

**SCHEDULE 1**  
**FORM 4**  
**REPUBLIC OF KENYA**

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

**APPLICATION NO. 36/2006 OF 20<sup>TH</sup> JULY, 2006**

**BETWEEN**

**BALLANTINES CONSULTING LTD.....APPLICANT**

**AND**

**NATIONAL ECONOMIC AND SOCIAL COUNCIL...PROCURING  
ENTITY**

Appeal against the decision of the Tender Committee of National Economic and Social Council, Procuring Entity dated 23rd June, 2006 in the matter of Tender No. OP/NESC/RFP/01/2005-2006 for Development of Brand Kenya Master Plan

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. J. W. Wamaguru	-	Member
Mr. P.M. Gachoka	-	Member
Eng. D. W. Njora	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Kenneth Mwangi	-	Secretary, Director Public Procurement Directorate

## **PRESENT BY INVITATION**

- Applicant** - **BALLANTINES CONSULTING LTD**
- Mr. Kiragu Kimani - Advocate, Hamilton & Mathews Advocates
- Mr. Edwin Karwanda - Advocate, Hamilton & Mathews Advocates
- Mr. James Mambozei - Pupil, Hamilton & Mathews Advocates
- Procuring Entity** - **National Economic and Social Council**
- Mr. C. F. Kimani - Legal Officer, Office of the President
- Dr. Wahome Gakuru - Director, National Economic and Social Council
- Mr R. Mwaura Gicia - Principal Procurement Officer, Office of the President
- Mr. Josphat K. Mwangi - Procurement Officer, National Aids Control Council
- Ms. J.W. K. Hanjari - Senior Administration Secretary, Cabinet Office
- Mr. Leonard N. Kimani - Ag. Secretary, Office of the President
- Ms. Sarah Yamo - Administration Officer, National Economic and Social Council
- Interested Candidates**
- Mr. John Ohaga - Advocate for Placebrands Ltd
- Ms. Stepanie Jones - Pupil, Ochieng', Onyango, Kibet & Ohaga Advocates
- Mr. Noonkuta Mpaayei - Pupil, Ochieng', Onyango, Kibet & Ohaga Advocates
- Mr. Paul Kukubo - Placebraands Ltd
- Mr. Muriuki Mugambi - Advocate for Ogilvy & Mather
- Mr. George Ojing - Director, Ogilvy & Mather
- Ms. Charity Crossen - Account Director, Lowe Scanad Kenya

## **IN ATENDANCE**

Mr. P. M. Wangai - Secretariat  
Mr. D. M. Amuyunzu - Secretariat

## **BOARD'S DECISION**

Upon hearing the Applicant, the Procuring Entity and the Interested Candidate therein, and upon considering the information in all documents before it, the Board decides as follows:

## **BACKGROUND OF AWARD**

In this procurement for Consultancy for Development of Brand Kenya Master Plan Tender NO: OP/NESC/RFP/01/2005-06, the Procuring Entity used restricted method of procurement and invited the following nine bidders on 15th May, 2006:

1. Placebrands Ltd
2. Ballantines Consulting
3. Square Gold PR
4. McCann Erickson
5. Lowe Scanad Kenya
6. The Advertising Company Ltd
7. J. Walter Thompson
8. Young & Rubicam
9. Ogilvy & Mather

Out of the nine bidders, only four namely Placebrands Ltd, Ballantines Consulting, Ogilvy & Mather and Lowe Scanad Kenya Ltd submitted their bids by the closing/opening date on 24<sup>th</sup> May, 2006. The tender opening in respect of the technical proposal was conducted immediately thereafter.

## **Technical Evaluation**

The technical evaluation was carried out by a committee chaired by Dr. Wahome Gakuru, the Director of the National Economic & Social Council, and was based on the following criteria:

	<u>Points</u>
(i) Specific experience of the consultant related to the assignment.	10
(ii) Adequacy of the proposed work plan and methodology in responding to the Terms of Reference	30
(iii) Qualification and competence of the key staff for assignment.	50
(iv) Local participation by Kenya national among key staff	<u>10</u>
<b>Total</b>	<b><u>100</u></b>

The summary of the technical evaluation report was as follows:

CRITERIA	Placebrands	Ballantines Consulting	Ogilvy & Mather	Lowe Scanad Kenya
Firm capability	2	7	4	4
Adequacy	29	24	28	25
Qualifications	5	10	10	5
Experience of the team	40	40	40	40
Local participation	10	0	10	10
<b>TOTAL</b>	<b>86</b>	<b>81</b>	<b>92</b>	<b>84</b>

The technical evaluation committee recommended all the four (4) bidders to proceed to the financial evaluation stage having scored above the cut-off mark of 75%.

The financial proposals were opened on 29<sup>th</sup> May, 2006 in the presence of bidders' representatives and both technical scores and tender prices were read out. The tender prices were as follows:

Bidders name	Amount quoted	VAT	Total
M/S Placebrands	Kshs. 15,350,525	334,692	Kshs.15,685,217
M/S Ballentines Consulting	Kshs 11,463,500	1,834,160	Kshs. 13,297,660
Ogilvy & Mather	US. \$ 794,097	US \$ 127,056	US \$ 921,153
Lowe Scanad	Kshs. 54,415,000	-	Kshs. 54,415,000

The following was noted at the opening of the financial proposals:

1. Placebrands Ltd's calculation for VAT was lower than the mandatory 16% and in addition, the bidder failed to enclose the original and copies of the financial proposals in one envelope as required in the Request for Proposals (RFP).
2. Ogilvy & Mather quoted in dollars instead of Kenya Shillings as per the tender documents. It was therefore decided that its tender price be converted into Kenya Shillings at Kshs. 72.4944 per US\$ 1.00 which was the CBK mean rate at the tender opening date.
3. Lowe Scanad Kenya was silent on VAT or any other taxes. It was therefore assumed that its bid price of Kshs. 54, 415,000 was the net figure. Further, the original and four (4) copies of its proposal were submitted in different envelopes instead of one envelop as required in the RFP.

Having made these observations, the Procuring Entity and the candidates' representatives agreed that any candidate who made an omission or mistake be penalized on their respective financial proposals as follows:

- |                        |   |                        |
|------------------------|---|------------------------|
| (a) Wrong computation  | - | 3 marks                |
| (b) Foreign currency   | - | 5 marks                |
| (c) Separate envelopes | - | <u>2 marks</u>         |
| <b>Total deduction</b> | - | <b><u>10 marks</u></b> |

As a result, the candidates were penalized as indicated hereunder:

<b>Bidder</b>	<b>Omission/ mistake</b>	<b>Marks deducted</b>
Placebrands Limited	Separate envelopes	2
Ballentines Consulting	None	Nil
Lowe Scanad Kenya	Separate envelopes	2
Ogilvy & Mather	Foreign Currency	5

Thereafter, the financial score (Sf) was calculated using the following formula:

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

Where; Sf = Financial score

FM = Lowest Priced Financial proposal

F = Price of proposal under consideration

The combined technical and financial score (S) was calculated using the following formula:

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

Where,

St = Technical score

Sf = Financial score

T = Weight for technical proposal = 0.8

P = Weight for financial proposal = 0.2

The final combined technical and financial scores were as tabulated below:

Bidder	Technical score		Financial Proposal		Total score (%)	Rank
	Out of 100	Weight at 80%	Amount (Kshs)	Weight at 20%		
Placebrands Ltd	86	68.8	15,685,217	16.44	85.24	1
Ballantines Consulting	81	64.8	13,297,660	20	84.8	2
Ogilvy & Mather	92	73.6	66,783,592.50	2.98	76.58	3
Lowe Scanad Kenya	84	67.2	54,415,000	4.48	71.68	4

Based on this ranking, the financial evaluation committee recommended that Placebrands Ltd be awarded the tender having attained the highest combined technical and financial score of 85.24%.

