

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

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

APPLICATION NO.47/2006 OF 6TH OCTOBER, 2006

BETWEEN

ARPRIM CONSULTANTS.....APPLICANT

AND

NYAYO TEA ZONES DEVELOPEMNT CORPORATION.....

PROCURING ENTITY

Appeal for administrative review against the decision of the Tender Committee of Nyayo Tea Zones Development Corporation, Procuring Entity dated 13th September, 2006, in the matter of Tender for Provision of Consultancy Services for Kipchapo Tea Factory at Kapsabet, Nandi District.

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

Mr. I.K. Kigen	-	Secretariat
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO. 47/2006

Applicant, Arprim Consultants

Mr. Cecil Miller	-	Advocate for Applicant
Mr Joseph Maina	-	Principal Consultants
Mr. John Njagi	-	Quantity Surveyor

Procuring Entity, Nyayo Tea Zones Development Corporation

Mr. James Kamau	-	Advocate, Iseme, Kamau & Mwema Advocates
Mr. Kamau Karori	-	Advocate, Iseme, Kamau and Mwema Advocates
Dr. Ann Kinyua	-	Managing Director
Mr. P. N. Kirugua	-	Director
Mr. D.W .Magomere	-	Project Engineer
Mr. Felix M. Wambugi	-	Procurement Officer

Interested Candidates

Mr. Chris Kabiro	-	Advocate, Kabiro Ndaiga & Co.
Mr. Mwaniki M. Nyambura	-	Pupil, Advocate, Kabiro Ndaiga & Co.
Mr. F.Ngunjiri	-	Principal Consultants, Axis Architects
Mr. S. K. Kioko	-	Civil/Structural Engineer, Multiscope Consulting Engineers
Mr. P. N. Ngahu	-	Quantity Surveyor, Ngahu Associates

BOARD'S DECISION

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

BACKGROUND

This was an open tender re-advertised in the local dailies on 31st march, 2006 for Expression of Interest for the Provision of Consultancy Services for Kipchapo Tea Factory.

The tender opening /closing date was 27th June, 2006. Seventeen (17) firms bought the tender documents but thirteen (13) returned their duly completed bids. The tender was opened on the due date and attracted the following bidders:-

- i. Arch Concepts Consulting Architects
- ii. U Design Architects
- iii. Spatial Systems Architects and Bear Architects
- iv. Axis Architects
- v. Ken Chuan Architects
- vi. Edon Consultants International Limited Architects
- vii. Arprim Consultants Architects
- viii. Skair Associates Architects and Interior Designers
- ix. Fairplan Architects
- x. Nyaundi Architects
- xi. Mutiso Menezes International Architects, Planning and Interior Design Consultants
- xii. Clarion Architects, Planners and Interior Designers
- xiii. Sk Archplans Architects and Town Planners

THE EVALUATION OF THE TENDER

The firms were tested for responsiveness based on the following parameters:

- a) Tax Compliance Certificate together with both VAT and PIN Certificates
- b) Professional Indemnity
- c) Audited Accounts (latest)
- d) Correct and Accurate information

Based on the above criteria, ten (10) firms were disqualified for failing to meet the criteria for responsiveness. These were:

- i. Arch Concepts Consulting Architects
- ii. U Design Architects
- iii. Spatial Systems Architects and Bear Architects
- iv. Ken Chuan Architects
- v. Edon Consultants International Limited Architects
- vi. Skair Associates Architects and Interior Designers
- vii. Fairplan Architects
- viii. Nyaundi Architects
- ix. Mutiso Menezes International Architects, Planning and Interior Design Consultants
- x. Clarion Architects, Planners and Interior Designers

The other three (3) firms who qualified for detailed technical evaluation were as follows:

- i. Axis Architects
- ii. Arprim Consultants Architects
- iii. Sk Archplans Architects and Town Planners

The three (3) tender documents were subjected to technical evaluation based on the following parameters:-

- i. Personnel (30)
- ii. Projects undertaken (30)
- iii. Litigation status (4)
- iv. Tools and Equipment (9)
- v. Premises (9)
- vi. Registration and complaint with relevant professional regulatory bodies
- vii. Tax Compliance Certificate (Mandatory) (4)

- viii. Professional Indemnity (Mandatory) (3)
- ix. Audited Accounts (up to 3 years)
- x. PIN and VAT Certificates (Mandatory) (2)

