procuring Entity by letters dated 7<sup>th</sup> July, 2010 invited the prequalified firms to participate in the next stage of the Request for Proposal (RFP).

The Board notes that only eight of the pre-qualified consultants including the Applicant, submitted their proposals which were opened on 16<sup>th</sup> August, 2010.

The Board also notes that the evaluation was carried out in three stages namely preliminary, technical and financial evaluation. The Board further notes that one of the bidders, Pinnacle Projects Ltd was disqualified at the Preliminary Evaluation stage for failing to attach a copy of its certificate of registration with the Ministry of Roads and Public Works. Of the seven remaining bidders, six were disqualified at the technical evaluation stage as follows:

1. Triad Architects and Mutiso Menezes International were disqualified as they had presented the same structural and civil consultant - Ms Otieno Odongo and Partners.
2. The Applicant and J D Nyaseme and Associates were disqualified as they had presented the same Electrical Sub-consultant, Ms Kaigutha and Partners.
3. Two other firms namely, Conte Design Team and Aprim Consultants also failed at the technical evaluation stage for failing to attain the pass mark of 64/85 as stipulated under clause 2.5.7 of the Appendix information to bidders.

Consequently, only one bidder Ms Symbion Kenya Ltd qualified to proceed to the Financial Evaluation stage. The Board notes that Symbion Kenya Ltd was found to be responsive at the financial evaluation stage and that the Evaluation Committee recommended that the tender be awarded to it at its bid price of Kenya shillings twenty two million eight hundred and forty three thousand eight hundred and fifty eight (Kshs 22,843,858).

The Tender Committee, in its meeting of 25<sup>th</sup> November, 2010, concurred with the recommendation of the Evaluation Committee and awarded the tender to Ms Symbion Kenya Limited. The Board notes that the Procuring Entity has conceded that the Applicant did not include the name of M/S Otieno Odongo and Partners in its proposal and therefore the Board does not need to make a finding on that aspect.

The Board further notes that the fact that both the Applicant and M/s J D Nyaseme had included Kaigutha & Partners as a sub-consultant is not in dispute. The issue for the Board to determine is whether or not the inclusion of one sub-consultant by any two or more of the invited consultants should amount to a breach of clause .2.3.3(i) of the Proposal Document.

The Board takes note of clause 2.3.3(i) as follows:

*“ If a firm considers that it does not have the expertise for the assignment, it may obtain full range of expertise by associating with individual consultant(s) and / or other firms or entities in a joint venture or sub-consultancy as appropriate. Consultants shall not associate with the other consultants invited for this assignment. Any firms associating in contravention of this requirement shall automatically be disqualified”.*

The question that then arises for determination is “who are the invited consultants?

The Board observes that the invitation letters that the Procuring Entity sent on 7<sup>th</sup> July, 2010 to the respective Managing Directors of the eleven prequalified consultant firms stated as follows :-

*“The Managing Director*

.....

.....

**RE: PREQUALIFICATION FOR CONSORTIUM CONSULTANCY SERVICES FOR DEVELOPMENT OF THE UNIVERSITY MASTERPLAN**

*Reference is made to the above consultancy services for MultiMedia University College of Kenya.*

*We are pleased to inform you that following the completion of the evaluation exercise your company has been pre-qualified as one of the firms to proceed to the next stage of Request for Proposals (RFP)*

*Yours faithfully*

*Prof. James A. Kulubi*

**PRINCIPAL"**

The Board notes that this letter is addressed to the Managing Director of the eleven bidders who had been invited to participate in the Request for Proposal. The letter did not invite the sub-consultants and it was expected that the Consultants will include details of the respective sub-consultants in their Request for Proposal Document. The Board then finds that Clause 2.3.3 (i) referred to the eleven consultants who had been invited and did not refer to the sub-consultants. If the Procuring Entity intended to bar the bidders from using the same sub-consultants, that requirement should have expressly stated in the Request for Proposal document to avoid ambiguity.

The Board Further takes note of the usage of the word "consultant" in Clause 2.3 which states as follows;

**"2.3 Preparation of Technical Proposal**

***2.3.1 The consultant's Proposals shall be written in English Language.***

***2.3.2 In preparing the technical proposal, Consultants are expected to examine the documents constituting this RFP in detail. Material***

*deficiencies in providing the information requested may result in rejection of a proposal.*

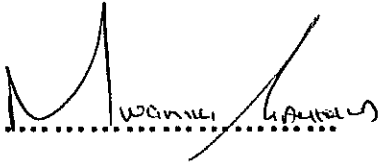
*2.3.3 While preparing the Technical Proposal, consultants must give particular attention to the following:...."*

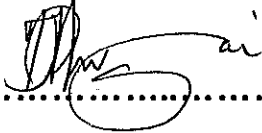
It is clear that the term "consultant" is used to refer to the bidder and does not refer to the sub-consultants as argued by the Procuring Entity. The Board finds that the Procuring Entity acted wrongly by disqualifying bidders who had same sub-consultants when this requirement was not expressly stated in the Request for Proposal Document.

Accordingly these grounds succeed.

Taking into account all the above matters into consideration, this Request for Review succeeds, and the award of the tender to the Successful Bidder is hereby annulled pursuant to Section 98 (a) of the Act. Further, pursuant to Section 98 (b) of the Act, the Board directs the Procuring Entity to re-evaluate the bids of all the bidders who passed the Preliminary Evaluation stage and award the tender accordingly.

**Dated at Nairobi on this 10<sup>th</sup> day of January 2011**

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**