

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 5 & 6/2011 OF 23<sup>rd</sup> & 24<sup>th</sup> FEBRUARY, 2011**

**BETWEEN**

**PROMARC CONSULTANCY LTD AND MATHU AND GICHUIRI  
ASSOCIATES LTD.....APPLICANTS**

**VS**

**KENYA INSTITUTE OF EDUCATION (KIE).....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Kenya Institute of Education, dated 8<sup>th</sup> February, 2011 in the matter of Tender No. KIE/04/2010-2011 for Request for Proposal for Consultancy Services for Architectural, Quantity Surveying, Civil/ Structural, Electrical/ Mechanical Engineering Services for the Proposed Educational Resource Centre (ERC).

**BOARD MEMBERS PRESENT**

Mr. Joshua W. Wambua	-	Member (In the Chair)
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **1<sup>st</sup> Applicant, Promarc Consultancy Ltd**

Mr. A. Ndambiri - Advocate  
Mr. Macktosh Nyamache - Director

### **2<sup>nd</sup> Applicant, Mathu and Gichuri Associates Ltd**

Mr. P. - Consultant  
Mr. M. Clement - Director  
Mr. K. Mathu - Director

### **Procuring Entity, Kenya Institute of Education**

Ms. Lydia Nyami - Director  
Mr. John Kimothi - SDDMES  
Ms. Florence Makindi - Chief Procurement Officer  
Mr. James Munyithya - Principal Procurement Officer

### **Interested Candidates**

Mr. M. Ibrahim - Advocate  
Mr. Peter Nganga - Project manager

## **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**

#### **Advertisement**

The Procuring Entity advertised the tender for Request for Proposals for Consultancy Services for Architectural, Quantity Surveying, Civil/ Structural, Electrical/ Mechanical Services for the Proposed Educational Resource Center, in the Daily Nation newspaper dated 30<sup>th</sup> September 2010.

### **Closing/Opening:**

The bids were closed/opened on 22<sup>nd</sup> October 2010. The bidders who submitted their bids at time of opening were as follows;

1. Uto Creations
2. U Design Architects
3. Promarc Consultancy
4. Archscan Associates Ltd
5. Decipher Technical Consultant
6. Kenchuan Architects
7. Cadplan Architects
8. Triad Architects Ltd
9. Gitutho Associates
10. Maestro Architects
11. Space Form Studio
12. Mathu and Gichuri Associates Ltd
13. Conte Design Team
14. Associated Architects

### **EVALUATION**

Tender Evaluation was carried out in two stages namely Preliminary and Technical

#### **Preliminary Evaluation**

The bids were determined on responsiveness on the following mandatory requirements;

- i) PIN registration certificate
- ii) VAT registration certificate
- iii) Certificate of tax compliance

- iv) Original and 2 copies of the bid documents
- v) Audited accounts for the preceding 3 years
- vi) Copy of certificate of incorporation.

Bidder No.	Bidder	PIN Cert.	3 bid docs.	VAT Cert.	Audited Accounts	Tax Compliance	Certificate of Incorporation	Responsiveness
1.	Uto Creations Studios	✓	✓	✓	X	✓	X Has certificate of registration but no certificate of incorporation	None Responsive
2.	U Design Architects	✓	✓	✓	✓	✓	X No Certificate of Incorporation but presented certificate of registration	None Responsive
3.	Promarc Consultancy Services	✓	✓	✓	✓	✓	✓	Responsive
4.	Archiscan Associates	✓	✓	✓	X	✓	✓	None Responsive
5.	Decipher Technical Consultant	✓	✓	✓	✓	✓	X No certificate of Incorporation. Has certificate of registration	None Responsive
6.	Kenchuan Architects	✓	✓	✓	X	X Expired 19/08/2010	✓	None Responsive
7.	Cadplan Architects	✓	✓	✓	X	✓	✓	None Responsive
8.	Triad Architects (No indication of buying)	✓	✓	✓	✓	✓	✓	Responsive
9.	Gitutho Associates Consulting Architects	✓	✓	✓	X	X Expired on 26/9/2010	X Has certificate of registration. No certificate of incorporation	None Responsive
10.	Maestro Architects	✓	X	✓	X	X Expired 31/8/2010	✓	None Responsive
11.	Space Form Studio	✓	✓	✓	X	✓	X No certificate of incorporation but has	None Responsive

