

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**CONSOLIDATED APPLICATION NOS.50 & 51/2007 OF 31<sup>ST</sup>  
AUGUST & 3<sup>RD</sup> SEPTEMBER, 2007 RESPECTIVELY**

**BETWEEN**

**MRUTTU SALMANN & ASSOCIATES AND SYMBION  
INTERNATIONAL..... (APPLICANTS)**

**AND**

**CATERING AND TOURISM DEVELOPMENT LEVY  
TRUSTEES..... (PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of the Catering and Tourism Development Levy Trustees dated the 10<sup>th</sup> August, 2007 in the matter of Tender No. CTDL/EOI 1/2006-2007 for Expression of Interest (EOI) for Consultancy Services for Construction of Headquarters and Office Block.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Ms. J. A. Guserwa	-	Member
Mr. S. K. Munguti	-	Member

**IN ATTENDANCE**

Mr. C. R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NOs.50 & 51/2007**

**1. Applicant, Mruttu Salmann & Associates – Appeal No. 50/2007**

Mr. Alex S. Masika - Advocate, Masika and Koross  
Advocates  
Mr. Otto Mruttu - Architect  
Ms. Miriam A. Ong'are - Advocate, Masika & Koross  
Company Advocates

**2. Applicant, Symbion International – Appeal No. 51/2007**

Ms. Mary Njuguna - Advocate, A.F. Gross Advocates  
Ms. Sheila Nnamdi - Lawyer, A.F. Gross Advocates  
Ms. Charity Gituma - Lawyer, A.F. Gross Advocates  
Mr. Nyagah Kithinji - Quantity Surveyor

**Procuring Entity, Catering and Tourism Development Levy Trustees**

Mr. Roger O. Sagana - Advocate, Ahmednasir Abdikadir  
Company Advocates  
Mr. Fredrick Orego - Legal Officer  
Mr. Patrick J. - Procurement Officer

**Interested Candidate, Otieno & Kungu Associates**

Mr. Philip Kungu - Partner  
Mr. Maxwell Odongo - Partner  
Mr. N. Otieno Wmosi - Partner

**BOARD'S DECISION**

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

## **BACKGROUND**

This was an open tender by way of Expression of Interest advertised in the local dailies on 30<sup>th</sup> March, 2007 for Consultancy Services for Construction of Headquarters and Office Block.

The Tender closing/opening date was 14<sup>th</sup> June, 2007. Three firms submitted their Tender Documents. These were:-

1. Mruttu & Salmann Associates;
2. Otieno Kungu & Associates; and
3. Symbion International.

## **THE EVALUATION OF THE TENDER**

The evaluation of the tender was based on paragraph 5 of the Information to Consultants.

Based on the criteria set out in the Request for Proposal document, the first evaluation committee recommended the contract for the Consultancy Services for Construction of Headquarters and Office Block be awarded to Symbion Group who had the highest score of 79.71%.

Due to issues raised by the Accounting Officer, a second evaluation was carried out and the 2<sup>nd</sup> Evaluation Committee recommended the contract for the Consultancy Services for Construction of Headquarters and Office Block be awarded to Otieno & Kungu Associates.

The Corporations' Tender Committee approved award of Consultancy Services for Construction of Headquarters and Office Block to Otieno & Kungu Associates which was the most technically responsive bidders.

## **THE APPEALS**

These Appeals were lodged by Muruttu Salmann & Associates on 31<sup>st</sup> August, 2007 and Symbion International on 3<sup>rd</sup> September, 2007 respectively against the decision of the Tender Committee of Catering and Tourism Development Levy Trustees in the matter of Tender No.

CTDL/EOI 1/2006-2007 for Expression of Interest (EOI) for Consultancy Services for Construction of Headquarters and Office Block.

The Applicant, Mruttu Salmann & Associates for Appeal No. 50/2007 was represented by Mr. Alex S. Masika, Advocate while the Applicant, Symbion International for Appeal No. 51/2007 was represented by Ms. Mary Njuguna, Advocate. The Procuring Entity was represented by Mr. Roger O. Sagana, Advocate.

With the consent of the parties the two appeals were consolidated as they arose from the same tender and raised similar complaints.

