

# **SCHEDULE 1**

## **FORM 4**

### **REPUBLIC OF KENYA**

#### **PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD**

**APPLICATION NO.43/2006 OF 29<sup>th</sup> AUGUST, 2006**

**BETWEEN**

**MUTISO MENEZES INTERNATIONAL (APPLICANT)**

**AND**

**KENYA SUGAR RESEARCH FOUNDATION (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Kenya Sugar Research Foundation (KESREF) dated 27<sup>th</sup> July, 2006 in the matter of Provision of Consultancy Services for the Construction of Offices and Laboratories at KESREF Headquarters

#### **BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Mr. P. M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary

**In attendance**

Ms. P. K. Ouma - Secretariat  
Mr. P. M. Wangai - Secretariat

**PRESENT BY INVITATION**

**Applicant, Mutiso Menezes International**

Mr. Cecil Miller - Advocate, Miller & Co. Advocates  
Mr. Alan Simu - Architect  
Mr. David Ndungu - Architect  
Mr. Sylvester Wafula - Quantity Surveyor, S. C. M. Quantity  
Surveyors

**Procuring Entity, Kenya Sugar Research Foundation (KESREF)**

Mr. George O. Mogaka - Legal Officer  
Ms. A. Munano - Chief Superintendent Architect, Ministry  
of Roads and Public Works  
Mr. A. M. Ombati - Chief Superintendent Quantity Surveyor,  
Ministry of Roads and Public works  
Mr. W. O. Ochola - Procurement Officer

**Interested Candidate, Kenchuan Architects**

Mr. Z. M. Bukania - Principal Partner  
Mr. David Situma - Architect  
Mr. Lusweti Wose - Quantity Surveyor  
Mr. N. K. Mangoli - Engineer

## BOARD'S DECISION

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

The Kenya Sugar Research Foundation advertised for Expressions of Interest for Provision of Consulting Services for Design and Construction Works on 21<sup>st</sup> February, 2006. Five bidders namely, Mutiso Menezes International, Promarc Consultancy, Nyaundi Architects, Kenchuan Architects and FM Projects Consultants were pre-qualified and invited to submit Technical and Financial Proposals on 20<sup>th</sup> April, 2006. The bids were closed and opened on 23<sup>rd</sup> May, 2006 in the presence of the bidders' representatives.

Technical Proposal documents were opened, while the Financial Proposals submitted were recorded and kept unopened pending the finalization of the evaluation of the technical proposals.

The first Technical Evaluation was conducted by a committee chaired by the Financial Accountant, Mr. S. Kamau. It developed the evaluation criteria based on the tender documents. The criteria for evaluation consisted of: -

1. Specific experience of the consultant
  - past five years relevant experience - 10 Marks
  
2. Adequacy of the Work plan and Methodology
  - Design drawings - 15 Marks
  - Responsiveness of the design to specifications- 20 Marks
  - Workplan - 5 Marks

### 3. Qualification and competence of Key Professional Staff

- Technical Supervision Staff - 20 Marks
- Adequacy for the project - 30 Marks

The pass mark for the evaluation was 80% and the five firms scored as follows:

Mutiso Menezes International	-	60%
Promarc Consultancy	-	85%
Nyaundi Architects	-	83%
Kenchuan Architects	-	96%
F. M. Projects Consultants	-	27%

The Technical Committee recommended Promarc Consultancy, Nyaundi Architects and Kenchuan Architects to proceed to the financial evaluation. The financial bids of the two eliminated firms were to be returned unopened.

The Procuring Entity's Tender Committee in its meeting held on 10<sup>th</sup> June, 2006 deliberated on the evaluation report and recommended that the Management engage the services of the Ministry of Agriculture, Kenya Agricultural Research Institute (KARI) and the Ministry of Public Works in the evaluation process. The new reconstituted evaluation committee was mandated to conduct a Quality Assurance of the Technical Evaluation Report.

The special evaluation committee noted that the evaluation of design drawings as had been done would be deemed unfair as this was not an explicitly specified item of evaluation in the tender document. In addition, the evaluation of sketches, designs and drawings would require a jury system involving a panel of experts which was not feasible at the current stage of the procurement process.

