

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 47 / 2011 OF 6th DECEMBER, 2011

BETWEEN

**MAINA & MAINA ADVOCATES AND
IGERIA & NGUGI ADVOCATESAPPLICANT**

AND

NATIONAL IRRIGATION BOARD.....PROCURING ENTITY

Review against the decision of the Tender Committee of National Irrigation Board dated 18th November, 2011 in the matter of Tender No. NIB/T/090/2010-2011 for Consultancy Services for Legal Audit for National Irrigation Board.

BOARD MEMBERS PRESENT:

Ms. Judith A. Guserwa - Member (in the chair)
Mr. Joshua W. Wambua - Member
Mrs. Loise Ruhiu - Member
Amb. Charles M. Amira - Member

IN ATTENDANCE:

Ms. Pauline Opiyo - Secretariat
Ms. Maureen Kinyundo - Secretariat

PRESENT BY INVITATION:

Applicant -Maina & Maina Advocates and Igeria & Ngugi Advocates

Mr. A. Ndegwa - Advocate

Procuring Entity - National Irrigation Board

Mr. Boaz Akello - Procurement & Supplies Officer

Mr. Stephen Apome - Irrigation Officer

Interested Party - Rachier and Amollo Advocates

Mr. Jotham O. Arwa - Partner

Ms. Jolie Obel - Advocate

Mr. Mark Okinda - Assistant

BOARD'S DECISION

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

BACKGROUND OF CONTRACT AWARD

Advertisement:

Expressions of Interest for prequalification in respect of the subject assignment (provision of legal services) were advertised in "The Daily Nation" and "The Standard" Newspapers of the Wednesday 30th June 2010. Ten (10) firms applied to be prequalified. All the ten (10) firms who applied to be prequalified for provision of legal services were prequalified

and the prequalification report approved by the Procuring Entity's Tender Committee.

Following the prequalification of consultants by the Board, six prequalified law consulting firms were shortlisted for invitation to submit proposals to offer consultancy service for Legal Audit for National Irrigation Board. The Request of Proposals (RFP) for Legal Audit for National Irrigation Board, Tender No. NIB/T/090/2010-2011 was through a Letter of Invitation (LoI) to the six shortlisted consulting law firms on 27th June 2011.

The six firms included;

1. Nyaundi Tuiyott & Company Advocates
2. Maina & Maina Advocates
3. Rachier & Amollo Advocates
4. Miller & Company Advocates
5. J. O. Juma & Company Advocates
6. Nyaberi & Company Advocate

Closing/Opening:

The closing date/time were given as 14th July 2011, at 12.00 noon Kenyan time. The Proposals were received by the Opening and Evaluation Committee appointed by the General Manager.

The following two of the six consulting firms invited returned their Proposals by Thursday 14th July 2011 at 12.00 noon:

No.	Consultant's Name	Documents
1.	Maina & Maina Advocates and Igeria & Ngugi Advocates	1 original Technical Proposal Document, three (3) copies and one Financial Proposal

2.	Rachier & Amollo Advocates	1 original Technical Proposal Document, two (2) copies and one Financial Proposal
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The following four consultancy firms did not submit their proposals;

1. Nyaundi Tuiyott & Company Advocates
2. Miller & Company Advocates
3. J. O. Juma & Company Advocates
4. Nyaberi & Company Advocates

EVALUATION

Evaluation Criteria:

The evaluating committee prepared the evaluation criteria as indicated in the Request for Proposals (RFP) Document. In the evaluation criteria, the evaluating committee considered whether the applicants had responded and addressed the key requirements highlighted in the Request for Proposals.

The suitability and adequacy of the applicants was evaluated by examining;

- (i) Law Expert /Team Leader
- (ii) Auditor
- (iii) Financial Specialist
- (iv) Human Resources Specialist

	Sub criteria	Category	Max score
1	The Specific Experience of the Consultants relevant to the Assignment	(Maximum of 4 projects each 5 marks)	20
2	Adequacy of the proposed Methodology and Workplan in responding to the Terms of Reference	Methodology; ToR 1 & 11 (max 6 mks each) (ToR 2-10)Each explained TOR max 2 mks	30
		Work plan indicating all activities, how they would be executed 5mks Durations of work plan using a ganth chart (5 mks)	10
3	The key professional staff qualifications and competence for the assignment	4 Personnel max 8 mks;	40
	Total		100