Based on the aforementioned criteria, the three (3) firms scored as follows:

- i. Axis Architects – 98 %
- ii. Arprim Consultants Architects – 79%
- iii. Sk Archplans Architects and Town Planners- 82.7%

The pass mark as set in the document was 70%. In view of the above, the Management's Technical Evaluation Committee stated that all firms qualified and were invited to submit Technical and Financial proposals

At the responsiveness stage, Sk Archiplans Architects was found non-responsive on account of submitting financial information together with the technical report contrary Section B:Information To Consultants, Sub-section 3.5 of the tender document. The other two firms, Arprim Architects and Axis Architects were evaluated further based on a two stage process as follows:

Stage 1

- i. Specific experience and profile of the firm relevant to the assignment – 10 Points
- ii. Organization and Staffing - 10 Points
- iii. Qualifications and Competence of key professional staff for the assignment - 30 Points

Stage 2

- i. Modeling - 30 Points
- ii. Technical approach, methodology and work plan - 10 Points
- iii. Adequacy of proposal - 10 Points

The pass mark as set out in the tender document for both stages was 35 points. In stage 1, the firms scored as follows:

- i. Arprim Architects – 43 Points
- ii. Axis Architects - 45 Points

In stage 2, the firms scored as follows;

- i. Arprim Architects – 31.25 Points
- ii. Axis Architects - 38.25 Points

The combined totals were as follows:

Firm	Stage 1 score	Stage11 score	Total technical score	Ranking
1.Arprim Architects	43	31.25	74.25	2
2.Axis Architects	45	38.25	83.25	1

The final technical score table after calculation were as follows:

Firm	Technical score (0.9)	Financial score (0.1)	Technical +Financial Max.1	Ranking
1.Arprim Architects	0.668	0.1	0.768	2
2.Axis Architects	0.749	0.063	0.812	1

The Evaluation Committee recommended that Axis Architects be invited for negotiations with the view of signing a contract with them at their quoted professional fee of 14% and reimbursables of Kshs.4, 390, 000, 00.

The Tender Committee concurred with the evaluation committee's decision to award the tender to Axis Architects and his associating consultants. Consequently, the management were to proceed with negotiations with the successful consultants.

THE APPEAL

This appeal was lodged on 6th October, 2006 by Arprim Consultants against the decision of the tender committee of Nyayo Tea Zones Development Corporation in the matter of tender for Consultancy Services for Kipchabo Tea Factory.

The Applicant prayed to the Board that the tender be annulled or alternatively that the award be made to the Applicant. Further, it requested the Board to compel the Procuring Entity to pay for the costs of the appeal incurred by the Applicant.

The Applicant was represented by Mr. Cecil Miller, Advocate. The Procuring Entity was represented by Mr. James Kamau and Kamau Karori, Advocates. Axis Architects, the Interested Candidate, was represented by Mr. Chris Kabiro, Advocate.

The Applicant in its Memorandum of Appeal raised thirteen (13) grounds. The Board has consolidated the grounds and arguments that raise similar issues. The grounds are dealt with as follows:

Grounds 1, 4, 5, 6 and 13

These are complaints concerning breaches of Regulations 4, 30 (1), 30(6) (c) and 32.

Mr. Cecil Miller for the Applicant stated that the Procuring Entity breached Regulation 30(6) (c) by accepting the bid submitted by Axis Architects, the successful bidder, since it was not responsive. Counsel argued that Axis Architects had failed to express the amount of fees chargeable for its services in form of percentage as indicated in the minutes of the opening of the financial proposals. This made it impossible for the application of the formula in the Request For Proposal documents for computation of the total financial and technical scores of the successful bidder. Consequently, the Procuring Entity sought clarification from the successful bidder vide its letter dated 6th September, 2006 requesting the bidder to indicate its fees in percentage form. In response to this letter, the successful bidder submitted a percentage fee of 14 % of the total cost of the project which amounted to an alteration of its price. This constituted a breach of Regulation 30(1) which prohibits changes in the substance of the tender, including price. By so doing, the Procuring Entity also breached Regulation 32, which prohibits the Procuring Entity from seeking modification of tenders or the substance of the tender. In addition, Counsel pointed out that the Procuring Entity had issued an Addendum dated 8th August, 2006 to the Request for Proposal.