The Applicant, Mruttu Salmann & Associates in Appeal No. 50/2007 requested the Board as follows:-

- a) To declare and hold that the evaluation process and the report emanating there from to be null and void and give direction that the Procuring Entity adopts the first evaluation report;
- b) Revise the unlawful decision of the tender committee of the Procuring Entity and award the Applicant the tender; and
- c) Annul in whole the decision of the tender committee of the Procuring Entity.

The Applicant, Symbion International in Appeal No. 51/2007 requested the Board as follows:-

- a) To give directions to the Procuring Entity to expunge the deliberations of the panel made on 2<sup>nd</sup> July, 2007 and award the project in accordance with the evaluation that is in accordance with the Act;
- b) Award the project to Symbion International if indeed our submission was found to be most responsive following procedural evaluation.

In Appeal No. 50-2007, the Applicant raised 7 grounds. Grounds 1, 2, 5 and 6 are mere statements not backed by any breach of the Act or the Regulations while ground 7 was in regards to the loss suffered. Grounds 3 and 4 were in regard to breach of Sections 81(2) (e) (iii) and 82 read together with Regulations 47 and 57 respectively.

In Appeal No.51-2007, the Applicant raised 2 grounds. Ground 1(a – d) regards breach of Sections 38 (1) (b) and 82(4) together with Regulations 7 and 10. Ground 2 is a mere statement backed by no breach of the Act or the Regulations.

The Board hereby deals with the grounds as follows:-

**MRUTTU & SALMANN ASSOCIATES - APPEAL NO. 50/2007**

**Ground 3 – Breach of Section 81(2) (e) (iii)**

The Applicant submitted that the Technical Evaluation committee of the Procuring Entity acted in breach of Section 81(2) (e) (iii) of the Public Procurement and Disposal Act, 2005 by proceeding to carry out two separate and independent technical evaluation processes. The Procuring Entity used an evaluation criterion that was not set out in the Request for Proposal document. That action was against the requirements of the Tender Document.

The Applicant further submitted that in accordance with Regulation 16(1), the Procuring Entity should establish an evaluation committee. There is no provision for the establishment of two evaluation committees. It further submitted that the first Evaluation Committee had recommended Mruttu Salmann & Associates while the second Evaluation Committee recommended Otieno & Kungu Associates. As a consequence, the Applicant was greatly prejudiced and stated that the second evaluation process and the report emanating there from was unfounded and contrary to the Act and the Regulations.

In response, the Procuring Entity argued that the evaluation process was done in accordance with the Request for Proposal document. It stated that in the first technical evaluation committee, the Procuring Entity undertook the evaluation of bids for the construction of the said office block. However, the recommendations therein raised a number of issues that needed reconsideration. As a result, the Accounting Officer constituted a second evaluation committee chaired by the Permanent Secretary, Ministry of Tourism and Wildlife. This was a step to encourage transparency in the tendering process. The technical evaluation team, after evaluation, agreed that the group of Messrs Otieno & Kungu Associates was the most

technically responsive for the assignment and therefore recommended for award.

In view of the above, the Procuring Entity submitted that the formation of the two evaluation committees was proper. Accordingly, there was no breach of the Act, the Regulations or the Tender Document committed by the Procuring Entity.

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

*“(e) The procedures and criteria to be used to evaluate and compare the proposals including:-*

*(i).....*

*.....*

*(ii).....*

*.....*

*(iii) any other additional method of the evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method.”*

The Board has noted that the Procuring Entity in its letter Ref: CLT/CONF/15/A dated 28<sup>th</sup> June 2007, invited 3 firms including Mruttu & Salmann Associates, the Applicant to appear before a panel. The Board observed that this action by the Procuring Entity was an additional method of evaluation which was not stipulated in the Request for Proposal document. This was also an issue that was raised by the Tender Committee in its meeting held on 10<sup>th</sup> August, 2007. Therefore, the Board finds that the Procuring Entity breached the Provisions of Section 81 (2) (e) (iii) by applying a new criteria not set out in the Request for Proposal document

On the issue of the two Evaluation Committees, the Board has noted that Regulation 16(1) requires the Procuring Entity to constitute an evaluation committee. In this particular tender, the first Evaluation Committee was formed by the Accounting Officer. An evaluation report was compiled by this committee. The Board noted that this first report was not tabled before the Tender Committee as required by the Regulations.

