

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 14/2012 OF 17TH APRIL, 2012

BETWEEN

GITUTHO ASSOCIATES.....APPLICANT

AND

CATERING AND TOURISM DEVELOPMENT LEVY

TRUSTEES.....PROCURING ENTITY

Review against the decision of Catering and Tourism Development Levy Trustees, in the matter of Tender No. CTDLT/003/2011-2012 for Provision of Consultancy Services for design, documentation, supervision and contract management of the proposed Ronald Ngala Utalii College (RNUC) in Kilifi County.

BOARD MEMBERS PRESENT

Ms. Judith Guserwa	-	Member (In the Chair)
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter M. Kioko	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. Nathan Soita	-	Secretariat
Ms. Judy Maina	-	Secretariat

PRESENT BY INVITATION

Applicant, Gitutho Associates

Mr. Martin G. Mwaniki - Muri Mwaniki & Wamiti Advocates

Arch. Kamau Njendu - Architect

Procuring Entity, Catering and Tourism Development Levy Trustees

Mr. Patrick Anam - Sichangi & Partners

Mr. Tim Liko - Sichangi & Partners

Mr. Teddy Okello - Sichangi & Partners

Ms. Nancy Siboe - Head of Legal

Mr. Joseph K. Ndung'u - Procurement Manager

Mr. Wilfred Cheruiyot - Procurement Assistant

Interested Candidates, Baseline Architects Ltd

Mr. Arimi Kimathi - Arimi Kimathi & Co. Advocates

Mr. D.O. Motanya - Architect

Mr. M. G. Njue - Architect

Mr. R.A. Malala - Quantity Surveyor, Ujenzi & Consultants

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 OF AWARD

Advertisement

The Procuring Entity advertised the Request for Proposal for Provision of Consultancy services for construction of Ronald Ngala Utalii College (RNUC) in Kilifi County in the Standard newspaper of 16th February, 2012 and closed/opened on 1st March, 2012.

Closing/Opening:

The tender closed and opened on 1st March, 2012 with the following sixteen (16) bidders responding:

- 1) AAKI Consultants
- 2) Scope Design Systems
- 3) Batiment Group Ltd
- 4) Symbion Kenya Ltd (Msa Branch)
- 5) Diaspora Design Build Ltd
- 6) Mruttu Salmann and Associates
- 7) Maestro Architects Ltd
- 8) Gitutho Associates
- 9) Baseline Architects Ltd
- 10) A.D Designs Architects
- 11) Tej Architects
- 12) Conte Design Team
- 13) Tectura International
- 14) Morphosis Ltd
- 15) Planning Systems Services Ltd
- 16) Kenchuan Architects

EVALUATION

The bids were evaluated on the basis of the Bidders' responsiveness to the RFP's Terms of Reference. The evaluation was conducted in two sequential stages, namely - Preliminary Examination and; Detailed Technical Evaluation.

Preliminary Evaluation

The preliminary evaluation was to determine bidders' eligibility and administrative compliance with the basic instructions and requirements of the solicitation document. The evaluation was done in three phases:

a) Submission of correct number of Technical Proposal documents.

*This was evaluated in accordance with **Clause 2.4.2** of the RFP document. The results are presented as follows:*

Table 2: Bidders and Bid Copies Submitted

NO.	BIDDER NAME	NO. OF COPIES	RESPONSIVENESS
1	AAKI Consultants	6	Responsive
2	Scope Designs	3	Responsive
3	Batiment Group Ltd	1	Non- Responsive
4	Symbion(K) Ltd	3	Responsive
5	Diaspora Design Build Ltd	3	Responsive
6	Mruttu Salmann & Associates	3	Responsive
7	Maestro Architects Ltd	3	Responsive
8	Gitutho Associates & Consulting Ltd	3	Responsive
9	Baseline Architects Ltd	3	Responsive
10	A.D Designs	3	Responsive
11	Tej Architects	3	Responsive
12	Conte Design Team	3	Responsive
13	Tectura International	3	Responsive
14	Morphosis Architects & Interiors Ltd	3	Responsive
15	Planning Systems Ltd	3	Responsive
16	Kenchuan Architects	3	Responsive

From the findings presented in Table 2 above, **Batiment Group** did not adhere to the aforementioned Clause by submitting only **ONE** set of document of the Technical Proposal contrary to the requirements.

b) Consortium Composition

The bidders were evaluated according to the criteria outlined in clause 2.3.3 of the RFP document which states, "consultants shall not associate with other consultants invited for this assignment. This leads to an automatic disqualification of the two firms." Table 3 below is a summary of the findings and, detailed notes on the remarks are herewith attached as **Annex IV**.