The Addendum read as follows:

“RE: ADDENDUM TO REQUEST FOR PROPOSAL FOR THE PROPOSED CONSULTANCY SERVICES FOR KIPCHAPO TEA FACTORY.

Pursuant to Clause 26 of the Exchequer and Audit (Public Procurement), Regulations, 2001, Modifications to tender documents. The Procuring Entity wishes to make the following clarifications and amendments to the bid documents:

- 1. Page 8 3.6 (a) Remuneration for consultants shall be deemed to be in accordance with the relevant scales of fees and remuneration for professional services as stipulated by various relevant acts. One need not enter any information in this respect except percentages applicable...***
- 5. The Budget for this project is approximately four hundred million Kenya shillings.” (emphasis ours)***

Counsel submitted that the Addendum made it mandatory for bidders to indicate their remuneration in form of percentages applicable with respect to the various professionals' fees. Counsel argued that where any bidder failed to indicate their remuneration in percentage form, their proposal was ultimately non-responsive, and should have been disqualified from further evaluation. The successful bidder's proposal should therefore have been disqualified for non-responsiveness. Counsel reiterated the importance of expressing the remuneration as a percentage by showing that the formula for identifying the successful bidder was unworkable and could not be applied except with the use of a percentage for the financial proposal.

Finally, Counsel argued that Regulation 4, which provides for transparency, efficiency and fairness in the procurement process, would be breached if the clarification given by the successful bidder was taken into account in the evaluation. All that the successful bidder had submitted in its proposal were statements that it would charge in accordance with the Architects and Quantity Surveyors Act, CAP 525, Laws of Kenya and the Conditions of Engagement of the Association of Consulting Engineers of Kenya (ACEK).

In response, Mr. James Kamau for the Procuring Entity denied the assertion that the Procuring Entity breached Regulation 30(6) (c). He further

submitted that Regulation 30 (5) allowed the Procuring Entity to regard a tender as responsive regardless of minor deviations that can be corrected without touching on the substance of the tender. Counsel argued that the requirements of the Procuring Entity were stipulated under Clause 3.6 of Instructions To Consultants and the Addendum issued on 8th August, 2006. It was clear from the Addendum that the remuneration of the consultants were deemed to be in accordance with the relevant scales of fees and remuneration. It was therefore optional for the bidders to either indicate the percentages or merely indicate that they would charge remuneration as per the statutes and relevant scale fees.

On the breach of Regulation 4, the Procuring Entity argued that the entire tendering process was conducted fairly and in a transparent manner as demonstrated in the Evaluation Report. Further, the Applicant had failed to avail any evidence to support its arguments that the process was neither fair nor transparent.

On the breach of Regulation 30(1), the Procuring Entity contended that it sought a clarification from Axis Architects through its letter Ref: NTZC/CONF.15/8/2 VOLI/76 dated 6th September, 2006. This was prompted by the fact that CAP 525, 4th & 5th Schedules had set minimum fees which are chargeable for the Architectural and Quantity Surveying consultancy services, respectively. The ACEK Conditions of Engagement also set minimum fees chargeable for the engineering services. In response to this letter, Axis Architects wrote to the Procuring Entity on 8th September, 2006 indicating that its percentage fee would be 14% of the total budget of the project. This was within the statutory scales as compared to the 10% indicated by the Applicant which undercut the statutory scales. However, the 14% offered by the successful bidder was not used by the Procuring Entity in the evaluation. Instead the Procuring Entity used 15% which they considered to be the minimum statutory fees.

It further argued that the Applicant's percentages were the lowest and the Applicant was therefore not prejudiced by the clarification sought from Axis Architects by the Procuring Entity. On the allegation that it awarded the tender at 15% which was higher than 10% quoted by the Applicant, the Procuring Entity stated that the final contract figures were yet to be negotiated between it and the successful bidder. Further, these percentages were not the only factors used by the Procuring Entity to arrive at the lowest evaluated bidder. It was therefore incorrect for the Applicant to claim that the Procuring Entity breached Regulation 4 without taking into consideration the outcome of the negotiations.

The Interested Candidate associated itself with the submission of the Procuring Entity and urged the Board to dismiss the appeal. It further argued that it was not true that nothing was indicated against charges of consulting services as per its tender. It submitted that it had indicated that the fees would be charged as per the relevant statutory provisions for professional services. Therefore, its proposal was responsive.

The Board has carefully considered the submissions of the parties and examined all the documents submitted.