Technical Evaluation:

The Tender Opening and Evaluation Committee evaluated the Technical Proposals submitted by the two consultancy firms as follows;

1. Maina & Maina Advocates

Sub-criteria	Description	Actual Score	Max Score
1	The specific experience of the consultants relevant to the assignment	20	20

2	Adequacy of the proposed methodology and work plan in responding to the terms of reference	37	40
3	The key professional staff qualifications and competence for the assignment	30	40
Total Technical Score		87	100

2. Rachier & Amollo Advocates

Sub-criteria	Description	Actual Score	Max Score
1	The specific experience of the consultants relevant to the assignment	20	20
2	Adequacy of the proposed methodology and work plan in responding to the terms of reference	31	40
3	The key professional staff qualifications and competence for the assignment	30	40
Total Technical Score		81	100

The minimum Technical Score required to qualify for Financial Evaluation was 75%.

Technical Evaluation - Summary Scores & Ranking

S/No	Firm	Technical Score (%)	Rank
1	Rachier & Amollo Advocates	81	2
2	Maina & Maina Advocates & Partners (Igeria and Ngugi Advocates)	87	1

Each of the two firms scored more than 75% in the technical evaluation.

Recommendation:

Following the technical evaluation of the proposals submitted by the two pre qualified consulting firms for Legal Audit for National Irrigation Board as explained above, the tender committee was requested to review the report and approve the technical evaluation report and subsequent opening of Financial Proposals for the two firms that scored 75% marks and above.

Opening of Financial Proposals:

The technically qualified consultancy firms were invited to attend the opening of the financial proposals scheduled for 26th September 2011 at 3.00pm at the Nile Basin Boardroom. The technical scores were publicly announced and followed by the opening of the financial bids for the qualified firms.

The summary of the Financial Proposals opened was as tabulated below:

No	Consultant's name	Amount in Kshs (VAT Inclusive)
1	Rachier & Amolo Advocates	928,000
2	Maina & Maina Advocates & Partners (Igeria and Ngugi Advocates)	-*

**No monetary figure in the submission financial proposal*

Evaluation Criteria:

The key evaluation criterion was as set out in the RFP whose formula is hereby reproduced. The formulae for determining the Financial Score (Sf)

shall, unless an alternative formula is indicated in the Appendix "ITC", be as follows:-

$S_f = 100 \times \frac{F_m}{F}$ where S_f is the financial score; F_m is the lowest priced financial proposal and F is the price of the proposal under consideration. Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T =the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; $T + p = 1$) indicated in the Appendix. The combined Technical and Financial Score, S , is calculated as follows:- $S = St \times T \% + Sf \times P \%$. The firm achieving the highest combined Technical and Financial Score will be invited for negotiations.

There was no alternative formula indicated in the Appendix ITC.

Detailed Evaluation of Financial Proposals:

The team analyzed the costs for the individual items in the proposal to check for correctness and consistency. The findings for the analysis are summarized in the table below:

	Rachier & Amolo Advocates	Maina & Maina Advocates and Partners (Igeria & Ngugi Advocates)
	Quoted	Quoted
Remuneration	800,000	To negotiate (No monetary figure given)
Reimbursable Expenses	-	-
Miscellaneous	-	-
Sub total	800,000	-
Taxes 16% VAT	128,000	-
Grand total	928,000	-

Evaluation of Financial Score

The formula for determining the financial score as specified in the RFP was as below:

$$Sf = 100 \times Fm / F$$

Where; Sf is the financial score;
Fm is the lowest priced financial proposal
F is the price of the proposal under consideration

Lowest priced financial proposal before the provisional sum (FM) = Kshs 928,000 by Rachier & Amollo Advocates.

The scores were calculated as per the table below:

Consultant's name	Total Financial Proposal (Kshs)	Financial Score (SF)
Rachier & Amollo Advocates	928,000	100
Maina & Maina Advocates & Partners (Igeria and Ngugi Advocates)	*	*

**No monetary figure in the submission financial proposal*

The Financial Proposal submitted by Maina & Maina Advocates & Partners (Igeria and Ngugi Advocates) did not list any cost for the assignment and thus not conforming to the requirements and conditions outlined in the issued RFP document (Clause 2.4). The Financial Proposal was therefore non-responsive and subsequently not considered in the evaluation.

Combined Technical and Financial Scores:

Proposals were to be ranked according to their combined technical (*St*) and financial (*Sf*) scores using the weights (*T*=the weight given to the Technical Proposal; *P* = the weight given to the Financial Proposal; *T* + *p* = 1) indicated in the Appendix.

The combined technical and financial score, *S*, is calculated as follows and summarized in the table below:

$$S = St \times T \% + Sf \times P \%$$

Schedule of Combined Technical and Financial Scores

No	Consultant's name	Technical Score	Weighted Technical Score	Financial Score (<i>Sf</i>)	Weighted Financial Score	Combined score	Rank
		(<i>St</i>)	(<i>St</i> x <i>T</i> %)		(<i>Sf</i> x <i>P</i> %)	(<i>S</i>)	
1	Rachier & Amollo Advocates	81	64.8	100	20	84.4	
2	Maina & Maina Advocates and Igeria & Ngugi Advocates	87	69.6	-	-		

Ranked Combined Technical and Financial Scores:

From the criterion of contract award in clause 2.85 of the RFP document, the firm achieving the highest combined technical and financial score will be invited for negotiations. From the table above, Rachier & Amollo Advocates met the criteria of submitting filled financial proposals.

Recommendation:

From the evaluation exercise of the proposal documents, Rachier & Amollo Advocates automatically lead without conditions. The evaluation team therefore requested the Tender committee to invite Rachier & Amollo Advocates for contract negotiations.

Also since time has passed such that we are already half way implementing the 2011/12 FY, the team requested the tender committee to recommend the legal audit to be for the 2011/12 FY.

TENDER COMMITTEE DECISION

The National Irrigation Board Tender Committee in its meeting held on 3rd November 2011, discussed the combined Technical and Financial Evaluation Report for Consultancy Services for Legal Audit for National Irrigation Board and approved the Evaluation Committee's recommendation of award of contract to Rachier & Amollo Advocates at their total corrected price of Kshs 948,000 (inclusive of taxes).

The Tender Committee's decision was communicated to the consultancy firms via letters dated 18th November, 2011.

THE REVIEW

The Applicants lodged this Request for Review on 6th December, 2011 against the decision of the Tender Committee of National Irrigation Board dated 18th November, 2011 in the matter of Tender No. NIB/T/090/2010-2011 for Consultancy Services for Legal Audit for National Irrigation Board. The Applicants were represented by Mr. A. Ndegwa, Advocate while the Procuring Entity was represented by Mr. Boaz Akello, Procurement & Supplies Manager. The Successful Bidder, Rachier & Amollo Advocates, was represented by Mr. Jotham Arwa.

The Applicants requested the Board for orders that:-

1. *"The award to M/s Rachier & Amollo Advocates of the bid for consultancy services for legal audit for National Irrigation Board made on 18th November 2011 be annulled and/or set aside.*
2. *The bid for consultancy services for legal audit for National Irrigation Board be awarded to the Applicants.*
3. *In the alternative, the financial proposals for the bid for consultancy services for legal audit for National Irrigation Board for consultancy services be retendered or revised as the case may be.*
4. *Costs be provided for."*

PRELIMINARY OBJECTION

The Procuring Entity raised a Preliminary Objection on the grounds that;

- (a) *"the Appeal has been filed outside the required period of fourteen (14) days contrary to the provisions of Regulation 73 (2), (c) of the applicable Public Procurement and Disposal Act, 2005 and Public Procurement Regulations, 2006.*

(b) This Appeal is frivolous, vexatious and made solely for the purpose of delaying the procurement proceedings."

However at the commencement of the hearing the parties agreed to have the Preliminary Objection argued together with the submissions on the merits of the case.

The Applicants raised six grounds of review which the Board deals with as follows;

Grounds 1, 2, 3, 4, and 5

These grounds have been consolidated as they address similar issues on the Procuring Entity's failure to award the contract to the bidder with the highest technical score.

The Applicants submitted that they were ranked highest in the Technical Proposals' evaluation and that since it was expressly provided in the Request for Proposal Document that the Technical Proposal held higher value or was of more importance than the Financial Proposal, then they expected to have been awarded the tender.

The Applicants further alleged that there was an express provision under clause 2.1.2 of the Request for Proposals (herein after referred to as "the RFP") that a party could submit a Technical Proposal only if it intended to apply Scale of Fees, in this case, the Advocates Remuneration Order. It argued that, it could not therefore be disqualified for not submitting a Financial Proposal as alleged by the Procuring Entity.

