

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 27/ 2012 OF 29TH MAY, 2012

BETWEEN

METROCOSMO LIMITED

AND

NATIONAL IRRIGATION BOARD

Review against the decision of the Tender Committee of National Irrigation Board in the matter of Tender No. NIB/T/082/2011- 2012 for Consultancy Services for Land and Asset Evaluation, Mwea Irrigation Development Project.

BOARD MEMBERS PRESENT:

Mr. P.M. Gachoka	-	Chairman
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member
Eng. Christine Ogut	-	Member

IN ATTENDANCE:

Ms. Pauline Opiyo	-	Holding brief for Secretary
Ms. Maureen Kinyundo	-	Secretariat

PRESENT BY INVITATION:

Applicant – M/s Metrocosmo Limited

Mr. Victor Nduhiu	-	Advocate
Mr. H.K. Njuguna	-	Advocate
Mr. Henry Njuguna	-	Advocate
Mr. David Ongeru	-	Director

Procuring Entity – National Irrigation Board

Mr. Andrew Wandabwa	-	Advocate
Ms. Rose Kariuki	-	Advocate
Ms. Elizabeth Sisenda	-	Pupil
Mr. Boaz Akello	-	Procurement and Supplies Officer

Interested Parties

Mr. John K'Opiyo	-	Administrator, Syagga and Associates
Mr. Paul M. Syagga	-	Director, Syagga and Associates
Mr. Moses Njuguna	-	Valuer, Zenith Valuers

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 THE AWARD

Invitation for Bids

The Procuring Entity's Tender Committee approved the procurement of the consultancy services through Restricted Tendering Method on 3rd February 2012 in accordance with Section 29 (3) and 73(2) (a) of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act."

On various dates in February and March 2012, the Procuring Entity requested for prequalified firms from other public entities namely Post Bank Kenya Ltd, Kengen, Rural Electrification Authority, Sports Stadia Management Board in accordance with provisions of Section 32 of the Act. Post Bank Kenya Ltd, Kengen and Sports Stadia Management Board provided the Procuring Entity with their lists of prequalified firms.

On 21st March 2012, ten (10) shortlisted firms, including the Applicant, were invited to bid for Consultancy Services for Land and Asset Valuation, Mwea Irrigation Development Project, NIB/T/082/2011-2012 using the Public Procurement Oversight Authority (PPOA) approved Standard Request for Proposal (RFP) Document. The invited firms were as listed hereafter:

1. Highland Valuers Limited
2. Zeneth (Management) Valuers Ltd
3. Seipak Investments
4. Kenstate Valuers
5. Metrocosmo Valuers Limited
6. Prestige Management Valuers
7. Pinnacle Valuers
8. Syagga and Associates Ltd
9. Mwaka Musau Consultants
10. Sedco Consultants Ltd

The initial deadline for submission of Bids was 11th April 2012 at 12.00 noon local time but this was extended to 12th April 2012 at 12.00 noon local time on request from one of the invited firms who did not receive the letter of invitation in good time.

Closing/Opening

Six Technical and Financial Proposals were received by the Procuring Entity as at the proposal submission deadline of 12th April 2012 at 12.00 noon local time. The Technical Proposals were publicly opened while the sealed Financial Proposals were safely kept in the Procuring Entity's Tender Box. Proposals received were as tabulated below:

Table 1 - Technical and Financial Proposals Received

1.	Syagga and Associates Ltd	One Original Technical Proposal, Three copies and one financial proposal
2.	Mwaka Musau Consultants	One Original Technical Proposal Three copies and one financial proposal
3.	Metrocosmo Valuers Limited	One Original Technical Proposal Three copies and one financial proposal
4.	Zenith (Management) Valuers Ltd	One Original Technical Proposal Three copies and one financial proposal
5.	Pinnacle Valuers Limited	One Original Technical Proposal Three copies and one financial proposal
6.	Prestige Management Valuers Limited	One Original Technical Proposal Three copies and one financial proposal

EVALUATION

Evaluation of proposals was conducted in three stages namely technical and financial evaluation.

Technical Evaluation

The technical suitability and adequacy of the firms was evaluated using the following criteria provided for in the Request for Proposal Document:

	Points
i. Experience of the consultant relevant to the assignment	40
ii. Adequacy of the proposed methodology and work plan in responding to the terms of reference	25

- iii. Time period to successfully complete the assignment 10
- iv. Personnel qualifications and competence (relevant experience) 25
for the assignment

Total Points **100**

***Minimum technical score required to pass is 75%**

Detailed score sheets were developed based on the above criteria and used to evaluate each firm. The summary of the technical evaluation results were as tabulated hereafter:

Table 2: Summary of Technical Evaluation

	Consultant's Name	Specific experience of the Consultants relevant to the assignment (Max Score=40)	Adequacy of the proposed methodology and work plan in responding to the terms of reference (Max Score=25)	Time period to successfully complete the assignment (Max Score=10)	Key professional staff qualifications and competence for the assignment (Max Score =25)	Total Score (Max 100)
		Score	Score	Score	Score	
1.	Prestige Management Valuers	30.00	7.00	10.00	25.00	72.00
2.	Pinnacle Valuers Ltd	30.00	13.00	10.00	17.80	70.80
3.	Zenith (Management) Valuers Ltd	32.00	6.00	10.00	23.30	71.30
4.	Metrocosmo Ltd	40.00	23.00	10.00	25.00	98.00
5.	Mwaka Musau Consultants	35.00	18.00	10.00	23.30	86.30
6.	Syagga and Associates Ltd	35.00	21.00	10.00	25.00	91.00

The summary of qualifications of the technical proposals was as tabulated hereafter:

Table 3: Summary of Qualification of Technical Proposals

No	Consultant's Name	Score (Max. 100)	Remarks
1.	MetroCosmo Ltd	98	Qualified
2.	Mwaka Musau Consultants	86.3	Qualified
3.	Syagga & Associates Ltd	91	Qualified
4.	Prestige Management Valuers Ltd	72	Disqualified
5.	Zenith Management Valuers Ltd	71.3	Disqualified
6.	Pinnacle Valuers ltd	70.8	Disqualified

Three firms attained technical scores above the set minimum score of 75%. The Tender Committee was therefore requested to approve the public opening of the financial proposal for the three technically qualified firms. The financial proposals from the other three firms that did not meet the set minimum technical score would be returned to them unopened.

The Technical Evaluation Report was presented to Procuring Entity's Tender Committee on 10th May 2012 and the same was approved.

Opening of Financial Proposals

On 14th May 2012, the qualified consultancy firms were invited to attend the public opening of the financial proposals scheduled for 15th May 2012. The public opening of financial proposals was conducted on 15th May 2012, at Nile Basin Board Room, NIB Head Office, Nairobi and was attended by the participating firms. The results for the technical score as in table 2 above were announced and followed by the opening of the financial bids. The summary of the financial bids opened is as tabulated hereafter:

Table 4: Summary of Firms' Financial Proposals

No	Consultant's Name	Amount in Kshs (Inclusive of Taxes)
1	Metrocosmo Limited	No Quote
2	Mwaka Musau Consultants	41,260,000.00
3	Syagga and Associates Limited	25,300,000.00

The Opening & Evaluation Committee developed an evaluation score sheet based on the evaluation criterion set out in the issued RFP (Clause 2.8.5) which states that:

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

Sf = 100 X F_m/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 that is 80; P = the weight given to the Financial Proposal that is 20; T + p = 100) 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."

There was no alternative formula indicated in the Appendix ITC of the issued Request for Proposal Document.

DETAILED EVALUATION OF FINANCIAL PROPOSALS

Each firm's break down of price per activity was first recorded as tabulated hereafter before embarking in the calculation of financial scores.

Table 5: Breakdown of Price per Activity

Price Component	Metrocosmo Limited	Syagga and Associates Limited	Mwaka Musau Consultants
		Quoted	Quoted
Remuneration	0	25,300,000	34,308,966.00
Reimbursable Expenses	0	0	780,000.00
Miscellaneous Expenses	0	0	480,000.00
Taxes 16% VAT		Inclusive	5,691,034.00
Grand Total	No Quote	25,300,000	41,260,000.00

Determination of Financial Scores

The formula below for determining the financial score as in the RFP was applied.

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

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 (FM) = Kshs 25,300,000.

The scores were calculated and were as shown in table 6.

Table 6: Schedule of Financial Scores

Consultant's name	Total Financial Proposal without provisional sum (Kshs)	Financial Score (SF)
Syagga and associates Limited	25,300,000.00	100
Mwaka Musau Consultants	41,260,000.00	61.3
Metrocosmo limited	0	0

Combined Technical and Financial Scores

Proposals were ranked according to their combined technical (S_t) and financial (S_f) 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 to Instructions to Bidders

The combined technical and financial score, S , was calculated using the formula:-

$$S = S_t \times T \% + S_f \times P \%$$

Details of the calculations of combined scores and the ranking of Firms are as indicated in the table below.

Table 7: Summary of Combined Technical and Financial Evaluation:

	Consultants' names	Technical Evaluation			Financial Evaluation		Combined Evaluation	
		Technical Scores $S(t)$	Weighted Scores $S(t) \times T$	Tech nical Rank	Financial Scores $S(f)$	Weight ed scores $S(f) \times F$	Score s $S(t) T + S(f) F$	Rank
1.	Syagga and Associates Ltd	91.00	$91.0 \times 0.8 = 72.80$	2	100 (Ksh.25.3M)	$100 \times 0.2 = 20.00$	92.80	1
2.	Mwaka Musau Consultants	86.30	$86.30 \times 0.8 = 69.04$	3	61.3 (Ksh.41.26M)	$61.30 \times 0.2 = 12.26$	81.30	2
3.	Metrocosmo Ltd	98.00*	$98.00 \times 0.8 = 78.4$	1	-	-	-	-
4.	Zenith (Management) Valuers Ltd	71.30**		5	-	-	-	-
5.	Prestige Management Valuers	72.00**		4	-	-	-	-
6.	Pinnacle Valuers Ltd	70.80**		5	-	-	-	-
Award recommendation		To highest combined technical and financial score. Consultant's name: Syagga and Associates Ltd						