Bidder No.	Bidder	PIN Cert.	3 bid docs.	VAT Cert.	Audited Accounts	Tax Compliance	Certificate of Incorporation	Responsiveness
							certificate of registration	
12.	Mathu and Gichuri Associates	✓	✓	✓	✓	✓	✓	Responsive
13.	Conte Design Team	✓	✓	✓	X	✓	Not incorporated	None Responsive
14.	Associated Architects	✓	✓	✓	X	✓	X No certificate of incorporation just has a certificate of registration	None Responsive

Three bidders were found to be responsive hence proceeding to the Technical Evaluation stage.

1. Mathu and Gichuri Associates
2. Promarc Consultancy
3. Triad Architects

### Technical evaluation

Responsiveness was determined by four requirements as tabulated below.

1. Experience of Consultancy
2. Proposed work plan and methodology
3. Qualification and competence of staff
4. Transfer of technology

SUMMARY OF TECHNICAL EVALUATION						
Bidder No	Bidder Name	Experience of the Consultant (Max 10%)	Work plan and Methodology (Max. 40%)	Qualification and Competence of the Staff (Professional Staff) Max.40%	Transfer of Technology (Max 10%)	Total Score (Max 100%)
12	Mathu and Gichuiri Associates	9	39	26 ½	9	83 ½
3	Promarch Architect	5	39	22 ¾	7	73 ¾
8	Triad Architect	10	39	23 ¾	8	80 ¾

### **THE TENDER COMMITTEE DECISION**

The tender committee in its meeting held on 8<sup>th</sup> February 2011, considered the preliminary evaluation and its verification, the technical evaluation threshold and TAX compliance verification by KRA. The tender committee recommended Triad Architects Ltd with a score of 80% for negotiations and award.

### **THE REVIEW**

The two Requests for Review were lodged on 23<sup>rd</sup> and 24<sup>th</sup> February, 2011 against the decision of the Kenya Institute of Education of Post Office Box Number 30231-00100 Nairobi dated 8<sup>th</sup> February, 2011 in the matter of Tender No. KIE/04/2010-2011- Consultancy Services for Architectural, Quantity Surveying, Civil/Structural, Electrical/Mechanical Engineering Services for the Proposed Educational Resource Centre.

The 1<sup>st</sup> Applicant, Promarc Consultancy Ltd raised three grounds of review and requests the Board for the following orders;

- a. *“That pending the hearing and determination of the Applicant's request for review, the procurement proceedings by KIE in respect for proposal (RFP) number KIE/04/2010-2011 be suspended.*

- b. *For purposes of the review the Board do direct KIE to release as per clause 45(2e), a summary of the evaluation, the evaluation reports and copies of the tenders submitted by all the candidates including their proposals or quotations and the evaluation criteria used by the evaluation and tender committees in arriving at their conclusions.*
- c. *That the decision of the procuring entity of request for proposal KIE/04/2010-2011 as communicated to the Applicant vide letters dated 17/1/2011 and 11/2/2011 be substituted with a decision based on the report that was evaluated within the mandatory thirty (30) days evaluation period as stipulated under section 46 of the Regulations.*
- d. *That the cost of the proceedings in relation to this request for review be awarded to the Applicant.*
- e. *That the review board do make any other or further orders as it may deem just in all the circumstances”.*

The 2<sup>nd</sup> Applicant, Mathu and Gichuri Associates Ltd raised three grounds of review and request the Board for the following orders;

1. *“That the Applicant’s Technical Proposal submitted on October 2010 conformed to the requirements of the RFP*
2. *That the Respondent’s position communicated by the letter dated 11<sup>th</sup> February 2011 that the Applicant’s bid for the tender under review was unsuccessful, be set aside.*
3. *That the Applicant be prequalified to proceed to the next level of evaluation.*

*4. In the alternative, and without prejudice to the foregoing, that the entire evaluation process be annulled and repeated*

*5. In further alternative, and without prejudice to the foregoing, that the entire tendering process be started afresh”.*

#### **PRELIMINARY OBJECTION**

At the commencement of the hearing, one of the Applicant's, Promarc Consultancy Limited, raised the issue that they had not yet been served with the response by the Procuring Entity following its filing of the Request for Review. It argued that, it was not in a position to proceed with the hearing because it had not yet been served with the response and hence requested that it be served with the Procuring Entity's response and further, that the hearing be adjourned to enable it prepare itself.