In its meeting held on 14<sup>th</sup> June, 2006, the Ministerial Tender Committee awarded the tender to Placebrands Ltd at its tender price of Kshs. 15,685,217.00 inclusive of VAT.

## THE APPEAL

This Appeal was lodged by Ballantines Consulting on 20<sup>th</sup> July, 2006 against the award of tender No.OP/NESC/RFP/01/2005-2006 for the Proposed Development of Brand Kenya Master Plan. The Applicant was represented

by Mr. Kiragu Kimani and Edwin Karwanda, both Advocates. The Procuring Entity was represented by Dr. Wahome Gakuru and Mr. Josphat Mwangi while Placebrands Ltd, an interested candidate was represented by Mr. John Ohaga, Advocate.

The Applicant raised four grounds of appeal. It prayed to the Board to set aside the award of the Procuring Entity and direct the Procuring Entity to proceed lawfully by awarding the tender to the Applicant or order that the tender process be re-started.

At the hearing Mr. Ohaga, for the interested candidate raised two preliminary objections as follows:-

1. That the Applicant had failed to comply with the mandatory provisions of Regulation 42(2) as read with Regulation 40(1) in that the Applicant had failed to state what loss or damage , if any, it had or stood to suffer arising from the award of the tender to the interested candidate;
2. That the Appeals Board lacked the requisite jurisdiction to hear and determine the present appeal as the case was not directed against a procuring entity within the meaning of the Exchequer & Audit Act , Chapter 412, and the Exchequer & Audit ( Public Procurement ) Regulations, 2001.

The Board brought to the attention of the parties that the appeal had to be heard and determined by 20<sup>th</sup> August, 2006 as per the requirements of Regulation 40(6). It was therefore agreed by consent of all parties that the preliminary objections would be argued first and the parties would then proceed to argue the substantive grounds in the appeal. The ruling on the preliminary objections and the decision on the appeal, if any, would then be delivered at the same time.

The successful candidate argued the preliminary objection through Mr. Ohaga as follows:-

Firstly, the successful candidate argued that the Applicant breached the mandatory provision of Regulation 42(2) as read with Regulation 40(1) in that the Applicant failed to state what loss or damage, if any, it stood to suffer arising from the award of the tender to the interested candidate. The candidate argued that under Regulation 42(2) it was mandatory for the Applicant to state the loss/damage it was likely to suffer. The candidate

further argued that the Memorandum of Appeal by the Applicant did not state the loss or damage the Applicant was likely to suffer. It invited the Board to look at the Memorandum of Appeal at grounds one to four, which did not have any statement of loss or damage, and urged the Board to dismiss the appeal on this ground.

The Procuring Entity did not make any submission on this ground and left the issue to the Board.

In response the Applicant urged the Board to refer to Regulations 4 and 41. It stated that the primary purpose for establishment of the Appeals Board was to enquire into legitimate complaints arising from the tender process. It stated that technical objections should not be allowed to stand in the way of such enquiries and technicalities should not be used to shoot down legitimate claims.

The Applicant argued that under Regulation 42, there was no requirement set out for use of any particular format to set out the loss or damage. It argued that in the Memorandum of Appeal and in particular in paragraph 4, the Applicant complained that it was the only compliant bidder and therefore should have been awarded the tender. Further, it stated in paragraph 1 of the Memorandum of Appeal that the Applicant's financial bid was the lowest priced of all the bidders whose technical proposals were found responsive and that it lost the tender without a clear basis.

Finally, the Applicant argued that when one read the Memorandum of Appeal, the loss as envisaged in the Regulation was apparent and that in the event that such loss was not apparent, the Board should allow it to amend its Memorandum of Appeal and include a statement of loss in paragraph 4.

The Board has carefully considered the arguments by the parties and examined the documents before it. It is clear from Regulation 42 that a party filing a complaint before the Board should state the loss or damage it is likely to suffer. However, there is no particular format stipulated in the Regulations to be used in setting out such loss or damage. Clearly, the spirit and purpose of Regulation (42) is to stop busybodies from filing complaints.

The Board has noted that in ground one of the appeal, the Applicant stated that it was the lowest priced amongst the four bidders whose technical proposals were found responsive, and that it was deprived the tender without



a clear basis. Further, in ground four, the Applicant stated that amongst the four bidders at the financial evaluation, only the Applicant complied with all the instructions for submission of financial proposals. The Applicant stated that non-responsive bidders ought to have been disqualified from the tender leaving the Applicant alone in the tender process.

It is clear from those two grounds that the Applicant is claiming to have suffered loss deprivation or damage as envisaged in the Regulations. In the premises, the preliminary objection on this ground has no merit and is hereby dismissed.

Secondly, the successful candidate argued that the Board lacked the requisite jurisdiction to hear and determine the appeal as the appeal is not directed against a Procuring Entity within the meaning of the Exchequer and Audit Act, Cap 412 and the Exchequer and Audit (Public Procurement) Regulations, 2001. The successful candidate argued that the appeal was directed to a party who was incapable of responding as a procuring entity as set out in the Regulations.

The successful candidate stated that the Procuring Entity has to be a public entity as defined in Section 5A sub-section 2(a). Under that section "Public Entity" means "the Government and any department, service or undertaking thereof". It argued the National Economic & Social Council (NE&SC), which was established vide Gazette Notice No.7679 published on 24<sup>th</sup> September, 2004, is a body with diverse membership whose functions are purely advisory. It stated that the Council could not be deemed to be a department of Government and argued that the proper Procuring Entity should have been Office of the President.

Mr. C. F. Kimani, Legal Officer, Office of the President supported the submission by the successful candidate and stated that the Office of the President should have been the proper party to this appeal. However, on questioning by the Board Mr. Kimani conceded that the NE&SC is a department under the Office of the President.

In response, Mr. Kiragu Kimani for the Applicant referred the Board to Section 5A 2(a) of Cap 412 and stated that the NE&SC is a proper party to this appeal. It clearly falls under the definition set out in that Section, as it is "a service, department or undertaking thereof".

The Applicant also referred to the definition of “service” and “department” as defined in the Oxford Dictionary and submitted that NE & SC fell within that meaning. Further, the Applicant argued that the primary purpose of the Regulations was to safeguard public funds, and the jurisdiction of the Board should not be ousted on the technical grounds that the wrong party had been sued.

Mr Mugambi, Advocate for Ogilvy and Mather associated himself with the submissions of the Applicant on both grounds of the preliminary objection.

The Board has considered the arguments and examined the documents before it. It is clear from the Gazette Notice No.7679 published on 24<sup>th</sup> September, 2004 that National Economic & Social Council is a body that was set up by His Excellency the President, to perform various functions as set out in the said notice. It has a defined secretariat based at the Office of the President and has a Secretary appointed as the Chief Executive by the President.

Although its membership comprises members of Government and some from the private sector, it is clear that this is a body that operates using public funds. The Board has also noted that the letter of invitation to tenderers was issued by National Economic & Social Council. Under paragraphs 1 and 2 of the letter it is stated as follows:-

- “1) The National Economic & Social Council has received funding from Government of Kenya (GOK) towards the financing of the development of Brand Kenya Master Plan.
- 2) The National Economic & Social Council now invites proposals to provide the following consulting services: The development of Brand Kenya Master Plan. More details on the services are provided in the attached terms of reference...”

In view of the above it is beyond argument that National Economic & Social Council is a department under the Office of the President and squarely falls under the definition of Section 5A(2)(a) of the Exchequer & Audit Act (Cap 412) as “Service or undertaking thereof”.

Accordingly, this preliminary objection also fails and is hereby dismissed.

Having dismissed the preliminary objections, we now deal with each of the grounds raised by the Applicant as follows:-

### **Ground One**

This was a complaint that the Procuring Entity breached Regulation 36(2) (d). The Applicant argued that the Procuring Entity failed to provide information on the evaluation criteria, relative weight to be given to the price, and the manner in which they would be applied in the evaluation. As a result, the Applicant argued that it lost the tender without clear a basis despite its bid being responsive and the lowest priced.