** The Consultant did not provide a responsive financial proposal as stipulated in Appendix to ITC 2.4.1 of the issued RFP document.*

*** The Consultants' technical proposals did not meet the set minimum technical score of 75% and thus the financial proposals were not opened.*

Clause 2.4.1 of the Appendix to ITC of the issued RFP Document which Metrocosmo did not comply with provide as follows;

"The Financial Proposal MUST follow Standard Forms (Section D). All the costs associated with the assignment including; (a) remuneration for staff (b) reimbursable expenses and (c) miscellaneous costs MUST be clearly indicated in monetary figures and in Kenya Shillings. FINANCIAL PROPOSALS WITHOUT MONETARY FIGURES SHALL BE DECLARED NON-RESPONSIVE AND REJECTED. The Consultants may base their professional fees on the applicable legal instruments (scale fees) which provides for the minimum percentage fees chargeable BUT must quote arising fees (as figures derived from their own percentage) for the services stated in this RFP. The details of the estimated values of the subject matter are provided in ANNEX I of the RFP. All other associated costs (Reimbursable and Miscellaneous) MUST also be clearly stated using the standard forms provided in Section IV.

In accordance with the Appendix to ITC 2.4.1 of the issued RFP Document, the Financial Proposal from Metrocosmo Ltd was thus declared non-responsive and rejected.

Recommendation

From the evaluation exercise of the submitted proposals, Syagga and Associates Limited of P.O. Box 26060-00504, Nairobi Kenya attained the highest combined technical and financial score of 92.80.

The evaluation team therefore requested the Tender Committee to approve the report and award the tender for the Consultancy Services for Land and Asset Valuation, Mwea Irrigation Development Project, NIB/T/082/2011-2012, to Syagga and Associates Limited of P.O. Box 26060-00504, Nairobi Kenya at their total read out bid price of Ksh.25,300,000.00 (Inclusive of Taxes).

The Combined Technical and Financial Evaluation Report was presented to the Procuring Entity's Tender Committee for adjudication on 16th May 2012.

TENDER COMMITTEE DECISION

The National Irrigation Board Tender Committee at its meeting held on 16th May, 2012 approved the Evaluation Committee recommendation of award of contract for Tender No. NIB/T/082/2011-2012: Consultancy Services for Land and Asset Valuation, Mwea Irrigation Development Project to Syagga and Associates Limited of P.O. Box 26060-00504, Nairobi Kenya, at their total price of Kshs 25,300,000.00 (Inclusive of Taxes).

The Successful Bidder and the Unsuccessful Bidders were notified of the tender outcome through their contact addresses on 17th May 2012.

THE REVIEW

The Applicant lodged this Request for Review on 29th May, 2012 against the decision of the Tender Committee of National Irrigation Board in the matter of Tender No. NIB/T/082/2011- 2012 for Consultancy Services for Land and Asset Evaluation, Mwea Irrigation Development Project.

The Secretary of the Board vide its letter dated 29th May, 2012 informed the Procuring Entity that the procurement proceeding had been suspended until the matter is heard and determined by the Board.

The Applicant was represented by Mr. Victor Nduhiu and Mr. H.K. Njuguna, Advocates while the Procuring Entity was represented by Mr. Andrew Wandabwa, Advocate. Other interested parties present were M/s Zenith Valuers represented by Mr. Moses Njuguna, Valuer and M/s Syagga and Associates, represented by Mr. Paul Syagga, Director.

The Applicant requests the Board for orders that:

- 1. Annul the award of the Tender NIB/T/082/2011-2012 to Syagga and Associates Limited made on the 17th May 2012 by the Respondent herein.**
- 2. Substitute the award of the Tender NIB/T/082/2011-2012 made to Syagga and Associates Limited on the 17th May 2012 in favour of the Applicant who had the highest technical score in the tender proceedings.**
- 3. Issue further directions to the Respondent with respect to the Valuers Act Cap 532, the Survey Act Cap 299 Laws of Kenya, Legal Notice Number 32 of 1997, Legal Notice number 92 (Valuers Scale Fees), the Public Procurement Oversight Authority Circular No. 1/2012, Clause number 2.1.2 page 5 of the RFP (by the Respondent), and Clause number 2.4.1 of the Request For Proposal (by the Respondent).**
- 4. Payment of the costs of this suit to the Applicant herein.**

PRELIMINARY OBJECTION

The Procuring Entity filed a Preliminary Objection dated Friday 22nd June 2012 which was filed with the Board Secretary at 4.00 p.m. on the same date based on the following grounds:-

- 1. That the Applicant having invoked the powers of the Director General under the Act cannot urge the current Application for Review.**
- 2. That the Project being donor funded must in keeping with the donor regulations attached hereto.**

With regard to the timing of the filing of the Preliminary Objection, the Board finds that the timing of the filing did not allow adequate time for the same to be distributed by the Secretariat to Board members or to be served on the Applicant.