Table 3: Consortium Composition Assessment

No	Bidder	Lead Consultant/ Architects	Architecture And Interior Design	Civil/ Structural Engineers	Quantity Surveyor	Electrical/ Mechanical	Environment Specialist	Remarks
1	AAKI Consultants	AAKI consultants	AAKI/Chege Designers Consultants	Pleng Ltd- no letter of association	Zinaki Consult	Mecoy Consulting Engineers	Pleng Ltd-no letter of association	Non-Responsive
2	Scope Design Systems	Scope Design Systems	Scope Design System	Multiscope Consulting Engineers Ltd	Amazon Consult	Edson Engineers	Samuel Getaro	Non-Responsive
4	Symbion (K) Ltd	Symbion (K) Ltd	Symbion (K) Ltd and Paul Smith Designs	Manor Consultants	Quantech Consultancy & Paul Smith/ Davison & Ward	Feradon Associates	Not Stated	Non-Responsive
5	Diaspora Design Build Ltd	Diaspora Design Build Ltd	Diaspora Design Build Ltd	Batch Associates Limited/Wada	Munderu & Associates	Gill Consult	Geoplan	Non-Responsive
6	Mrutu Salmann & Associates	Mrutu Salmann & Associates	Mrutu Salmann & Associates	Otieno Odongo & Associates	Ngahu & Associates	Metroeng Consulting	Otieno Odongo & Associates	Responsive
7	Maestro Architects Ltd	Maestro Architects Ltd	Maestro Architects Ltd	Not stated	Not Stated	Not stated	Not stated	Non-Responsive
8	Gitutho Associates & Consulting Ltd	Gitutho Associates & Consulting Ltd	Gitutho Associates & Consulting Ltd	Maxcard Associates	Gakuya Associates	Prime Consult	Raz-E Productions	Responsive
9	Baseline Architects Ltd	Baseline Architects Ltd	Baseline Architects Ltd	Armitech Consulting Engineers	Ujenzi Consulting	West Consult	PKF Consulting Ltd	Responsive
10	A.D Designs	A.D Designs	A.D Designs	Utmost Consulting	Nyange & Associates	ZPOJAWO Consulting Engineers	Not stated	Non-Responsive
11	Tej Architects	Tej Architects	Tej Architects	Shomax Consulting Engineers	Bills Partnership	Shako & Partners	Geodev(K) Ltd	Responsive
12	Conte Design Team	Conte Design Team	Conte Design Team	Cas Consultants Ltd.	Gachagua, Kahoro and Associates	Associated Services Consultants	Conte Design Team	Responsive
13	Tectura International	Tectura International	Tectura International	Professional Consultants	Muambi Associates	Not stated	Kiburu & Associates	Non-Responsive
14	Morphosis Architects & interiors Ltd	Morphosis Architects & interiors Ltd	Morphosis Architects & interiors Ltd	Metrix Intergrated Consultancy	Northwind Consulting Ltd	Edson Engineers	EHS Management Consultants	Non-Responsive
15	Planning Systems Services	Planning Systems Services	Planning Systems Services	Tamcon Consulting Engineers	Harrod Fenwick	East African Maritime Services	TEM Consultants	Responsive
16	Kenchuan Architects	Kenchuan Architects	Kenchuan Architects	Malaba Keya & Partners	Songa Opoda & Associates	Mauzito Engineers	Not stated	Non-Responsive

c) **Eligibility Criteria-Mandatory Requirements.**

This was evaluated according to the criteria specified in **Clause 2.6.1(a)** of the RFP document requiring all bidders to submit the following documentation:

- *Notarized copy of Certificate of business incorporation/Registration.*
- *Notarized copy of current and valid Tax Clearance Certificate.*
- *Notarized copy of VAT registration.*
- *Statement of no conflict of interest.*
- *Declaration that bidder is not under suspension by PPOA.*
- *Affidavit.*
- *Proof of works not less than 1.0 Billion within the last 5 years.*
- *Declaration that bidder will not be involved in corruption or fraudulent practices.*
- *Disclosure on place of business.*
- *Litigation History*

This evidence based evaluation found Bidder No.12 M/s Conte Design Team to be Non-responsive. While the evaluation (on Y/N) is attached as **Annex V**, the explanatory notes are presented as **Annex VI**. From the aforesaid results, the following Bidders in Table 4 below proceeded to the Technical Evaluation Phase.