It then revised the marks allocation as follows:-

❖ Adequacy of the work plan and Methodology

- i) Work Plan..... 5 marks
- ii) Methodology..... 20 marks
- iii) Responsiveness to specifications..... 15 marks

❖ Specific Experience of the consultant related to the assignment

- i) Complexity of the project..... 6 marks
- ii) Cost of the project..... 4 marks

The results of the technical evaluation by the special technical committee is as tabulated below:-

CRITERIA		Maximum score	F1 Mutiso Menezes International	F2 Promarc Consultancy	F3 Nyaundi Architects	F4 Kenchuan Architects	F5 FM Projects Consultants
Specific Experience	Cost of the project	4	3.8	2.5	2.9	3.7	2.3
	Complexity of the project	6	5.1	4.3	4.1	5.5	2.7
Adequacy of the Workplan & Methodology	Work Plan	5	4.6	3.1	1.9	2.9	1.3
	Methodology	20	16.5	17.9	14.8	18.1	10.7
	Responsiveness	15	8.3	11.5	10.8	13.6	5.1
Qualification & Competence of Key Professional Staff	Technical Supervision Staff	20	20	20	17	20	8
	Adequacy for the project	30	30	30	25	29	10
<b>Total Scores</b>		<b>100</b>	<b>88.3</b>	<b>89.3</b>	<b>76.5</b>	<b>92.8</b>	<b>40.1</b>

The committee recommended firms 1, 2 and 4 proceed to the next stage of evaluation as they had attained above the pass mark of 80%. Financial proposals of firms 3 and 5 were to be returned unopened.

The Financial Proposals were opened on 3<sup>rd</sup> July, 2006 in the presence of the bidders' representatives. The prices read out at the bid opening were:-

1. Mutiso Menezes International - Kshs. 7 , 296,400
2. Promarc Consultants - Kshs. 21, 188,560
3. Kenchuan Architects - Kshs. 16, 960, 940

An error was noted in the currency used in the breakdown of remuneration of cost per Activity for Firm No. 1. It was further noted that firm 1, left out the cost of soil investigation. Its bid was loaded with Kshs. 150, 000 (from the highest bid), while the bid of firm 2 was loaded with Kshs. 250, 000 for the cost of land surveyor. Firm 2 had quoted for the cost of the clerk of works at Kshs. 720,000. This was deducted from its tender price as this item was not required. The new evaluated prices for firms 1 and 2 were therefore Kshs. 7, 470,400.00 and Kshs. 20, 817,360.00

The Committee then applied the following formula to arrive to the financial scores:

$$\text{Financial Score} = 100 \times \frac{\text{value of the lowest financial bid}}{\text{value of the financial bid under consideration}}$$

The combined technical and financial scores are as illustrated in the table below:-

	Firm 1 Mutiso Menezes International	Firm 2 Promarc Consultancy	Firm 4 Kenchuan
Technical Scores	88.3	89.3	92.8
Financial Scores	100	35.88	44
Technical Score x 0.8	70.64	71.44	74.24
Financial Score x 0.2	20	7.16	8.8
Overall score	90.64	78.6	83.04
Ranking	1	3	2

The evaluation committee noted that the Applicant's bid of Kshs. 7, 470, 400.00 was too low as compared to the estimated cost of the assignment of Kshs. 25 million. In addition, the time offered by the applicant fell below the optimum time expected for such a project. The committee then set a standard optimum time expected for the project and applied the rates provided by each bidder to the cumulative time per expert on a pro-rata basis. The findings were as follows:-

- i) Firm 1 - Its cost at the optimum time requirement was Kshs. 19,058,800. This was higher than its quoted price of Kshs. 7, 470, 400. Its quoted price therefore could not be taken as the actual cost
- ii) Firm 2 - Its cost at optimum time was Kshs. 17, 182,983.72 therefore its quoted price of Kshs. 20, 817,360 was taken to be reliable.
- iii) Firm 4 - Its cost at optimum time was Kshs. 19,304, 720.00 and its quoted price of Kshs. 16,960,940.00 was also taken to be reliable

The Special Evaluation Committee then recommended firm 4 be awarded the contract at its bid price of Kshs. 16, 960,940.00. The Procuring Entity's Tender Committee in its special meeting held on 27<sup>th</sup> July, 2006 deliberated on the special technical committee's recommendation and awarded the tender to bidder No. 4, Kenchuan Architects at a price of Kshs. 16, 960,940.00 for being most responsive in terms of performance in technical evaluation and the most realistic cost analysis.