In response, the Procuring Entity stated that the information on the relative weights for both technical and financial proposals and the criteria for financial evaluation were set out in the RFP and the formulae which were to be applied were also indicated. It evaluated all proposals in accordance with the evaluation criteria set out in the RFP without any discrimination and the firm which scored the highest combined technical and financial scores, was awarded the tender.

Mr. Ohaga for the successful candidate associated himself with the submissions of the Procuring Entity while Mr. Mugambi for Ogilvy & Mather associated himself with the arguments of the Applicant.

The Board has carefully considered the representations of the Applicant, the Procuring Entity and the interested candidates. It has also examined the copy of the blank tender document issued to the tenderers by the Procuring Entity and noted that the evaluation criteria, the relative weights which were to be given to the technical and financial scores and the manner in which they were to be applied in the evaluation of proposals, were clearly indicated under Clause 5.9 of Section B, Information to Consultants of the RFP. Further, the formulae to be applied in the evaluation were clearly set out in the RFP and therefore the Procuring Entity did not breach Regulation 36(2) (d) as alleged by the Applicant.

Accordingly, this ground of appeal fails.

## **Grounds Two, Three and Four**

These grounds of appeal have been consolidated as they raised the same complaints that the Procuring Entity breached Regulations 36(5), 30(7) and 30(6) (c) regarding the evaluation of bids.

On the breach of Regulation 36(5), the Applicant alleged that the Procuring Entity made an award that did not promote economy and efficiency in public procurement. It argued that its tender price was Kshs. 11,463,500.00 exclusive of VAT. This price was lower than Kshs. 15,350,525.00 quoted by the successful bidder by almost Kshs. 4 million.

The Applicant further stated that the Procuring Entity breached Regulation 30(7) by awarding the tender without following the criteria and procedure set out in the RFP under Clauses 5.3 and 5.9. The Applicant argued that it was the only responsive bidder having complied with all tender instructions on the submission of financial proposals. It argued that in addition to the successful bidder failing to submit its financial proposals in one envelope, it also failed to comply with Clause 3.7 of the Information to Consultants which required the bidders to identify as separate amounts, the local taxes, duties, fees, levies, and other charges imposed by the law on the consultants. The bid of the successful bidder was therefore non-responsive and should have been disqualified forthwith. However, the Procuring Entity in its meeting held on 29<sup>th</sup> May, 2006, opted to deduct penalty marks on the financial scores of the non responsive bidders instead of disqualifying them. By so doing, the Procuring Entity introduced an evaluation criterion that was not provided for in the RFP.

The Applicant further contended that the failure by the Procuring Entity to disqualify the non-responsive bidders was a breach of Regulation 30(6) (c). Referring to the meeting of 29<sup>th</sup> May, 2006 where the deduction of marks from the financial proposals of non-responsive bidders was consented to, the Applicant argued that such an arrangement has no basis in the Regulations. Although the candidates agreed on the penalty marks, such consent had no basis in law and the Procuring Entity had breached Regulation 30(6) (c) notwithstanding the consent by the candidates.

The Applicant cited the Board's ruling in **Application No.4/2004 between Lavington Security Guards Limited and Kenya Pipeline Company Limited** and stated that the breaches committed by the Procuring Entity

were substantial and went to the root of the entire tendering process. Therefore, it urged the Board to revise the unlawful decision of the Procuring Entity and re-award the tender to the Applicant.

In response, the Procuring Entity denied breach of the Regulations 36(5), 30(7) and 30(6) (c). On breach of Regulation 36(5), the Procuring Entity stated that the tender was awarded to the bidder with the highest combined technical and financial scores which was determined in accordance with the evaluation criteria set out in the RFP. This Regulation was therefore not breached.