Table 4: Bidder for Technical Evaluation Phase

BID NO.	BIDDER NAME
6	Mruttu Salmann & Associates
8	Gitutho Associates & Consulting Ltd
9	Baseline Architects
11	Tej Architects
15	Planning Systems Services

Detailed Evaluation

Detailed evaluation involved assessment on bidders' responsiveness to the Terms of Reference of the solicitation document. The technical quality of the bids were assessed against set criteria on a merit point system, to determine the technical score of the bid as well as to determine which technical bids reached the minimum technical score required. This involved two levels as follows:

a) Specific Experience of the Providers and Adequacy of Methodology.

This was evaluated based on the criteria prescribed in *Clause 2.6.1*. The results are presented in **Annex VII**.

Note: This was evaluated out of **40 marks**.

b) Qualification and Competence of Key Staff(60 marks)

This was evaluated based on the criteria prescribed in *Clause 2.6.2*.

Each of the key staff was first evaluated against the 100 point scale:

- General Qualification 30points
- Adequacy for the project 60 points
- Experience in the proposed position 10points

This was then scaled down to the 60 point scale according to their respective weights. **RFP document Clause 2.6.3**.

Each member of the committee evaluated each applicant independently and awarded marks for each item. Averages were calculated and weights allocated to each of the scores of the professional staff as specified in **Clause 2.6.3** of the RFP documents. This score is represented by letter **Y**. The results are summarized in **Annex VIII**.

Final Score

In generating the Final Score and in accordance with the assessment and computations tabulated as **X** and **Y** in the foregoing part, Table 5 below presents Final Scores and evaluation ranking.

Table 5: Final Technical Evaluation Score(X+Y)

Bidder No:	BIDDER NAME	SCORE(Out of 40): X	Score(Out of 60): Y	Score(X+ Y)	Position
6	Mruttu Salmann & Associates	22.28	55.80	78.08	4
8	Gitutho Associates & Consulting	31.67	56.22	87.89	2
9	Baseline Architects Ltd	34	55.79	89.79	1
11	Tej Architects	26.57	55.89	82.46	3
15	Planning Systems Services	23.39	37.38	60.77	5

The minimum technical score required to pass the technical evaluation is **75** points as provided for in the **RFP Clause 2.6.4.2**. Thus, Planning Systems Services was found Non-Responsive.

RECOMMENDATIONS

The Technical Evaluation Committee, after careful evaluation found Bidder No. 9 M/s Baseline Architects Ltd to have presented the most responsive bid. Given the foregoing, the Technical Evaluation Committee recommends that **Baseline Architects Ltd, P. O. Box 39928, Parklands, Nairobi (00623)** be considered for the award of the consultancy services for the Design,

Documentation, Supervision, and Contract Management of the Proposed Ronald Ngala Utalii College (RNUC).

TENDER COMMITTEE DECISION

The Tender Committee at its meeting No.TC/79/2011-12 held on 4th April, 2012 adopted the recommendations of the Evaluation Committee and approved the bidder with the highest technical score M/s Baseline Architects Ltd who were to be invited for negotiations on the basis of scale of fees for professional services.

THE REVIEW

The Request for Review was lodged by Gitutho Associates on the 17th April, 2012 against the decision of Catering and Tourism Development Levy Trustees in the matter of Tender No. CTDLT/003/2011-2012 for Provision of Consultancy Services for design, documentation, supervision and contract management of the proposed Ronald Ngala Utalii College (RNUC) in Kilifi County.

The Applicant was represented by Mr. Martin G. Mwaniki, Advocate while the Procuring Entity was represented by Mr. Patrick Anam, Advocate. The interested candidates M/S Baseline Architects Ltd was represented by Arimi Kimathi, Advocate.

The Applicant requested the Board for the following orders:-

- (a) The tendering process of the above tender be investigated and reviewed;*
- (b) The award of the tender to Baseline Architects be annulled; and*
- (c) The Board makes the decision on award of tender in substitution for the decision of the Respondent.*

(d) Costs of this request be awarded to the Applicant.

The Applicant raised four grounds of review which the Board deals with as follows:

GROUND 1 and 4:

The grounds have been consolidated because they are generalized factual statements by the Applicant which do not cite any breach of the Act or Regulations by the Procuring Entity; and as such the Board need not make any finding on them.

GROUND 2 and 3: Breach of Section 82 of the Act and Regulation 57

The two grounds have been consolidated because they raise similar issues related to the tender evaluation process.