Notifications were made to the bidders vide letters dated 8<sup>th</sup> August, 2006.

## THE APPEAL

Mutiso Menezes International lodged the appeal on 29<sup>th</sup> August, 2006. It was represented by Cecil Miller, Advocate, Alan Simu, Architect, David Ndungu, Architect and Sylvester Wafula, Quantity Surveyor.

The Procuring Entity was represented by Mr. George O. Mogaka, Legal Officer, A. Munano, Chief Superintendent Architect, Ministry of Roads and Public Works, A. M. Ombati, Chief Superintendent Quantity Surveyor, Ministry of Roads and Public Works and W. O. Ochola, Procurement Officer.

The Interested Candidate present was Kenchuan Architects which was represented by Z. M. Bukania, Principal Partner, David Situma, Architect, Lusweti Wose, Quantity Surveyor and Engineer N. K. Mangoli.

The appeal is based on five grounds which we deal with as follows:-

### **Ground 1**

In this ground the Applicant complained that the Procuring Entity failed to provide the evaluation criteria as required under Regulation 10(2). It alleged that it wrote to the Procuring Entity requesting for the evaluation criteria after it was notified of being unsuccessful. It stated that it was entitled to the evaluation criteria that the Procuring Entity used to eliminate it, despite submitting the lowest bid price wise and qualifying in the technical evaluation. However, it was denied the summary of the evaluation report.

In response, the Procuring Entity stated that the evaluation criteria was contained in the tender documents and therefore the Applicant was not denied access to it. It further stated that the alleged breach of Regulation 10 (2) was not applicable as the Regulation allowed Procuring Entities to disclose,



in summary form, the evaluation criteria stipulated and applied and a summary of the evaluation and comparison of tenders, proposals or quotations received only once the proceedings had resulted in a contract or had otherwise been terminated. It averred that the contract under appeal had not been signed or terminated and therefore the Applicant was not entitled to the summary of the evaluation report. However, its letter dated 16<sup>th</sup> August, 2006 in response to the Applicant's request contained sufficient information regarding why its bid was not successful.

The Board has carefully considered the representations of the parties and examined the documents submitted before it. The Board notes that the Request for Proposal (RFP) document contained the following evaluation criteria:-

- Specific experience of the consultant's related to the assignment
- Adequacy of the Work Plan and Methodology
- Qualification and competence of key staff for the assignment

The Applicant's letter dated 8<sup>th</sup> August, 2006 addressed to the Procuring Entity requested for the evaluation report. Regulation 10 (2) (b) provides that the Procuring Entity shall not disclose information relating to the examination and evaluation of tenders, proposals or quotations and the actual content of tenders, proposals or quotations other than in a summary form as provided for in Regulation 10 (1) (c). The Board notes that Regulation 33 (2) provides that notification of award shall constitute the formation of a contract between the parties and the existence of a contract shall be confirmed through the signing of a contract document. The Procuring Entity in this case had notified tenderers vide letters dated 8<sup>th</sup> August, 2006. The Applicant herein was therefore entitled to a summary of the proceedings.

The Applicant in its letter dated 8<sup>th</sup> August, 2006 however requested for a copy of the evaluation report from the Procuring Entity. The Board finds that the request made was not for a summary of the evaluation report as required by Regulation 10 (2) (b) but for the evaluation report itself.

Accordingly, this ground of appeal fails.

### **Grounds 2 and 5**

We combine these two grounds as they raise similar issues concerning the evaluation process.

The Applicant alleged that the Procuring Entity failed to award the tender to the lowest evaluated tender price in breach of Regulation 30(7) and 8(a). It stated that the lowest evaluated tenderer should have been awarded the tender according to Regulation 30 (8) (a), or be determined on the basis of factors affecting the economic value of the tender as specified in the tender document as per Regulation 30 (8) (b). It further stated that the Procuring Entity breached Regulation 4 by making an award to a tenderer whose price was not economical or efficient. It argued that it should have been awarded the tender since its combined technical and financial score was ranked first.