Subsequently, the Board ordered, by consent of the parties, at the commencement of the hearing of the application for review, that the Preliminary Objection be argued together with the parties' submissions.

The Procuring Entity argued that the Board's jurisdiction to hear the application was ousted because the matter was already before the Director General (DG) of the Public Procurement Oversight Authority (PPOA). It submitted that the Applicant had written to the DG on 25th May 2012, complaining about having not been awarded the tender in spite of having had the highest technical score and that it had not been notified of the award. It further submitted that by a letter dated 18th June, 2012, the DG instructed the Procuring Entity to submit to the Authority its response to the issues raised, including the current status of the tender, by 25th June, 2012.

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

The Board notes that this request for review was filed on 29th May 2012, and that the letter from the DG to the Procuring Entity instructing it to submit to the Authority its response to the issues raised in the Applicant's letter of 25th May, 2012, was dated 18th June 2012, when the appeal had already been filed before the Board.

Further the Board also notes the provisions of Section 114 of the Act which states that;

“(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under Part VII.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.”

The Board therefore finds that Section 114 provides that any investigation that may have commenced after this request for review was filed before the Board should be stayed until the Board has heard the matter and made its decision. Further, the Board having read the Act did not find any provision therein which ousted its jurisdiction if a matter subject to an appeal before it, had also been referred to the DG of the PPOA.

Accordingly, the Board finds that it has jurisdiction to hear the appeal before it.

With regard to the project which is the subject of the tender under review being donor funded and as such must be in keeping with the donor regulations attached hereto, the Procuring Entity submitted JICA Guidelines for Tendering as evidence that the project was donor funded.

In response, the Applicant submitted that this information had not been disclosed to the bidders at the time of tendering and was only being brought up at this time.

The Board has examined the Letter of Invitation to bidders and the RFP document, and finds that the Procuring Entity did not reveal in any of these documents that the project was donor funded or that the donor regulations would apply. Furthermore, the Board notes that the RFP document issued to the bidders was based on the Standard Request for Proposal Document issued under the Public Procurement and Disposal Act and no amendments were incorporated into it to take care of any donor requirements.

On examination of the Project Status Report on Mwea Irrigation Development Project Loan Agreement No. KE-P27, submitted by the Procuring Entity, the Board notes that the funding stated in the document indicates that the overall project of which the tender under review is part of, will be funded as follows:-

JICA: Not exceeding Y 13,178 million

Government of Kenya and other Financiers: Y 5,453 million

The Board therefore finds that the project will also be funded by public funds and as such the Public Procurement and Disposal Act, 2005 and its Regulations, 2006 apply.

Accordingly, the Board proceeds to consider the matter on merit.

The Applicant in its Request for Review raised two (2) grounds of appeal.

The Board deals with them as follows:-

Grounds 1 and 2, Breach of Sections 82(4) and 82(5) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as “the Act”)

These grounds have been consolidated because they raise similar issues regarding non responsiveness of the Applicant’s Financial Proposal and whether Valuers are permitted to complete on fees in view of the statutory fee scales for Valuers.

The Applicant averred that the Procuring Entity had breached Section 82(5) of the Act, and disregarded the provisions of the Valuers Act Cap 532, the Survey Act Cap 299 Laws of Kenya, Legal Notice Number 32 of 1997, Legal Notice number 92 (Valuers Scale Fees), and the Public Procurement Oversight Authority Circular No. 1/2012.

It further averred that the Procuring Entity had breached Section 82(4) of the Act by disregarding the directions from the Institution of Surveyors of Kenya (herein after referred to as “ISK”) regarding the adherence to Professional Scale Fees by their members when bidding for tenders from State Corporations such as the Procuring Entity.

It submitted that the decision by the Procuring Entity not to award it the tender was arrived at without due regard to the evaluation procedure and criteria set out under clause Clauses 2.1.2 and 2.4.1 of the Request for Proposal (herein after referred to as “RFP”).

The Applicant argued that the Valuer’s Act at Schedule 3 prescribed the statutory fees that a Valuer was to charge, and therefore, by having stated in its Financial Proposal that its fee will be as per the “Valuers Scale Fees Legal Notice No. 92 of 2011”, and waiving travelling and other disbursements, it was financially responsive as per the RFP.

It further argued that it was not possible for it to have computed a fee amount in Kes based on the estimated compensation in the RFP at page 99 because this would have implied that it was in agreement with the compensation value computed by the Procuring Entity which value was the subject of the RFP and as such could only be determined after a formal valuation was carried out by an appointed Valuer. It further submitted that this would have also disregarded the various directions sent by the ISK with regard to the RFP, to the bidders and the Procuring Entity.