The fourth and Fifth Schedules of the Architects and Quantity Surveyor's Act Cap 525, prescribes the minimum fees chargeable by Architects and Quantity Surveyors for professional services which they render. Similarly, the ACEK Conditions of Engagement of Engineers prescribes the minimum fees chargeable for the professional services which they render. In all cases the professional fees are exclusive of the cost of plant, machinery and equipment in respect of the project in issue. This was common ground between the parties. The successful bidder quoted an overall fee of 14% of the budget figure of Kshs. 400 million which included the cost of plant and equipment. It was common ground that the estimated cost of plant, machinery and equipment was Kshs. 150 million. On its part, the Applicant quoted its fee based only on Kshs. 250 million being the cost of the building works, which excluded the cost of plant, machinery and equipment. The Applicant quoted a fee of 10% of the budget figure of Kshs. 400 million after discounting the cost of plant, machinery and equipment. The Procuring Entity in its evaluation used 15% of the budget figure of Kshs. 400 million to work out the chargeable fees by the successful candidate.

The Board finds that it was improper for the consultancy fee figure to be based on the total budget figure of Kshs. 400 million without excluding the cost of machinery, plant and equipment, estimated at Kshs. 150 million. This is contrary to the provisions of the Architects and Quantity Surveyors Act, CAP 525 and the Association of Consulting Engineers (ACEK) Conditions of Engagement. The Board further finds that the bid as quoted by the successful bidder was unworkable without the percentage clarification tendered by the successful candidate because the Act only sets out the minimum chargeable fees, which may vary if there are repetitive works. In their proposal, the successful bidder only indicated that they would follow the Architects and Quantity Surveyors Act, Fourth and Fifth Schedules and the ACEK Conditions of Engagement without stating whether their fees

would be based on the minimum, or otherwise. Indeed that was why the Procuring Entity found it necessary to seek clarification by a letter dated 6th September, 2006, which sought the percentages to be used for the Procuring Entity to be able to compute the financial and technical scores of the successful bidder based on the formula provided in the RFP. This clarification amounted to a change in the substance of the original tender of the successful bidder contrary to Regulation 30 (1).

Finally, the Board notes that on 13th September, 2006, the Evaluation committee recommended that Axis Architects be invited for negotiation with a view to signing a contract at their quoted price of 14% of the budget figure and reimbursables of Kshs. 4,390,000.00. On 15th September, 2006, the Tender Committee made the award to Axis Architects and directed that they be invited for negotiation. On the same date, the successful bidder was invited for negotiations to be held on 19th September, 2006. On the 19th September, 2006, the Procuring Entity wrote to successful candidate in the following terms:

"Your proposal subject to the discussed amendments is hereby accepted. The contract documents are in the process of being finalized, your firm will be expected to sign the contract within 21 days of the date of this letter."

We note that this letter of award is inconclusive as it does not disclose the amendments negotiated, and does not set out the budget ceiling or the man months necessary for the performance of the proposed assignment contrary to Regulation 30 (6).

Accordingly, these grounds of appeal succeed.

Grounds 2 and 3

Mr. Cecil Miller for the Applicant abandoned the above grounds but stated that he would refer to them for information purposes.

Ground 7

Counsel for the Applicant, submitted that the Request For Proposal document was contradictory and was open to manipulation. The criteria set for evaluating the proposal under Clause 5.9 of the tender document could only be used if the fee was given as lump sum. Therefore the action of the Procuring Entity was a breach of Regulation 24 (2), which requires tender

documents to contain sufficient information to enable competition on complete, neutral and objective terms.

In response, Mr. James Kamau for Procuring Entity submitted that the criteria set out in the tender document including the Addendum was clear on what the Procuring Entity required from tenderers. He argued that the Applicant was not prejudiced because it submitted its bid based on the requirements of the tender document. Indeed if the Request For Proposal document was contradictory, the Applicant should have sought clarification.

The Interested Candidate associated itself with the submissions of the Procuring Entity.

The Board has considered the arguments of the parties and the documents submitted. It notes that the Request for Proposal document contained the criteria, for evaluation of the Technical and Financial proposals under Clauses 3.6 (a) and 5.9. These criteria were clear and unambiguous.

Accordingly, this ground fails.

Ground 8

This was a complaint that the Procuring entity breached Regulation 36 (2) (d).