In addition, the Applicant submitted that the Procuring Entity's response to its inquiry stated that its price was found to be unrealistically low. The tender documents did not include benchmarks of costs that would render a price to be unrealistically low. Further, the alleged evaluation of its technical proposal after the opening of the financial proposals was in breach of the Regulations in that the Request for Proposal document had stated in Clause 5.8 that the selection method would be based on the Quality and Cost method. According to this method the best bidder emanating from the combined technical and

financial scores would be invited for negotiations. As this procedure was not followed, the Procuring Entity introduced new criteria for evaluation, which was in breach of Regulation 30 (7).

Finally, the Applicant submitted that the technical evaluation was flawed, as the Procuring Entity had notified it by a letter dated 2<sup>nd</sup> June, 2006 that it had been unsuccessful in the technical evaluation, only to receive another letter dated 19<sup>th</sup> June, 2006 instructing it to ignore the earlier letter and confirming that it had passed the technical evaluation. An interested candidate, Nyaundi Architects, on the other hand had received an earlier letter informing them of having succeeded in the technical evaluation and a later one informing it that it had not technically qualified.

In response, the Procuring Entity stated that the Applicant's tender price was lowest at the tender opening but this was not the lowest evaluated tender price. It submitted that it had made a comparison between staff months proposed by the bidders and adopted an ideal standard optimum cited by the Ministry of Roads and Public Works officials who were in attendance at both the technical and financial evaluation. It then compared the variance between what the bidders quoted and the total price per optimum time. The Applicant had the highest variance of 63.5%, Promarc Consultancy had the least variance of 2.02% but its quoted price was the highest, while the successful bidder, Kenchuan Architects, had a variance of 12.14%. The Procuring Entity therefore awarded Kenchuan Architects as the lowest evaluated bidder.

The Procuring Entity further stated that the Applicant's quoted price was 2.99% of the expected construction costs. This was found to be unrealistically low as the Ministry of Roads and Public Works indicative scales and those in the Architects and Quantity Surveyors Act, Cap 525, ranged between 8%, 13%,

15% and 20%. In addition, the Applicant's tender had inconsistencies in the time periods allocated in the technical and financial proposals. The Procuring Entity had noted a variance of Kshs. 880, 466.66 between the Applicant's financial and technical proposals, which resulted in a reduction of the Applicant's offer to Kshs. 6, 589, 933.34. The Procuring Entity therefore concluded that the actual implementation of the project would be problematic, if the tender was awarded to the Applicant.

An interested candidate, Kenchuan Architects submitted that under the scale of fees in Cap 525 of the Laws of Kenya, the Association of Consulting Engineers of Kenya and Ministry of Roads and Public Works Conditions and Scales of Fees, the chargeable fees were set to ensure that consultants are economically remunerated to be able to deliver assignments without difficulties. Any serious departure from the set scales fees could lead to either the consultant abandoning the project or resorting to unprofessional conduct to recoup the losses.

The Board has carefully considered the submissions of the parties, the interested candidates and has perused the documents submitted before it. We note that the Applicant was evaluated for technical responsiveness and was disqualified in the first technical evaluation but qualified in the second evaluation. The Applicant's bid was also the lowest at the financial proposals opening. Its price was, however, corrected during evaluation from Kshs. 7, 296,400.00 to include the cost of soil investigation which it had omitted in its tender. The Procuring Entity therefore loaded its bid by Kshs. 150, 000 from the highest bid on this element. Its new price was Kshs. 7, 470,400.00. The Applicant was ranked first after the combination of both the technical and financial proposals scores. The Technical Committee however felt that the

Applicant's price was low and compared the cost of the bids at the "optimum expert time".

On the Procuring Entity's and the interested candidate's arguments that the Applicant's fees proposal was way below the standard recommended by the regulatory bodies in the industry, the Board finds that the tender under appeal was an open national tender under the Exchequer and Audit (Public Procurement) Regulations 2001. The scales in question were therefore not applicable in the current case.

The Board further notes that Clause 9.1 of the RFP document indicated that the method of selection would be based on Quality and Cost Based Selection (QCBS). Clause 5.8 stated that the firm achieving the highest combined technical and financial score would be invited for negotiations. The Procuring Entity evaluated the bids according to the criteria stipulated in its tender document up to the combination of the technical and financial scores. However, instead of awarding the tenderer ranked first, it further re-evaluated the bids by including a criteria based on the remuneration of the expert staff at the "optimum time requirement" which was not contained in the Request for Proposal document. We find that this was a breach of Regulation 30 (7).

In view of the foregoing these two grounds of appeal succeed.

#### **Grounds 3 and 4**

We combine these grounds of appeal as they raise issues on breach of Regulation 30

In these grounds, the Applicant alleged that the Procuring Entity failed to seek clarification from the time the Procuring Entity realized that the Applicant's

price was too low contrary to Regulation 30 (1). In addition, Regulation 30 (2) was breached as the Procuring Entity did not notify it on any arithmetical correction of its tender. It submitted that though Regulation 30 (1) was not mandatory, in the interest of fairness and economy pursuant to Regulation 4, the Procuring Entity should have given it a chance to clarify any issues that were not clear in its tender document. In its submissions before the Board, the Applicant stated that the 20 days indicated in the work plan, amounted to a calendar month. There were therefore no inconsistencies as indicated by the Procuring Entity.

In response, the Procuring Entity submitted that it did not find it necessary to seek clarifications as the Applicant's tender was clear. In addition, there were no arithmetical errors and the issue of notice did not therefore arise. It noted that the Applicant applied different staff months in the technical and the financial proposals. This difference amounted to a variance of Kshs. 880, 466.66 therefore making the Applicant's financial proposal inconsistent with its technical proposal.

The Board has carefully studied the documents submitted to it and has noted that the technical proposal of the Applicant's time schedule for the professional staff was submitted in days yet the RFP document Section C, Clause (vii) required the bidders to indicate the time in months. In addition, the Board notes that there is a variance in the time duration given for three consultants namely Simon Nzioka, Project Architect, Leonard Kasili, Support Quantity Surveyor and Engineer Okwakol, Project Structural Engineer in the technical and financial proposal of the Applicant. The Procuring Entity also had to guess what the days indicated in the Applicant's document meant.

The Board notes that Regulation 30 (1) gives the Procuring Entity discretion to seek clarification on the RFP of the tenderers when necessary. The Applicant's document was however adjusted to include Kshs. 150, 000 for soil investigation and no other arithmetical adjustment was made. The adjustment was in line with the tender conditions in clause 5.7 on evaluation. Regulation 30 (2) on the other hand refers to purely arithmetical errors which were not discovered in the current case.

Accordingly these grounds of appeal fail.

### **Loss**

The Applicant stated that it would suffer loss of profits that would have been earmarked had it been awarded the tender and also lack of employment for its staff.

In response the Procuring Entity stated that there was no contract between it and the Applicant and its argument on loss should fail.

The Board notes that these grounds are statements of perceived losses arising from anticipated profits, which the Applicant would have made if it were awarded the tender. The tendering process is a business risk. Further, in open competitive bidding, there was no guarantee that a particular tender would be accepted, and just like any other tenderer, the Applicant took a commercial risk when it entered into the tendering process. In view of the foregoing, it cannot claim losses on anticipated work.

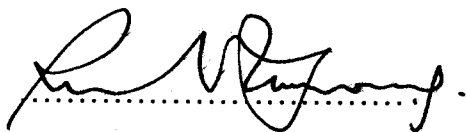
In conclusion, the Board notes that the Procuring Entity sent notification to tenderers after the first evaluation which differed from the second notification, in the case of the Applicant and Nyaundi Architects. The reversed

notifications were both perplexing and confusing to the bidders who could not understand the basis of the two notifications. In addition the Board noted with concern that the Procuring Entity and Nyaundi Architects communicated extensively in regard to the tender while the tendering process was still ongoing. This form of correspondence is contrary to Regulation 31, on confidentiality.

In view of all the foregoing matters the Board finds that the tendering process was seriously flawed and that the Procuring Entity introduced a new evaluation criteria that was not included in the tender document.

The appeal therefore succeeds and the award is hereby annulled. The Procuring Entity is hereby ordered to re-tender and may use restricted tendering method limited to the five pre-qualified bidders.

Dated at Nairobi on this 27<sup>th</sup> day of September, 2006



Signed Chairman



Signed Secretary