The Applicants also averred that despite the above provisions, the Tender Committee awarded the tender to Rachier & Amollo Advocates and not the Applicants purportedly because they did not give a Financial Proposal. They argued that since they achieved the highest score in the 'Technical Proposals' evaluation, the Procuring Entity by not awarding them the tender deliberately misdirected themselves which constituted an error in principle and fact.

In response, the Procuring Entity stated that the method of selection for the assignment was Quality and Cost Based Selection and the Applicants were aware of this selection method hence the issue of considering only the technical score is a misrepresentation of facts.

It further stated that the Applicants chose to ignore the provisions of the Appendix to Information to Consultants Reference Clauses 2.1.1 and 2.1.2 which clearly specified that bidders were to submit both Technical and Financial Proposals. It argued that the requirement for the bidders to submit both Technical and Financial Proposals in specified standard formats was a material fact that could not be ignored.

The Procuring Entity submitted that it could only evaluate proposals in accordance with the procedures and criteria set out in the RFP document as provided for under Section 82(3) of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act").

The Procuring Entity further argued that the evaluation criteria had a weight of 0.8 and 0.2 on Technical and Financial Proposals respectively and the Applicants were aware of this fact. It stated that the Applicants could not rely only on the Technical Proposal, by arguing that their score was the highest and thus ignore the weight assigned to the Financial Proposal. It

submitted that both Technical and Financial Scores were to be considered in determination of the Successful Bidder. The Procuring Entity further stated that, in any event, the evaluation criteria were Quality and Cost Based Selection and the same could not be changed by the Procuring Entity or challenged by participating bidders after submission of proposals.

The Procuring Entity argued that it had specified clearly in the Appendix to Information to Consultants, Reference Clause 2.1.1 and 2.1.2, that bidders were required to submit both Technical and Financial Proposals. It stated that the provisions of the Appendix to Information to Consultants took precedence over the provisions of the Information to Consultants. The Procuring Entity further argued that it had specified the requirements for both the Technical and Financial Proposals using the standard forms in the Request for Proposal document and could not under any circumstances change any specified terms or conditions, including the evaluation criteria.

The Procuring Entity stated that the Successful Bidder submitted acceptable Technical and Financial Proposals, which were evaluated in accordance with the stipulated evaluation criteria and achieved the highest combined Technical and Financial Score. It submitted that it was on this basis that the tender was awarded to the Successful Bidder in line with provisions of Clause 2.8.5 of the RFP document. It stated that the Applicants' Financial Proposal did not list any costs for the assignment and thus did not conform to the requirements and conditions outlined in the RFP document under Clause 2.4.1. It concluded that the Applicants' Financial Proposal was non-responsive and consequently was not considered for evaluation, a fact of which they were notified.

Finally, the Procuring Entity submitted that the Tender Committee discharged its functions as prescribed by the Act and was satisfied that the Applicants' Financial Proposal did not conform to the requirements and conditions outlined in the RFP document **Clause 2.4.1**.

On its part, the Successful Bidder had filed an affidavit with the Board in response to the Request for Review and sought to rely on it. It submitted that it had received a letter from the Procuring Entity informing it of the suspension of the procurement proceedings on the said tender, necessitated by the Request for Review filed by the Applicants. It argued the procurement process had been conducted in compliance with the Act and the RFP document. It stated that the Request for Review was null and void and in the circumstances ought to be set aside on the grounds that the Scale of Fees on the Advocates Remuneration Order which the Applicants sought to rely on as their Financial Proposal did not apply to legal audits. It submitted that the Procuring Entity evaluated and compared the responsive tenders using the procedures and criteria set out in the tender documents and no other criteria as required under the Act. In this regard, it urged the Board to find no merit in the Request for Review as filed and argued by the Applicants.