It further argued that on 19<sup>th</sup> February 2011, it had sought, through a letter to the Procuring Entity, the reasons why its bid was rejected. It stated that, by the time, it filed its Request for Review on 23<sup>rd</sup>, February, 2011 it had not received a reply from the Procuring Entity, a position that prevailed up to the time of the hearing. In this regard, it requested the Board to order the Procuring Entity to respond to its Letter and furnish it with the reasons of its bid disqualification before the Board hears the matter. In conclusion, it requested the Board to adjourn the Hearing until it is served with the two documents specified above.

In response, the Procuring Entity stated that it had filed the response to the Request for Review in time and that it was the responsibility of the Board to serve the parties.

On its part, the Interested Party, Triad Architects Ltd, stated that the hearing should proceed, as it was possible for the Applicant to be served and given a short



period to read the response and get ready for the hearing. It therefore urged the Board to find no merit on the Applicant's arguments.

With regard to the response on the Letter by the Applicant seeking for reasons for disqualification of its bid, the Procuring Entity stated that it had received the Letter from the Applicant on 19 February 2011, seeking for the reasons why its bid was disqualified. It stated that before it replied the Letter, it received another communication from the Board's Secretary that, the Applicant had filed a Request for Review. It submitted that, upon receiving the communication to the effect that a Request for Review had been filed, it then forwarded all the original tender documents relating to the subject tender to the Secretary of the Public Procurement and Administration Review Board as required and therefore was not in a position to reply the Applicant's letter. It stated that it was not at fault, because when it was preparing to reply the Applicants letter, the Applicant moved to file the Request for Review and therefore had itself to blame.

The Board adjourned the hearing for about thirty minutes to consider the issues raised by the Applicant and the response by the Procuring Entity and the Interested Party.

The Board, after consideration of the issues raised by the Applicant, the response by the Procuring Entity and upon perusal of the documents presented before it, made the following observations and decision:

- i) The Board noted that bidders were notified on the outcome of the Request for Proposal (RFP) through Letters dated 11<sup>th</sup> February 2011 and therefore, the Appeal window for filling any Request for Review was to close on 25<sup>th</sup> February 2011, upon expiry of fourteen days.

- ii) The Board noted that the Applicant, through a Letter dated 19<sup>th</sup> February 2011 requested the Procuring Entity to give its reasons for the disqualification of the bid.
- iii) The Board further noted that the Applicant filed its Request of Review on 23<sup>rd</sup> February 2011.
- iv) The Board is alive of the requirements of Regulation 74 (2), that the secretary to the Review Board is required upon receiving of a Request of Review to require the Procuring Entity to suspend the Procurement proceedings. Based on this provision, the Board has found that, after the Secretary to the Review Board received the Request for Review on 23<sup>rd</sup>, February 2011, he directed the Procuring Entity to suspend the procurement proceedings. The suspension was done before the Procuring Entity replied to the Applicant's Letter requesting for reasons of disqualification of its bid.

Taking into account all the above, the Board finds no fault on the Procuring Entity since the Procurement process was suspended from the date of filing the Request of Review until a decision is made by the Board on the appeal. In the circumstances, the Applicant is required to argue its Request of Review and since the Board has access to all the Tender Documents, the Board will peruse the Tender Documents and endeavour to make a well informed decision with no prejudice to any party.

With regard to the request by the Applicant for an adjournment of the hearing on account that the Applicant was not served with the Procuring Entity's Response as required, the Board after consideration, agreed that the hearing be adjourned to 11<sup>th</sup> March 2011, at 2pm. The Applicant to be served with the Procuring Entity's

response, to enable it acquaint itself with the Procuring Entity's response to its Request for Review.