The Board further noted that the second Evaluation Committee was constituted by the Accounting Officer for the purpose of carrying out evaluation of the same tender. The Board has observed that a report emanated from this evaluation committee which was presented to the Tender Committee. In its meeting held on 10<sup>th</sup> August, 2007, the Tender Committee recommended award to Otieno & Kungu Associates. Although the recommendations of the first Evaluation Committee were not presented before the Tender Committee, the Board observed that the recommendations of the second evaluation committee were not consistent with the first report.

The Board further noted that the composition of the Evaluation Committee is set out in Regulation 16(3). The said Regulation does not provide for the formation of the two evaluation committee as done by the Procuring Entity. Therefore, there was no basis of constituting a second evaluation committee. The Board finally observed that due process was not followed by the Procuring Entity in arriving at its decision.

Accordingly, this ground of appeal succeeds.

**Ground 4 – Breach of Section 82 of the Act read together with Regulations 47 & 57.**

The Applicant submitted that the first evaluation process and the report emanating thereof was valid and lawful. Therefore, the Procuring Entity acted in breach of Section 82 of the Public Procurement and Disposal Regulations, 2005 read together with Regulations 47 and 57 of the Public Procurement and Disposal Act, 2006 for failing to disqualify and/or reject the proposal by Symbion International. The Applicant further submitted that the Proposal by Symbion did not fulfill all the requirements of the Request for Proposal document. Finally, the Applicant submitted that the Procuring Entity breached Section 82 of the Act and Regulation 47 & 57 for failing to carry out a proper evaluation.

In response, the Procuring Entity argued that the evaluation process was done in accordance with the requirements set out in the Tender Document. It further submitted that the second evaluation was necessary to clear issues that were noted by the Accounting Officer. Therefore, the evaluation was proper and in accordance with the Request for Proposal document.

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

As already held in ground number 3, the evaluation process was not properly conducted in accordance with the Act, Regulations and the requirements of the Request for Proposal document.

Accordingly, this ground also succeeds.

### **SYMBION INTERNATIONAL - APPEAL NO. 51/2007**

#### **Ground 1(a – d) - Breach of Sections 38 (1) (b) and 82(4) together with Regulations 7 and 10**

The Applicant submitted that the second Evaluation Committee chaired by the Permanent Secretary, Ministry of Tourism and Wildlife which interviewed Tenderers on 2<sup>nd</sup> July, 2007 was an intrusion into the procurement process. It further submitted that this attempt to influence the evaluation and comparison of the tenders was contrary to Section 38 (1) (b) of the Act.

The Applicant further submitted that Regulation 10 also sets out the functions of the Tender Committee. It stated that the second Evaluation Committee of 2<sup>nd</sup> July, 2007 could not have been a tender committee as envisaged by the Regulations and neither could it have been an evaluation committee. It further submitted that the 2<sup>nd</sup> Evaluation Committee carried out an evaluation which was contrary to Section 82 of the Act. The Request for Proposal did not provide an additional method of evaluation and therefore the interview conducted by the Procuring Entity was unprocedural.

In response, the Procuring Entity argued that the appointment of the Permanent Secretary and the Project Manager as members of the 2<sup>nd</sup> Evaluation Committee was properly constituted. It further argued that the presence of the two officials was to encourage transparency and professionalism in the procurement process. Finally, the Procuring Entity submitted that the meeting of 2<sup>nd</sup> July, 2007 was to seek clarifications on certain issues before finalizing the Evaluation Process.



The Board has carefully examined the documents before it, and considered the parties submissions:-

The Board has noted that Section 38 (1) (b) prohibit persons not officially involved in evaluation and comparison of tenders from influencing the evaluation process.


As the Board held in Appeal No. 50-2007, the formation of the two evaluation committees for the same tender was a breach of the Act and the Regulations.

Accordingly, this ground of appeal also succeeds.

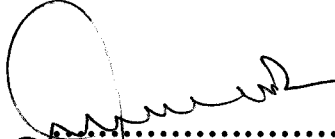
Taking into account all the foregoing matters, the Appeals succeed and the tender is hereby annulled.

Accordingly, the Procuring Entity may re-tender.

Dated at Nairobi on this 1<sup>st</sup> day of October, 2007



.....  
**CHAIRMAN**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**

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