On the allegation that it breached Regulation 30(7) by introducing a criteria that was not set out in the RFP, the Procuring Entity stated that the issue of penalty marks was deliberated and agreed upon by all bidders including the Applicant at the meeting held on 29<sup>th</sup> May, 2006 for the opening of financial proposals. The Procuring Entity and the candidates had agreed that for any omission or mistake in the submission of the financial proposals, the defaulting bidder would have penalty marks deducted from their respective financial scores. It therefore argued that having consented to this agreement, it was wrong for the Applicant to claim that a new evaluation criteria was introduced during the evaluation of the proposals.

On the allegation that the financial proposal of the successful bidder was non-responsive due to its failure to comply with Clause 3.7 of the Information to Consultants on submission of taxes as separate items, the Procuring Entity stated that the amount of tax to be paid by the successful bidder could not be 16 % of its tender price since some expenses would be paid in its country of origin and such expenses would not attract VAT in Kenya. It argued that the Kshs. 334, 692.00 indicated by the successful bidder, represented the amount of tax payable at 16 % for the work to be carried out in Kenya. This clarification was given to the Procuring Entity during the meeting held on 31<sup>st</sup> May, 2006 between it and representatives of the bidders, which was convened by telephone, and attended by the representatives of all bidders. It was therefore wrong for the Applicant to claim that the Procuring Entity breached Regulation 30(6) (c) by accepting a bid that was not responsive.

Mr. Ohaga for the successful candidate associated himself with the submissions of the Procuring Entity while Mr. Mugambi for Ogilvy & Mather associated himself with the arguments of the Applicant.

The Board has carefully considered the submission of the parties and examined all the documents before it.

As noted in ground one above, the criteria and procedures for evaluation of proposals were set out in the RFP. The technical proposals were to be evaluated first followed by financial proposals. During the opening of financial proposals on 29<sup>th</sup> May, 2006, it was noted that all bidders, apart from the Applicant, had not complied with all tender requirements on the submission of financial proposals. Consequently, the Procuring Entity and the candidates agreed that for any omission or mistake in the submission of financial proposals, penalty marks would be deducted from the respective financial scores of the defaulting candidates. The Procuring Entity argued that the deduction of marks was consented to by the bidders and that the financial proposals did not specifically state that bidders would be disqualified for non-compliance on the submission of financial proposals.

The Board has noted that Regulation 30(7) requires the Procuring Entities to evaluate tenders in accordance with the procedures and criteria set forth in the tender document. The Board further noted that at the opening of financial proposals, the Procuring Entity observed that certain bidders had not complied with the instructions to tenderers as set out in the RFP. Such candidates were non-responsive and ought to have been disqualified. The agreement which was reached on 29<sup>th</sup> May, 2006 between the Procuring Entity and the bidders to invoke penalty marks in the middle of the evaluation process, amounted to introduction of a new criteria. As clearly set out in Regulation 30(7), evaluation can only be done on the criteria set out in the tender document. The consent by the Procuring Entity and the parties to invoke penalty marks instead of disqualifying candidates has no basis under the Regulations and such consent by the parties cannot cure the breach.

The Board would like to state that calling of a meeting in the middle of evaluation to agree on the way the evaluation would be done was an irregularity that cannot be allowed as this would amount to changing the goal posts in the middle of the evaluation. The Board, therefore, finds that the deduction of marks from the financial proposals of non responsive bidders was not only a breach of Regulation 30(7), but also a breach of Regulation 30(6) (c) as it allowed non-responsive bids to proceed with the evaluation.

With regard to the meeting of 31<sup>st</sup> May, 2006 between the Procuring Entity and the bidders, the Board finds that the Procuring Entity breached Regulation 12 by inviting bidders by telephone and not confirming such invitations in writing.

In view of the above findings, the RFP was irregularly evaluated and awarded contrary to the Regulations.

Accordingly, these grounds of appeal succeed.

Taking into account all the above matters, we hereby annul the award of the tender and hereby allow the Procuring Entity to re-tender using restricted tender method and including the candidates who participated in this tender.

Dated at Nairobi this 21<sup>st</sup> day August, 2006

CHAIRMAN..........SECRETARY.....

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