Upon reconvening on March 11<sup>th</sup>, 2011 at 2pm, the hearing proceeded as scheduled and the Board deals with the three grounds of review for the 1<sup>st</sup> **Applicant** as follows:

**Ground 1: Breach of Section 66(6) of the Act and Regulations 11(2), 16(5)(b), 46**

The Applicant submitted that the Procuring Entity's Tender Committee failed to act on the evaluation report submitted to it, by the Evaluation Committee, in accordance with the provisions of Regulation 11(1), and that instead it amended the contents of the said report which was contrary to Regulation 11 (2) of the Public Procurement and Disposal Regulations, 2006 (hereinafter 'the Regulations'). It claimed that the Procuring Entity relied on these amendments and recommendations thereto, in its decision on the tender award communicated to the Applicant vide a letter dated 11 February 2011.

The Applicant submitted alleged that the Procuring Entity did not evaluate the tenders within 30 days from the date of tender opening which was contrary to Section 66(6) of the Act. and Regulation 46. It claimed that the evaluation report relied on by the Procuring Entity in disqualifying it vide the letter dated 11 February, 2011, and awarding the tender to the Successful Bidder, had not been concluded within 30 days from the date tenders were opened.

In its response, the Procuring Entity stated that the Evaluation Committee started its work on 4 November, 2010 and signed off its Evaluation Report on 16 November 2010. It further stated that the said report was submitted to the Tender Committee on 26 November, 2010, but after deliberating on it, the Tender

Committee rejected the report because of various shortcomings which it pointed out. It stated that its Tender Committee recommended the need to engage technical evaluators with competencies in the professional areas specified in the Request for Proposal, which it complied with. It averred that the second Evaluation Committee completed its report on 25 January, 2011, and submitted it to the Tender Committee on 8 February, 2011. It submitted that the Tender Committee deliberated on the report and made the award to the Successful Bidder, which decision was communicated to the bidders vide letters dated 11, February 2011. It concluded by stating that the Applicant had not met the threshold score of 80% stipulated in the Tender Document and as such was not considered for the award of the tender.

On its part, the Successful Bidder, Triad Architects, submitted that its bid had complied with the requirements of the Act, the Regulations and the Tender Documents. It stated that it had been notified on 11 February, 2011 that its bid had been successful.

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

The Board notes that the tenders were opened on 22<sup>nd</sup> October 2010, therefore, the evaluation of the tenders should have been completed by 21 November, 2010, in accordance with Regulation 46.

The Board further notes that there were two evaluations carried out. The first evaluation carried out was completed on 16 November, 2010, and the report thereof was rejected by the Tender Committee at its meeting of 26 November,

2010 with reasons and recommendations. Following the Tender Committee's recommendations, a new Evaluation Committee was constituted. The second Evaluation Committee signed off its Evaluation Report on 25 January, 2011.

The Board finds that the first evaluation completed on 16 November, 2010 was completed within 30 days of the tender opening. Further, the Board notes that the re-evaluation done pursuant to the Tender Committee's rejection of the first report, was completed on 25 January, 2011, which was beyond the 30 days evaluation period stipulated under Regulation 46. However, the Board finds that Regulation 46 only refers to the initial evaluation of the tenders and does not make reference to any periods applicable to subsequent evaluations/re-evaluations arising out of referrals from the Tender Committee.

Accordingly, this limb of the ground of appeal fails.

As regards the Applicant's claim that the Tender Committee amended the first Evaluation Committee's report, the Board notes that the Tender Committee rejected the report with reasons and gave its recommendations. The Board further notes that the Procuring Entity followed the recommendations and constituted a new Evaluation Committee to evaluate the bids and address the shortcomings identified by the Tender Committee.

The Board finds that this action by the Tender Committee was in line with the provisions of Regulation 11(b) and that the Tender Committee did not modify the first Evaluation Report.

With regard to the appointment of the second Evaluation Committee, the Board finds that pursuant to Section 27(2) of the Act, the Accounting Officer acted within the powers conferred by the Act.

Accordingly, this limb of the ground of appeal also fails.