It alleged that the other two technically responsive bidders ought to have been disqualified by the Procuring Entity for having quoted monetary prices in their financial proposals instead of stating that the applicable fees were those prescribed by the Valuers Act Cap 532 as stipulated in Legal Notice Number 92 (Valuers Scale Fees) of July 2011. It further alleged that according to the Valuers Act Cap 532, The Valuers (Professional Misconduct) (Procedure) Rules, 1987, these bidders were guilty of misconduct. It argued that if the Procuring Entity were to get into contract with the Successful Bidder, such a contract would be illegal *ab initio*. In conclusion, the Applicant stated that it was financially responsive and having attained the highest technical score, the Procuring Entity ought to have awarded it the tender. It prayed that the tender be awarded to it as well as costs of the appeal.

An Interested Candidate, Zenith Consultants supported the application for review and submitted that it had been disqualified at technical evaluation stage and that the ISK required fees to be quoted as per the Valuers' Scale.

In its response, the Procuring Entity submitted that Section 82(5) of the Act required the successful proposal to be determined on the basis of responsiveness and attainment of the highest score determined by combining the scores assigned to the technical and financial proposals. It

further submitted that Clause 2.8.5 of the RFP encapsulated this requirement of the Act, by requiring bidders to quote their prices, the basis on which the financial scores would be computed.

It submitted that the failure by the Applicant to comply with the requirements of both the RFP, the Act, and the Regulations could not be justified by reliance on other statutes and legal instruments, to wit the Valuers Act Cap 532, the Survey Act Cap 299 Laws of Kenya, Legal Notice Number 32 of 1987 the Valuers (Professional Misconduct (procedure) Rules Clause 3(1) (f) and (g), Legal Notice Number 92 of 2011 (Valuers Scale Fees).

It further submitted that in evaluating the tender, it could only have relied on the documents before it, and could not have made reference to extraneous material as suggested by the Applicant, contrary to the provisions of Section 66(2) of the Act.

It averred that the Applicant ignored the provisions of the Appendix to Information to Consultants (ITC), Reference Clauses 2.1.1 and 2.1.2 of the RFP which specified that bidders shall submit both Technical and Financial Proposals. It further averred that the method of selection for the assignment was Quality and Cost Based Selection Method (QCBS) and the same was clearly specified in the issued RFP Document.

It submitted that the requirement in the RFP for the bidders to submit both technical and financial proposals in a specified in standard format was a material fact that could not be ignored. It further submitted that the provisions of the Appendix to Information to Consultants at Clause 2.4.1 of the RFP required all bidders to provide their financial proposals in monetary figures, that is quote their prices for the consultancy services and that financial proposals without quoted prices were to be declared non responsive and rejected.

It averred that the Applicant was aware of this tender requirement and did not raise an objection to it during the tendering process; and that the Applicant and other bidders submitted their proposals accordingly.

It submitted that if the Applicant had been dissatisfied with the said requirement, it should have duly filed an appeal in respect thereof, as provided for in the law hence its attempt to raise the said issue at this time, when it has been declared unsuccessful, was belated.

The Procuring Entity submitted that the financial proposal from the Applicant did not have a monetary figure (price) and a resulting contract would have violated provisions of Section 85 (4) (a) of the Act. It further submitted that in any event, it could only evaluate proposals in accordance with the procedures and criteria set out in the RFP as per Section 82(3) of the Act.

The Procuring Entity claimed that the legal instruments relied upon by the Applicant could not have resulted in a definite figure upon which a financial evaluation of its bid was possible. It further claimed that it was possible for the Applicant to have computed a monetary figure (price) as required to the RFP by applying the relevant scale fees in the Valuers Act Schedule 3 to the estimated compensation value provided in the RFP.

With regard to the allegation that it had violated the provisions of Section 82(4) of the Act by disregarding the advisory opinion and or directions from the ISK regarding the adherence to Professional Scale Fees by ISK members when bidding for tenders, the Procuring Entity submitted that the Act and the RFP did not provide for additional methods of evaluation except those stipulated at Clauses 2.7.1 and 2.8.5 of the RFP for Technical Proposals and Financial Proposals respectively.

It further submitted that it was not bound by the advisory opinion or directions of the ISK and as such an appeal on the ground that it had not complied with such an opinion or directions could not be sustained.

In conclusion, the Procuring Entity stated that the financial evaluation was in adherence to the provisions of Section 82 of the Act and Regulation 57 of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as "the Regulations"); in full compliance with the Public Procurement Oversight Authority Circular No. 1 of 10th February 2012; and as such the Request for Review bears no merit and the same should be dismissed with costs.

The Successful Candidate, Syagga and Associates Limited, did not make any submissions. Another Interested Candidate, Mwaka Musau Consultants, in its written submissions supported the Procuring Entity's position. It argued that, since the number of properties involved had already been identified and the Legal Notice No. 92 of 2011 stipulates the minimum valuation fees as Kshs 15,000 per case, it was possible for it to quote a figure without breaking the law. It further submitted that PPOA Circular No. 1/2012 of 10th February 2012 takes cognizance of the fact that the legal documents which govern valuation fees provide for minimum fees chargeable.