The Applicant averred that the Procuring Entity awarded the tender to Successful Bidder, Baseline Architects, irregularly because it had not met the mandatory criteria under Section 1(6) of the Letter of Invitation in the Request for Proposal by having failed to disclose information regarding pending litigation and subsequently its bid in that regard was not responsive as required under Section 82 of the Public Procurement and Disposal Act (herein after referred to as "the Act") and Regulation 57 of the Public Procurement and Disposal Regulations, 2006 (herein after referred to as "Regulations"). The Applicant, in its Supporting Statement by Architect James Kamau Njendu, stated that the Weekly Citizen newspaper dated 16th - 22nd April, 2012, had published that the tender had been awarded to Baseline Architects and that Baseline Architects had not submitted a responsive tender for failure to disclose information regarding litigation as required to by the Tender Documents.

The Applicant claimed that the Litigation Disclosure submitted by the Successful Bidder in its Bid did not meet the requirements of disclosure under the Tender Document because the disclosed case with the Coffee Board of Kenya did not state the amount in dispute. It further claimed that it was Baseline Architects Limited that was a party to the dispute as evidenced by a print out of a daily cause list of 26th November, 2008 indicating that High Court Civil Case 152/04 was between Baseline Architects Limited, a limited liability Company and Coffee Board of Kenya and not Baseline Architects the partnership.

In its response, the Procuring Entity submitted that the entity called Baseline Architects did not respond to the Request For Proposal, never submitted any bid and had not been awarded the tender under review. It further submitted that the firm being considered for award was M/s Baseline Architects Limited and that it was this bidder who had provided information disclosing its litigation history and thereby had complied with the Tender Document under Clause 1(6) of the Letter of Invitation. It stated that the Successful Bidder's Litigation Disclosure confirmed that the arbitration with NHIF was concluded in 2007. It further stated that the Successful Bidder's disclosure with respect to the case with the Coffee Board of Kenya did not disclose the disputed amount because the party to this dispute was not the bidder, Baseline Architects Limited, but the partnership of Baseline Architects which was not a bidder in the subject tender under review.

The Procuring Entity averred that M/s Baseline Architects Ltd was responsive in all aspects regarding these specific allegations and that the entire appeal was based on speculations derived from a publication that had not disclosed the source of information and had not published the writer's name.

With regard to the Applicant's allegation that the cause list proved that it was Baseline Architects the limited liability company, and not the partnership that had a case pending, the Procuring Entity submitted that, a cause list print out from the website cannot be relied upon to establish the identity of parties.

The Procuring Entity concluded that it had followed the provisions of the Act and its Regulations and that no reasonable grounds had been disclosed by the Applicant to warrant the Board to exercise its discretion in the Applicant's favour.

On its part, the Successful Bidder aligned itself with the Procuring Entity's submissions and stated that based on the Applicant's Request for Review, it was not the party cited as the Successful Bidder namely Baseline Architects. It further stated that its bid was in compliance with the instructions in the Tender Document and with all the provisions of the Act and its Regulations. It submitted that it possessed the necessary qualifications, capabilities, experiences and technical facilities to provide the services being procured by the Procuring Entity in accordance with Section 31 of the Act; and that it was on that basis that it had been awarded the tender, the subject matter of this Review.

The Successful Tenderer further stated that it had met all the tender requirements including disclosure of information regarding litigation for the last 5 years. It contended that the Applicant's grounds for review arose from the gutter press which could not have been based on any valid and/or factual grounds.

The Successful Tenderer also contended that the application for review was speculative and ambiguous and could not be granted for reasons that it was made against an entity that had not participated or submitted a bid for the tender under review; and that the application was frivolous, vexatious, fatally

defective and made with the aim and purpose of delaying the procurement of the tender.

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

The Board notes the provisions of Clause 1(6) of the Letter of Invitation, Section 82 of the Act and Regulation 57.

Clause 1(6) of the Letter of Invitation in the Request for Proposal states; *"Information regarding any litigation, current or during the last five years, in which each firm is involved, the parties concerned and disputed amount"*

Section 82 of the Act provides as follows:

- (1) "The procuring entity shall examine the proposals received in accordance with the request for proposals.*
- (2) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals."*

Regulation 57 provides that *"The procedure for preliminary evaluation of open tenders set out in Regulation 47 shall apply to evaluation of proposals under Section 82 of the Act."*

The Board has examined the Bid document submitted by the Successful Bidder and finds that the bidder had attached a Litigation Disclosure which read as follows:

"We refer to the Letter of Invitation and disclose as follows:

- i) *That one of Directors of Baseline Architects Ltd, Arch. Morris G. Njue, is involved in court case in matter between Baseline Architects (which was a partnership of Morris G. Njue and Late F. Muriuki) and Coffee Board of Kenya over non-payment of Fees. The case was filed in 2001 and is ongoing.*
- ii) *In 2005 Baseline Architects Ltd and Ujenzi Consultants among others were in arbitration with NHIF over delayed payment of Fees. The issue was concluded in early 2007 and later resolved out of court with the consultants retained in the project which is ongoing."*

With respect to the first disclosure, the Board notes that in the disclosure, Baseline Architects, a partnership, is the party involved in the dispute; and that the amount under dispute was not declared.

The issue for the Board to determine in this instance is who the Successful Bidder was - Baseline Architects, the partnership or Baseline Architects Limited; and whether the amount under dispute ought to have been disclosed in that instance.

From the Tender Documents, the Board finds that Baseline Architects Limited was a tenderer in the subject tender under review and that there was no bid document submitted by Baseline Architects, a partnership. Therefore, the Board finds that the litigation disclosure requirements stated under Clause 1(6) of the Letter of Invitation, was applicable to the bidder, Baseline Architects Limited and not to the partnership of Baseline Architects. Subsequently in this regard, the Board finds that the disclosure as submitted by the Applicant with respect to the Coffee Board of Kenya case, without disclosure of the disputed amount, was sufficient because the dispute was between the partnership and not the limited liability company which was the bidder. This is consistent with the Board's finding in its decision dated 18 March 2011, in the matter of Review No. 5 and 6 between Promarc

Consultancy Limited and Mathu and Gichuiru Associates Limited vs Kenya Institute of Education, where the Board held that the Procuring Entity erred in the evaluation of tax compliance requirements by verifying with KRA the PIN Number for Mathu and Gichuiru Associates (a partnership) which did not participate in the tender instead of the Applicant's Mathu and Gichuiru Associates Ltd.

With regard to the Applicant's allegation that the High Court daily cause list indicated that Baseline Architects Ltd was the party in a matter before the court against Coffee Board of Kenya; the Board finds that it is upon the Applicant to place before the Board sufficient material, in this instance, a copy of the pleadings relating to the cited case for the Board to be able to verify the real identity of the parties.

With regard to the allegations alluded to by the Applicant as published by the Weekly Citizen of 16th -22nd April, 2012, which the Applicant relied on in filing this request for review, the Board notes that the publication indicated that Baseline Architects had failed to disclose its litigation history with National Health Insurance Fund (NHIF), Coffee Board of Kenya and National Social Security Fund (NSSF).

As the Board has already found, the bidder in the tender under review was Baseline Architects Limited and not Baseline Architects; and that there were two disclosures submitted by the Successful Bidder, namely the Coffee Board of Kenya case with Baseline Architects, a partnership, and the NHIF case which was submitted as having been concluded in 2007 and was not within the threshold of the requirement of disclosure of litigation history within the last 5 years.

At the hearing, the Board enquired from the Applicant as to the position of the third alleged undisclosed case, that with NSSF. The Applicant admitted that it could not find any evidence of this alleged case in the High Court records.

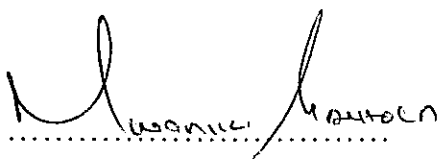
Based on the foregoing, the Board finds that the Successful Bidder had complied with Clause 1(6) of the Letter of Invitation of the Tender Document with respect to Litigation Disclosure; and further that the Procuring Entity evaluated the Successful Bidder's tender in accordance with the Request for Proposal and rightly found its bid to be responsive.

Subsequently, the Board finds that the Procuring Entity did not breach Section 82 of the Act together with Regulation 57 as alleged by the Applicant.

Accordingly, these grounds of appeal fail and the request for review is hereby dismissed.

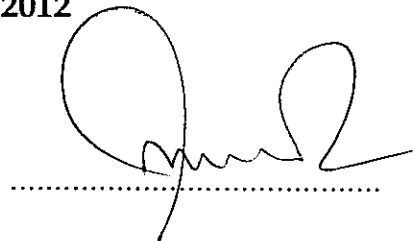
Subsequently, the Board orders, pursuant to Section 98 of the Act, that the procurement process may continue.

Dated at Nairobi on this 11th day of May, 2012



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**