Counsel for the Applicant, submitted that the Request for Proposal document did not contain information on the criteria for evaluating the proposals. It was not clear whether charges for consulting services would be used as a basis for awarding scores for the financial proposal or whether reimbursables and miscellaneous expenses were the ones to be used or whether both were to be used.

In reply Counsel for the Procuring Entity, asserted that the ground was frivolous because Clauses 3.6, 3.7 and 5.9 of the Request For Proposal document was clear on the requirements expected from bidders and the criteria for evaluation of the proposals was clearly set out.

The Interested Candidate associated itself with the submission of the Procuring Entity.

The Board has considered the arguments of the parties and examined the documents before it and observed that Clauses 3.6 (a) & (b) and 5.3 set out the criteria for evaluation of technical and financial proposals, respectively.

Accordingly, this ground fails.

Grounds 9 and 10

Counsel for the Applicant, submitted that the evaluation criteria set out in the tender document for evaluating the technical proposal under Clause 5.3 was subjective and therefore a breach of Regulations 14 (1) and (2). It was not clear what the Procuring Entity meant by modeling, which had been given 30 marks. As a result of these, the criteria was not practicable, objective and quantifiable, hence a breach of Regulation 30 (8) (b).

In response, the Procuring Entity argued that the ground raised by the Applicant had no merit since the Applicant had every opportunity to seek clarifications which it did not. In addition, the Procuring Entity submitted that the criteria set out in the tender document was clear.

The Board has considered the parties' arguments and scrutinized the documents and observed that the Information to Consultants in the RFP document provided an opportunity for bidders to seek clarification under Clause 2.1. We note that Applicant's proposal responded categorically to each item of the RFP without seeking clarification, and was evaluated on the basis of the criteria as stipulated.

Accordingly, these grounds fail.

Ground 11

Counsel for the Applicant, submitted that after the opening of financial proposals the Chairman of the Tender Committee went ahead and announced that the Applicant's competitor was the likely winner of the tender. He further alleged that Mr. Ngahu, a representative of the successful bidder was asked to remain behind for further briefing while the Applicant and his team members were asked to leave. This was a clear violation of the Regulation 31 (1).

In response, the Procuring Entity denied the allegations raised by the Applicant, and stated that the Chairman did not announce the winner but only read out the contents of the Financial Proposals. He further asserted that the Chairman requested the participants to raise any questions or complaints but none did so. The Procuring Entity also denied the assertion that Mr. Ngahu remained behind after tender opening.

The Board finds that this was a mere allegation which was not supported by any evidence

Accordingly, this ground fails.

Ground 12

Counsel for the Applicant submitted that the involvement of Mr. D. W. Magomere in the technical evaluation prejudiced the evaluation process given that he had been interdicted by the Ministry of Public Works through a letter dated 17th July, 2006.

In response, the Procuring Entity stated that Mr. D. W. Magomere was not the only officer who did the evaluation, and therefore his participation in the evaluation process was part of a collective decision. Further, at the time of evaluation, Mr. D.W Magomere was already an employee of the Procuring Entity.

The Board noted that Mr. Magomere was an employee of the Procuring Entity and no evidence of prejudice has been adduced.

Accordingly, this ground fails.

Loss suffered.

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it were awarded the tender. Clause 1.4 of Information To Consultants stated that the costs of preparing the proposal and of negotiating the contract, including any visit to the site are not reimbursable as a direct cost of the assignment.

In open competitive bidding there is no guarantee that a particular tender will 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 the cost or damages associated with the tendering process which resulted in the award of the tender to another bidder.

Finally, submissions were made by the parties pointing out that this was the second time this tender process was being challenged. The Procuring Entity pleaded with the Board not to disturb the award in the public interest due to the loan granted by East African Development Bank (EADB) and the costs already incurred. The Applicant, on its part sought direct award to itself. These pleas notwithstanding, the Board finds that there were major irregularities and breaches of the Regulations which flawed the whole tender process.

The award, having been made on the basis of 14% of the total budget of the project, if allowed to stand would be contrary to CAP 525 and the ACEK Conditions and inimical to the public interest. We consider that this tender process requires guidance of the Public Procurement Directorate under Regulation 7 (4) (c) and (d).

Taking into account all the above matters, the appeal succeeds and the tender is hereby annulled. The Procuring Entity may re-tender in accordance with the Regulations.

Delivered at Nairobi on this 8th day of November, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB