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

The issue for the Board to determine is whether pursuant to Sections 82(4) and 82(5) of the Act, the Public Procurement Oversight Authority Circular No. 1/2012 and Clauses 2.1.2 and 2.4.1 of the Request for Proposals (RFP), the Procuring Entity correctly determined the Applicant's financial bid as non responsive for not computing a monetary figure (price).

The Board 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 proposals 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)."*

The Board further notes the provisions of the Public Procurement Oversight Authority (PPOA) Circular No. 1/2012 which provides as follows;

PPOA Circular No.1 /2012:-

".....
.....*In addition , Section 82(5) of the Act specifically provide that '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.....*

To this end, it is a requirement of the Act for Procuring Entities to call for both technical and financial proposals when procuring intellectual and professional services. Consequently, professional fees chargeable (price) should form part of the evaluation criteria.

Further PPOA takes cognisance of the fact that professionals such as lawyers, Architects and Quantity Surveyors have their prices governed by the Advocates Remuneration Order and the Architects and Quantity Surveyors Act respectively. We note that the legal documents provide for a minimum percentage of fees chargeable for services offered by the respective professionals.

The aforementioned documents do not oust the requirement for competition over prices quoted above the legal minimum. In that regard, all Procuring Entities intending to procure professional services are required to keep abreast of such legal and regulatory documents that govern fees for professional services prior to proceeding with procurement procedures.

Since the price quoted by the tenderers responding to a RFP will have to be considered among other issues such as technical capacity of the tenderer to deliver the services, PEs , guided by the principle of competition, fairness and legality, stipulated in the procurement law should ensure that their evaluation criteria are engendered to award tenders only to qualified professionals / firms who adhere to the regulations governing the practice of their professions.....”.

Based on the foregoing provisions in the Act and PPOA Circular No. 1/2012, the Board finds as follows:-

1. Section 82 of the Act requires that the procuring entity evaluates and assigns a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals or any additional methods described therein.

2. Section 82 of the Act further prescribes that 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 and the results of any additional methods of evaluation therein.
3. PPOA Circular No. 1/2012 emphasizes that it is a requirement of the Act for Procuring Entities to call for both technical and financial proposals when procuring intellectual and professional services. Consequently, professional fees chargeable (price) should form part of the evaluation criteria.
4. PPOA Circular No. 1/2012 further emphasizes that in Quality and Cost Based Selection Method '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.....
5. In line with PPOA Circular No. 1/2012, the onus was on the Procuring Entity to make it clear in the Request for Proposal that Financial Proposals were required to be submitted by all bidders and ensure that its evaluation criteria was engendered to award tenders only to qualified professionals/firms who adhere to the regulations governing the practice of their professions.....

In this regard, the question before the Board is whether the provisions in the RFP document complied with Section 82 of the Act and PPOA Circular No. 1/2012.

The Board notes the provisions of Clauses 2.1.2 and 2.4.1 of the Request for Proposals (RFP) which provide as follows;

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 to "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."

Clause 2.4.1

"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 notes Paragraph 1 of the Appendix to Information to Consultants and Clause References 2.1.1, 2.1.2 and 2.4.1 of the same appendix in the RFP which provides as follows;

“APPENDIX TO INFORMATION TO CONSULTANTS (ITC)

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 and to consultants and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the information to consultants.

.....

Clause Reference

- 2.1.1 *The method of selection is: Quality and Cost Based Selection (QCBS)*
- 2.1.2 *Technical and Financial Proposals are requested: YES*
- 2.4.1 *The Financial Proposal MUST follow Standard Forms (Section D). All the costs associated with the assignment including; (a) remuneration for staff (b) reimbursable expenses and (c) miscellaneous costs MUST be clearly indicated in monetary figures and in Kenya Shillings. **FINANCIAL PROPOSALS WITHOUT MONETARY FIGURES SHALL BE DECLARED NON-RESPONSIVE AND REJECTED.** The Consultants may base their professional fees on the applicable legal instruments (scale fees) which provides for the minimum percentage fees chargeable BUT must quote arising fees (as figures derived from their own percentage) for the services stated in this RFP. The details of the estimated values of the subject matter are provided in ANNEX I of the RFP. All other associated costs (Reimbursables and Miscellaneous) MUST also be clearly stated using the standard forms provided in Section IV.”*

Based on these provisions in the RFP document, the Board finds as follows:-

1. The Procuring Entity complied with the PPOA Circular No. 1/2012, by amending Clauses 2.1.1 and 2.1.2. of the Instruction to Consultants in the Appendix to Information to Consultants, Clause References 2.1.1 and 2.1.2. by making the submission of both Technical and Financial Proposals a mandatory requirement.
2. The RFP provided that if there was 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 mandatory in the evaluation process although they had different weights.