## **Ground 2: Breach of Sections 61(2) of the Act.**

The Applicant alleged that the Procuring Entity breached the said Section of the Act by failing to extend the tender validity period. It further alleged that the 90 day tender validity period expired on 21 January 2011, and that it had not been requested by the Procuring Entity to extend its tender validity. It concluded by stating that at the time the Procuring Entity had decided to declare the Applicant's bid as unsuccessful, without having extended the tender validity period, such decision was null and void.

In its response, the Procuring Entity stated that it did not need to seek approval from the Applicant or other bidders for extension of the tender validity. It argued that Section 61(1) and (2) did not require it to seek approval from bidders but to give notice of the extension of the tender validity period. The Procuring Entity claimed that it had notified the bidders including the Applicant of the extension of tender validity vide its letter dated 17 January 2011.

The Successful Bidder, Triad Architects, fully supported and aligned itself with the Procuring Entity's submissions.

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

The Board notes that the Tender Advertisement stated that *prices quoted should be net, must be in Kenya shillings and shall remain valid for 90 days from the closing date of the tender.*

The Board further notes that the Tender Notice also contained an invitation to tender for disposal of motor vehicles, generator, media equipment and other items located at the Procuring Entity's premises.

On examination of the Tender Documents, the Board notes that the Request for Proposal did not require a Financial Proposal because consultants' fees were to be paid in accordance with the statutory scales of remuneration – thus competition was based on technical proposal alone. The Board further notes that clause 2.4.5 of the Tender Document which falls under clause 2.4 Preparation of Financial Proposal, stated that tender validity was 60 days and during this period, the Consultant was expected to keep available at his own cost, the professional staff proposed for the assignment. The Board finds that despite there being no competition on price in the tender under review, this clause was applicable to the Request for Proposal because it required bidders to keep professional staff proposed for the contract available at their own cost during the validity period.

The Board therefore finds that because there was no competition on price for the tender under review, the 90 day validity period referred to in the Tender Notice, could only refer to prices quoted for the tender for disposal of motor vehicles, generator, media equipment and other items located at the Procuring Entity's premises.

Therefore, the 60 day tender validity period in the Tender Document was the applicable validity period to the tender under review.

Accordingly, the tender validity period expired on 21 December 2010. Therefore, the notification of award which was done vide a letter dated 11 February, 2011, was outside the tender validity period which is contrary to Section 67(1) of the Act.

The Board further finds that in any case even if the tender validity was to have been assumed to be 90 days, the tender validity period would have expired on 21 January 2011, which date was before the date of notification of award. As previously held by the Board in its decision in *Application No.2/2007 of 10<sup>th</sup> January, 2007 between Lantech (Africa) limited and Ministry of Finance, dated 8 February, 2007*, where there is power to extend validity, such power ought to be invoked before the expiry of the instrument whose life is being extended.

On the issue as to whether the letter by the Procuring Entity dated 17 January 2011 was a letter extending the validity period of the tender, the Board notes that the letter merely informed bidders that the evaluation process is still on going. It did not address the extension of the validity period. The Board therefore finds that the said letter was not a letter extending the validity of the tender under review, and in any case, at this time, the tender validity period had already lapsed.

Accordingly, the Board finds that there was no extension of the tender validity period before it expired and this ground of appeal succeeds.

### **Ground 3: Inclusion of Illegitimate/Unqualified Candidates in the Evaluation.**

The Applicant alleged that there were some bidders who did not purchase the Tender Documents for Kes 5,000/=, and as such ought not to have been allowed to participate and their bids should never have been evaluated. The Applicant stated that it had paid for its Tender Document.

In its response, the Procuring Entity stated that all the bidders who had been evaluated purchased the Tender Documents as Lead Consultants or as members of a consortium. It stated that at the tender opening, all the bids which were



opened were serialized and that those were the only bids which were considered for evaluation.

The Successful Bidder, Triad Architects, stated that it had purchased the bid documents as part of a joint venture pursuant to clause 2.3.3 of the Tender Document.

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

The Board notes from the second Evaluation Report that at preliminary evaluation, the Evaluation Committee noted that for the Successful Bidder, Triad Architects ("Triad"), there was no evidence of buying (the tender document); and that this was not considered by the Evaluation Committee to be a mandatory requirement.