The Board has carefully considered the representations of the parties and the documents presented before it. The issue for the Board to determine is whether the evaluation and award of the tender was done in line with the Act and the RFP Document. In order to make this determination, the Board notes the following:

(i) Clauses 2.1.1 and 2.1.2 of the Instructions to Consultants provide as follows;

- Clause 2.1.1 - *"The Client named the Appendix to "ITC" will select a firm among those invited to submit a proposal, in accordance with the method of selection detailed in the appendix. The method of selection shall be as indicated by the procuring entity in the Appendix."*
- Clause 2.1.2 - *"The consultants are invited to submit a Technical Proposal and a Financial Proposal, or a Technical Proposal only, as specified in the Appendix "ITC" for consulting services required for the assignment named in the said Appendix. A Technical Proposal only may be submitted in assignments where the Client intends to apply standard conditions of engagement and scales of fees for professional services which are regulated as is the case with Building and Civil Engineering Consulting services. In such a case the highest ranked firm of the technical proposal shall be invited to negotiate a contract on the basis of scale fees. The proposal will be the basis for Contract negotiations and ultimately for a signed Contract with the selected firm."*

(ii) Paragraph 1 of the Appendix to Information to Consultants on the other hand states as follows:

"The following information for procurement of consultancy services and selection of consultants shall complement or amend the provisions of the information to consultants, wherever there is a conflict between the provisions of the information to consultants and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the information to consultants."

(iii) Clause References 2.1.1 to 2.1.2 of the Appendix to Information to Consultants further provide as follows:

"2.1.1. The name of the Client is: National Irrigation Board

The method of selection is: Quality and Cost Based Selection

2.1.2 Technical and Financial Proposals are requested: YES."

From the foregoing, the Board notes that as provided for in paragraph 1 of the Appendix to Information to Consultants, the clauses referenced above namely, Clauses 2.1.1 and 2.1.2 of the Information to Consultants were amended in the Appendix as clearly stipulated above. The Board further notes that there is a provision that if there is any conflict between the provisions of the Information to Consultants and the provisions of the Appendix, the provisions of the Appendix shall prevail over those of the Information to Consultants. Consequently, the Quality and Cost Based Selection method specified in the Appendix was applicable, implying that both the Technical and Financial Proposals were important in the evaluation process although they had different weights. Secondly, the Board finds that the provisions of Clause 2.1.2 were amended in the Appendix thus making the submission of both Technical and Financial Proposals a mandatory requirement.

Upon perusal of the Original Financial Proposals submitted by the Applicant and the Successful Bidder, the Board finds that the Successful Bidder submitted a Financial Proposal using the provided forms, giving a summary as well as a breakdown of costs into the required categories.

With regard to the Applicants' Financial Proposal, the Board finds that the content of their Financial Proposal Submission Form stated as follows:

"We the undersigned offer to provide the consulting services for Legal Audit for National Irrigation Board, in accordance with your Request for Proposal dated 27th June 2011 and our proposal."

Further the Board notes that the Applicants attached a letter to the Financial Proposal Submission Form which in part stated as follows;

"We refer to your Request for Proposal, hereafter referred to as the RFP, dated 27th June 2011. We Maina & Maina Advocates (hereafter M&M) and Igeria & Ngugi Advocates (hereafter I&N) working as a consortium, submit our Financial Proposal, in accordance to your terms in the document mentioned above. We intend to be bound by the Advocate Remuneration Order as per section 2.1.2 of the RFP and are accordingly of the view that the Financial Proposal will be negotiable. We submit our financial proposal for your consideration, and commit to your stated terms of reference."

The Board finds that apart from the above statements contained in the Applicants' Financial Proposal Submission Form and letter, the Applicants' Financial Proposal did not list any costs and thus did not conform to the requirements of the Request for Proposal Document with respect to submission of Financial Proposals as provided for under Clause 2.4.1 of the RFP document which stated that;

"In preparing the Financial Proposal, consultants are expected to take into account the requirements and conditions outlined in the RFP documents. The Financial Proposal should follow Standard Forms (Section D). It lists all costs associated with the assignment including;

(a) remuneration for staff (in the field and at headquarters), and; (b, reimbursable expenses such as subsistence (per diem, housing), transportation (international and local, for mobilization and demobilization), services and equipment (vehicles, office equipment, furniture and supplies), office rent, insurance, printing of documents, surveys, and training, if it is a major component of the assignment. If appropriate these costs should be broken down by activity."

The Board also takes note of Clause 2.8.5 of the RFP document which provided that;

"The formula for determining the Financial Score (Sf) shall, unless an alternative formula is indicated in the Appendix "ITC", be as follows:-

Sf = 100 X FM/F where Sf is the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration. Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T=the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + p = 1) indicated in the Appendix. The combined technical and financial score, S, is calculated as follows:- S = St x T % + Sf x P %. The firm achieving the highest combined technical and financial score will be invited for negotiations."