From the foregoing, it is clear that the RFP required a Financial Proposal to be submitted and therefore the Procuring Entity had complied with the provisions under Section 82 of the Act and PPOA Circular No. 1/2012 in this regard.

With regard to how the Financial Proposal was to be submitted, the Board notes Section IV of the RFP and in particular the following forms; 1. Financial Proposal Submission Form; 2. Summary of Costs table; 3. Breakdown of Price per Activity table; 5. Reimbursables per Activity; 6. Miscellaneous Expenses.

From these forms it is clear that the Financial Proposal was to comprise the following:-

- i) Remuneration (fees);
- ii) Reimbursables (travel and subsistence allowance);

iii) Miscellaneous Expenses (telephone costs, reproduction of reports, software, computers etc.)

With regard to how financial score was to be determined under Financial Evaluation, the Board notes that Clause 2.8.5 of the Instructions to Consultants in the RFP provided as follows:-

"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 weights given to the Technical (T) and Financial (F) Proposals are:

Technical Proposal (T) = 0.8;

Financial Proposal (F) = 0.2"

From the foregoing, the Board finds that the Procuring Entity provided procedures and criteria for the evaluation and assigning of scores to technically responsive bidders' financial proposals as well as providing under clause 2.8.5 of the Request for Proposal, the formula for determining both the technical and financial score, as well as a formula for combining and ranking the bidders' proposals according to their combined technical and financial scores.

Upon perusal of the Original Financial Proposals submitted by the Applicant and the Successful Bidder, the Board notes 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 Applicant’s Financial Proposal, the Board notes that the content of its Financial Proposal Submission Form stated as follows:

“We the undersigned offer to provide the consulting services for Land and Asset valuation, Mwea Irrigation Development Project Ref. NIB/T/082/2011-2012 in accordance with your Request for Proposal dated 2^{1st} March 2012 as per the Valuers and Surveyors Scale of Fees as stipulated in the respective statutes.

Valuation and Surveying are professions regulated by the Valuers Act Cap 532 and the Survey Act Cap 299 of the Laws of Kenya respectively. Likewise, the fees chargeable are statutory regulated and deviation from these scales is punishable by law.

Our financial proposal is therefore guided by the Law and shall apply as follows:-

Valuation:

It shall be as per the Valuers Scale Fees Legal Notice No. 92 of 2011 (copy attached). From this Schedule of Fees, the applicable Scales are No. 2 and 6.

Survey Fees

For any survey work in this exercise, the fees shall be in accordance with the Scale Fees applicable.

DISBURSEMENTS AND REIMBURSEABLES

We shall waive traveling and other disbursement expenses. However our fees shall attract taxes as applicable.

.....
.....
... .”

The Board further notes that apart from the above statements contained in the Applicant's Financial Proposal Submission Form and an illustration on how the Scale of Fees was supposed to be applied, the Applicant's Financial Proposal did not state a monetary amount (price) 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 and the reference to the same clause in the Appendix to Information to Consultants.

As already found by the Board, the Successful Bid was to have been 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 absence of any monetary figures in the Applicant's Financial Proposal, it was not possible for the Procuring Entity to determine the Applicant's financial score and subsequently its combined Technical and Financial Score.

The Board observes that the Applicant attached to its Financial Bid, a copy a letter from the ISK to the Procuring Entity forwarding to it copies of: the gazette notice containing the list of Registered and Licensed Practicing Valuers for the year 2012; Gazette Supplement No 68 Legal Notice No. 92 on the Applicable Scale of Fees and PPOA Circular No 1/2012 on Procurement of Professional Services. The Board notes that in the said letter to the Procuring Entity, the ISK requested the Procuring Entity to ensure the prequalified firms adhere to the regulations and the Scale of Fees.

The Board further notes the Applicant's argument that it could not use the estimated compensation value stated in the RFP as a basis to apply the prescribed fees under the Valuers Act to these estimated compensation values, and thus compute a monetary amount (price).

In this regard, the Board notes the provisions of Legal Notice No. 92 of 22nd July 2011, which provides as follows;

Legal Notice No. 92-:

“THE VALUERS ACT (Cap 532)

IN EXERCISE of the powers conferred by Section 25 of the Valuers Act, the Minister for Lands makes the following Rules:

THE VALUERS (FORMS AND FEES) (AMMENDMENT) RULES 2011

- 1. This order may be cited as the Valuers (Forms and Fees) (Amendment Rules 2011.***
- 2. The Valuers (Forms and Fees) (Amendment Rules are amended by deleting the Third Schedule and substituting therefore the following new schedule.***

THIRD SCHEDULE

1. Urban rating and agriculture

First Kshs 2,000,000 at 1.0 percent

Residue at 0.25 percent

2. Compulsory Acquisitions

First Kshs 2,000,000 at 1.0 percent

Residue at 0.25 percent

3. Rental... ..

4. Plant Machinery and Automobile

First Kshs 5,000,000 at 1.5 percent

Residue at 0.5 percent

5. Furniture, Fittings, Equipment, Trading Stocks and Going Concerns

First Kshs 1,000,000 at 5.0 percent

Residue at 2.5 percent

6. Minimum Valuation Fees

Kshs 15,000 for any valuation.