The Board has examined the tender submitted by Triad and notes that there is a copy of a receipt, in the name of Ooro and Sanya dated 5<sup>th</sup> October 2010, for the purchase of the tender document. The Board also notes that Ooro and Sanya are indicated in Triad's tender as being part of Triad's consortium of consultants.

The Board has examined the Tender Document and finds that at clause 2.3.3, there is a provision for a firm which considers it does not have all the expertise required for the assignment, to obtain a full range of services by associating with other consultants. The Board also did not find any clause in the Tender Document requiring proof of purchase of the Tender Document to be a mandatory requirement under preliminary evaluation.

The Board therefore finds that the consortium of Triad purchased the tender document and accordingly this ground of appeal fails.

**Statement of Loss and Damage likely to be suffered by the Applicant**

The Applicant claimed that it would suffer loss and damage because the tender was not awarded to it.

As the Board has held on several occasions, costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore, each bidder carries its own costs.

The Board notes the Procuring Entity's allegation that the Applicant acted fraudulently during the tender evaluation period and tried to use undue influence on certain members of the Procuring Entity, contrary to Section 38 of the Act, which allegation the Applicant firmly denied.

The Board finds no evidence adduced by the Procuring Entity to support this allegation and as such cannot make a finding on it.

The Board deals with the three grounds of review for the **2<sup>nd</sup> Applicant** as follows:

**Ground 1: That the Applicant submitted its bid in conformity with all requirements set out in the Tender Document**

This is a statement which does not cite any breach of the Act or its Regulations, and as such, the Board need not make any finding on it.

**Ground 2: That the Procuring Entity erred by holding that the Applicant's bid was unsuccessful; and Breach of Section 45 of the Act**

The Applicant alleged that the Procuring Entity erred by holding that its bid was unsuccessful and further for not giving it reasons for making such decision. It stated that it had submitted all the documents required to be submitted with the Tender.

In its response, the Procuring Entity stated that the Tender Committee during its deliberation and verification of the second evaluation report on 8 February 2011, confirmed that the Applicant had failed to submit a valid VAT certificate of registration, which was a mandatory requirement provided under clause 2.7.1 of the Request for Proposal. It claimed that the VAT certificate of registration, submitted by the Applicant was for Mathu and Gichuri Associates, as evidenced by PIN Number P0006166078E on the said certificate whereas, the bidder was Mathu and Gichuri Associates Limited with a PIN Number of P051126906U.

The Successful Bidder, Triad Architect, fully supported and aligned itself with the Procuring Entity's submissions.

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

The Board notes that clause 2.7.1 lists four statutory documents to be submitted for preliminary evaluation, namely:-

- i) Current VAT Compliance Certificate;
- ii) PIN Certificate;
- iii) VAT Certificate;

#### iv) Certificate of Incorporation

The Board notes that whereas the procuring Entity required a Current VAT Compliance Certificate under this clause, the bidders submitted Tax Compliance Certificates (not VAT Compliance Certificates) and the Procuring Entity accepted these certificates for evaluation.

The Board further notes on examination of the second Evaluation Report that the Applicant was found to have submitted certified copies of all the mandatory statutory documents required under clause 2.7.1 for preliminary evaluation.

The Board examined the Applicant's tender and found that the Applicant had submitted a certified copy of VAT certificate registration number 0013094X. This certificate was in the name of Mathu and Gichuri Associates with a PIN Number P0006166078E.

The Board also found a certified copy of a PIN certificate Number P051126906U in the name of Mathu and Gichuri Associates Limited; and a certified copy of a Tax Compliance Certificate, valid up to 28 January, 2011, confirming that Mathu and Gichuri Associates Limited, PIN Number P051126906U, had fulfilled the obligation to file relevant tax returns and to pay taxes due as provided by the law.

The question then arises as to how a firm can be tax compliant if it claims it is registered for VAT but does not have a valid VAT certificate of registration? It could be that:-

- i) the VAT certificate of registration no 0013094X in the name of Mathu and Gichuri Associates that was submitted with the bid could be the same certificate that KRA recognises for tax purposes; or

- ii) that there is another VAT certificate of registration in the name of Mathu and Gichuri Associates Limited PIN Number P051126906U; or
- iii) that Mathu and Gichuri Associates Limited, PIN Number P051126906U were not tax compliant contrary to the certified copy of tax compliance it submitted.

The Board notes that the Procuring Entity took the initiative to verify, from Kenya Revenue Authority ("KRA"), the tax compliance status of the bidders. The Board has examined the copy of the letter from KRA dated 17 January, 2011, which was in response to the Procuring Entity's request for confirmation that the bidders' were tax compliant.

The KRA letter indicated that Mathu and Gichuri Associates PIN Number P0006166078E was not tax compliant. The Board finds that the firm for which the Procuring Entity was seeking tax compliance confirmation on was not the bidder. The bidder's PIN Number was P051126906U and not P0006166078E which was the PIN Number for Mathu and Gichuri Associates.

The Board therefore finds that the Procuring Entity did not conclusively establish whether the Applicant's VAT certificate of registration as submitted with the tender was indeed valid or whether the Applicant was tax compliant.

With respect to the evaluation and award procedure, the Board has observed that the Tender Committee in its meeting of 2<sup>nd</sup> February, 2011 had deliberated on the second evaluation report and noted that the Applicant had two different PIN numbers. It mandated the Procuring Officer to countercheck and give a report on the issue.

The Board further observes that the Tender Committee in its meeting held on 8 February, 2011, received the Procuring Officer's report which stated that the Applicant had not provided a VAT certificate of registration. The Board notes that the Tender Committee considered the Procuring Officer's mandatory requirements report and the KRA tax compliance letter in awarding the tender to the Successful Bidder instead of awarding it to the Applicant who was recommended for award by the Evaluation Committee.

The Board finds that this was not procedural. The Tender Committee ought not to have considered the Procurement Officer's report and the KRA letter in its own capacity, but should have referred such information when it was presented to it, to the Evaluation Committee for consideration and inclusion as appropriate in the Evaluation Report. The action of the Tender Committee amounted to modification of the Evaluation Report and as such it acted beyond its mandate as set out in Regulation 11.

From the foregoing, the Board finds that the Procuring Entity erred in the evaluation of tax compliance requirements, and accordingly, and the first limb of this ground of appeal succeeds.

With regard to the second limb of this ground of appeal on the issue of the Procuring Entity not furnishing the Applicant with reasons for its being unsuccessful, the Board has already ruled on this matter in its ruling on the Preliminary Objection on 10<sup>th</sup> March 2011, at the commencement of the hearing of this Review.

**Ground 3: Breach of Regulation 16(5); Breach of clause 2.4.5 of the Tender Document**

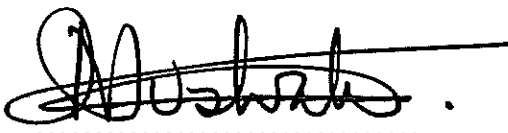
As the Board has previously found under Application No. 5 of 2011, for the 1<sup>st</sup> Applicant, Promarc Consultancy Limited, the first evaluation was done within 30 days in accordance with Regulation 16(5); and that the second evaluation was completed after the expiry of the tender validity period.

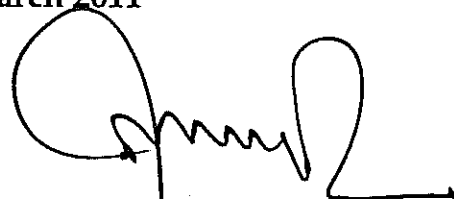
Accordingly, the first limb of this ground of appeal, on the evaluation of the tenders within 30 days, fails; and the second limb of the ground of appeal, on the extension of tender validity, succeeds.

Taking into account the foregoing, the Board finds that the tender process was flawed; and the failure to extend the validity of the tender before expiry, was in this case fatal, in that the tenders having become invalid after 21 December 2010, there was no valid offer available to the Procuring Entity to accept and award.

Accordingly, the two appeals succeed; and the Board orders, pursuant to Section 98 of the Act, that the award to the Successful Bidder, Triad Architects, is hereby annulled. The Procuring Entity may retender.

**Dated at Nairobi on this 18<sup>th</sup> day of March 2011**

  
.....  
**for: CHAIRMAN**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

10/1/19

( )

( )