The Board notes that, as stated in Clause 2.8.5 of the RFP, the Successful Bid was to be determined by applying a combination of the technical score and financial score in a predetermined formula and not the technical score *per se* as alleged by the Applicant. In the circumstances, in the absence of any figures in the Applicants Financial Proposals, the Board finds that the

Procuring Entity acted properly by declaring the Applicants' Financial Proposal non-responsive.

~~To the above end, all the grounds of review fail.~~

As regards the Preliminary Objection, the Procuring Entity informed the Board that the Request for Review was filed out of time and it was therefore incompetent.

The Procuring Entity argued that it was notified of the Request for Review on 6th December 2011 by the Secretary, Public Procurement Administrative Review Board.

It argued that the Request for Review did not in law lie and the same should be dismissed on the following grounds;

(a) That the Request for Review had been filed outside the required period of fourteen (14) days contrary to the provisions of Regulation 73 (2), (c) of the Public Procurement and Disposal Regulations, 2006.

(b) That the Request for Review is frivolous, vexatious and made solely for the purpose of delaying the procurement proceedings.

It submitted that the notification of award was done on 21st November 2011 and the Applicants' representative collected the notification letter on the same day. It stated that the fourteen days appeal's window lapsed on 5th December 2011. It argued that the Applicants filed their Request for Review on 6th December 2011 and was therefore out of time.

In response, the Applicants submitted that although they received the notification letter on 21st November 2011, in their computation the appeal

window closed on 6th November 2011, the same date they filed their Request for Review. They argued that the merits of their case should take prominence rather than using legal technicalities against the provisions of Article 69(2) of the Constitution of Kenya, 2010 to defeat the Objects of the Public Procurement and Disposal Act as set out in section 2 of the said Act. In this regard they requested the Board to hear the Request for Review on merit.

The Board has considered the representation of the parties and the documents presented before it. The Board notes the following:

- i) That the letters of notification to both the Applicants and the Successful Bidder were dated 18th November, 2011.
- ii) That the letters of notification to the Applicants and the Successful Bidder were collected by their representatives on 21st and 22nd November 2011, respectively.
- iii) That the appeals window for the Applicants, if deemed to be effective from 22nd November 2011, would close on 5th December, 2011.
- iv) That the Request for Review was filed on 6th December, 2011.

The Board notes that under Regulation 73(2), (c) of the Public Procurement and Disposal Regulations, it is provided that;

"The request referred to in paragraph 1 shall-

(c) be made within 14 days of -

- i. the occurrence of the breach complained of where the request is made before the making of an award; or***
- ii. the notification under section 67 or 83 of the Act"***

In view of the above, the Board finds that this Request for Review was filed out of time and is therefore frivolous.

Ground 6 - Loss and damage suffered

The Applicants alleged that they stood to suffer severe loss and damage as they had expended considerable resources in terms of time, research and money, if the respondent's decision was not reviewed to reflect a fair and just outcome.

In response, the Procuring Entity stated that this ground was unsustainable on the grounds that;

- a) The Applicants were well aware that the costs of preparing the proposal and of negotiating the contract, including any visit to the client were to be borne by the bidders regardless of the outcome of the tender.
- b) The Bidders generally expended resources in preparation and submission of proposals and the Applicants were not an exception. In any case, the Successful Bidder had also expended resources and could not claim costs for loss and damage if they had failed to win the bid.

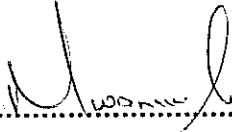
The Board has held severally that tendering costs are commercial business risks taken by the parties in the course of doing business. Further, the Request for Proposals documents under the Information to Consultants, Clause 2.1.5 stipulates that:

“(i) the costs of preparing the proposal and of negotiating the Contract, including any visit to the Client are not reimbursable as a direct cost of the assignment; and (ii)”

In the circumstances, this ground of Request for Review also fails.

Taking into account all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98(b) of the Act, that the procurement process may proceed.

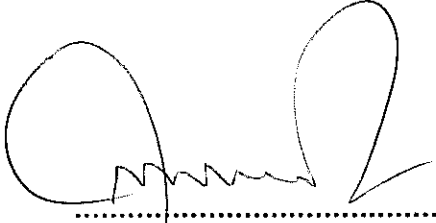
Dated at Nairobi on this 3rd day of January, 2012.



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CHAIRMAN

PPARB



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SECRETARY

PPARB