7. Consultancy

A minimum of Kshs 5,000 per hour where such consultancy does not involve carrying out a valuation... ..

8. Travelling expenses and disbursements

These shall be based on the costs incurred in undertaking the valuation.

Made on the 13th July, 2011."

Based on these provisions in the Valuers Act, the Board finds as follows:-

1. The Valuers (Forms and Fees) (Amendment Rules 2011) Third Schedule prescribes the basis of calculation of fees to be charged by Valuers whose services are governed by the Valuers Act (Cap 532).
2. The said Third Schedule or Amendment Rules 2011 do not in themselves prescribe that such registered Valuers shall only state that fees chargeable are as per the Valuers Scale of Fees and not compute and quote the fee they intend to charge based on the prescribed scales when submitting Tenders. Indeed, the Third Schedule, by providing the basis of calculation of the fees, seems to be intended to be used to calculate fees based on the prescribed scales therein.

Further, the Board finds that upon perusal of the ISK letter attached to the Applicant's Financial Proposal, which letter the Applicant relied upon in its request for review, the Board does not find any evidence that the contents of the said letter prohibits a Valuer from applying the prescribed scale in the Valuers Act to compute a monetary fee for the purposes of a Tender.

Further, with regard to the Applicant's argument that it was not possible for a bidder to calculate fees without contravening the relevant statutory provisions, the Board notes and finds as follows:-

RFP Section 12: Cost and Budgets, clearly indicated the estimated costs and budgets for the various items to be undertaken in the tender. With those figures, it was possible for the bidders to give their financial proposal in monetary terms in accordance with the relevant statutes.

The Board notes that at the same Section 12 of the RFP, it stated with respect to estimated prices per acre given in the RFP document, that "It should be noted that at the time of actual compensation, land prices should be adjusted to reflect current market value at that time". This in the Board's view provided for an adjustment of the tendered fee based on the prescribed scale fee being applied to the land value at the time of actual compensation, which final fee due would have been in compliance with the provisions of the Valuers Act in that the final fee computation would have been based on the actual land value.

With regard to the Applicant's allegation that a contract with the Successful Bidder would be illegal because it quoted monetary fees thereby breaching the Valuers Act and as such it would be guilty of misconduct under the same Act, the Board notes Rule 3(1)(f) and (g) of The Valuers Act, Cap. 532, The Valuers (Professional Misconduct) (Procedure) Rules, 1987 which provides that:-

"3(1) A registered valuer shall be guilty of professional misconduct if he

.....
(f) Deviates from the schedule of fees prescribed by the Board by charging less or more than the charges laid down without notifying the Board of his intention to do so, and the reasons for the extent of such deviation and receiving the Board's sanctions thereto.

(g)Tenders or quotes fees outside the scales laid down by the Board"

The Board further notes Rule 2, which states as follows:-

"2. In these Rules, "professional misconduct", in relation to a charge against a registered valuer, means conduct which the Board deems, after due inquiry, to be professional misconduct."

In this regard, the Board finds that the Valuers 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. (Precedent: the Board's decision in Application No. 24/2006 between Kinyua Koech and Local Authorities Pension Trust dated 21st June, 2006).

The Board further holds that before a bidder can be held to have contravened the law governing their profession, such bidders are entitled to a hearing to demonstrate their compliance or otherwise. Therefore, Procuring Entities are not bound to consider general circulars issued by professional bodies in the course of evaluation.

Whereas the Board agrees with the Applicant that professionals should comply with the statutes prescribing minimum and maximum fees as applicable, for their respective professions, so as to prevent undercutting on fees and to promote professionalism, the Board also holds that the requirements of the Act and its Regulations, together with the requirements of a Tender Document should also be complied with; such that if a Tender Document calls for fees to be computed, professionals should compute the applicable fees based on their prescribed scale of fees.

Taking all the above into consideration, the Board finds that the Procuring Entity did not breach Sections 82(4) and 82(5) of the Act; and further that the Procuring Entity acted properly by declaring the Applicant's Financial

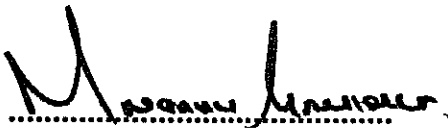
Proposal non-responsive for not providing a monetary figure (price) as required to under the Act and the RFP Document.

Subsequently, these grounds of appeal fail.

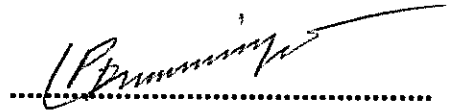
Accordingly, the Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

There are no orders as to costs.

Dated at Nairobi on this 28th day of June, 2012



**CHAIRMAN
PPARB**



For: **SECRETARY
PPARB**