

SCHEDULE 1
FORM 4
REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 13/2008 OF 2008

BETWEEN

OTIENO ODONGO & PARTNERS..... (APPLICANT)

AND

NORTHERN WATER SERVICES BOARD..... (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of the Northern Water Services Board dated the 13th day of March, 2008 in the matter of Request for Proposal for the Supervision of Construction of the Garissa Sewerage Project.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member
Mr. S. K. Munguti	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Ms. P. K. Ouma	-	Secretariat

PRESENT BY INVITATION

Applicant, Otieno Odongo & Partners

Mr. A. S. Masika - Advocate, Masika & Koross Advocates
Mr. Oduor Awour - Advocate, Masika & Koross Advocates
Mr. Aduke Enock - Manager

Procuring Entity, Northern Water Services Board

Mr. M. M. Shurie - Chief Executive Officer
Eng. Peter O. Mangiti - Board Director
Mr. Ndungu S. K. - Asset Development Officer
Mr. D. N. Shem Nderi - Technical Manager
Mr. A. N. Osman - Finance Manager
Eng. B. I. Kasabuli - Senior Superintending Engineer (MW & I)
Mr. Abdi Gose - Procurement Officer

Interested Candidate, Wanjohi Consulting Engineers

Eng. I. G. Wanjohi - Director

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

The Northern Water Services Board advertised for an Expression of Interest (EOI) for Consulting Services for the Supervision of Construction of Garissa Sewerage Works on 2nd July, 2007. The closing/opening of the EOI was on 1st August, 2007. The tender was circulated to the pre-qualified consultants on 30th October, 2007 and closed/opened on 23rd January, 2008 in the presence of the parties' representatives.

The following five local and five Arab firms returned their bids as joint ventures:-

1. CAS Consultants Ltd in Association with Al Obaid Engineering Consultants
2. Ahmed Abdel Warith Egypt in Association with Howard Humphreys (East Africa) Ltd Consulting Engineers
3. Saudi Consult Services in Association with Otieno Odongo & Partners
4. Wanjohi Consulting Engineers in Association with Shora Consult Company
5. Consulting Engineering Centre CEC Sajdi & Partners in Association with Runji & Partners Consulting Engineer Ltd.

EVALUATION

The evaluation of the tenders was carried out in three stages namely:-

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

The following bidders were found to be technically responsive and were recommended for financial evaluation.

1. CAS Consultants Ltd in Association with Al Obaid Engineering Consultants
2. Saudi Consult Services in Association with Otieno Odongo & Partners
3. Wanjohi Consulting Engineers in Association with Shora Consult Company
4. Consulting Engineering Centre CEC Sajdi & Partners in Association with Runji & Partners Consulting Engineer Ltd.

FINANCIAL EVALUATION

During the Financial bids opening, the technical scores were read to the bidders including the financial costs as written in the documents.

The financial proposals were evaluated and a combined technical and financial evaluation score was as follows:

Bid No.	Name of Bidder	Financial (%)	Technical (%)	0.2*Financial	0.8*Technical	Combined (%)
1	Cas Consultant in association with Al-Obaid	59.17	74.11	11.83	59.29	71.12
3	Saudi Consulting Services in Association with Otieno Odongo & Partners	80.99	73.43	16.20	58.74	74.94
4	Wanjohi Consulting Engineers in Association with Shora Consult	100.00	70	20.00	56.00	76.00
5	CEC in association with Runji & Partners	57.55	70.72	11.51	56.58	68.09
	Note: The Weights given to the Technical and Financial Proposals are T=0.8, and F=0.2					

The combined evaluation report was forwarded to the Bank for approval on 3rd March, 2008 and a no objection was given on 11th March, 2008 for the Procuring Entity to enter into negotiations with the successful bidder. The letters of notification of award to both the successful and unsuccessful bidders were written on 13th March, 2008.

THE REVIEW

This review was lodged on 28th March, 2008 by Otieno Odongo & Partners against the decision of the Tender Committee of Northern Water Services Board, in the matter of Request for Proposal for Consultancy Services for the Supervision of Construction of Garissa Sewerage Project. The Applicant was represented by Mr. Alex S. Masika, Advocate, while the Procuring Entity was represented by Mr.

Mohammed Shurie, Chief Executive Officer, and the interested candidate, Wanjohi Consulting Engineers was represented by Eng. I.G. Wanjohi, Director.

The Applicant requested the Board to make the following orders:

1. Annul in whole the decision of the Tender Committee of the Procuring Entity
2. The Contract be awarded to the Applicant; and
3. Northern Water Services Board be condemned to pay the Applicant the costs of the Appeal.

At the commencement of the hearing, the interested candidate, Wanjohi Consulting Engineers raised a preliminary objection that the Appeal was lodged by the Applicant outside the 14 days appeal window required under Regulation 73 (1) (c) of the Public Procurement and Disposal Regulations, 2006.

The interested candidate submitted that the letter of award was dated 13th March, 2008. It argued that the appeal should have been filed within 14 days from 13th March 2008. Therefore, the applicant's appeal filed on 28th March, 2008 was time barred.

The Procuring Entity submitted that the letters of notification to the bidders dated 13th March, 2008 were emailed on the same day and posted on 14th March, 2008.

In response, the Applicant submitted that it was notified of its unsuccessful bid by a letter dated 13th March 2008 which was posted on 14th March, 2008 and received on 26th March, 2008. It further submitted that excluding 14th March, 2008, the appeal was filed within time.

The Board has considered the submissions and representations and makes the following finding:

The Board finds that the Appeal window opened on 15th of March 2008 and remained so until 28th March, 2008 in accordance with Regulation 73 (2) (c) of the Public Procurement and Disposal Regulations, 2006 . The appeal was filed by the

Applicant on 28th March, 2008 which was within the Appeal window. Further the preliminary objection was not filed in accordance with Regulation 77. Accordingly this preliminary objection fails.

THE APPEAL

The Applicant raised five grounds of Appeal and the Board deals with them as follows:

Grounds 1, 2, 3 and 4 Breach of Section 82, of the Act on Evaluation of Proposals.

The four grounds have been consolidated since they raised similar complaints.

The Applicant, submitted that the Procuring Entity acted in breach of Section 82 of the Public Procurement & Disposal Act, 2005 on evaluation of proposals read together with the Request for Proposals (RFP) document. It argued that the Procuring Entity did not adhere strictly to clause 5.8 of the RFP document. It further argued that as set out in paragraph 3 of its Request for Review, the Applicant achieved the highest combined score of 76.485 whereas the successful bidders score was 76.40. The Applicant stated that the Procuring Entity breached Section 82(5) of the Public Procurement & Disposal Act, 2005 by failing to find that its proposal was the most responsive with the highest score of the combined technical and financial evaluation.

The Applicant submitted that at the opening of the financial bids, its bid price was read out as Kshs. 32,893,375/- .It further submitted that if that was its bid price, then its combined score of 76.485 in paragraph 3 of the request for review was the highest. It noted that the Procuring Entity had corrected its bid price upwards to Kshs. 35,901,375/- pursuant to clause 5.7 of the RFP document. It stated that the Procuring Entity did not notify it of the change of its bid price at any time. It argued that their price was competitive and the change of the bid price without notice was fundamental and a breach of rules of natural justice. It observed that the clause 5.7 of the RFP document was silent on notification on correction of errors. It urged the Board to interpret the correction in light of rules of natural justice. It made reference to page 467 of the sixth edition of "Administrative Law by H.W.R Wade" which provides as follows:

'Violation of Natural justice is then to be classified as one of the varieties of wrong procedure,.....

Thus violation of natural justice makes the decision void,...

It is enough to note that the rules of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power.'

The Applicant argued that the Request for Proposals process was equivalent to an open tender and therefore the provisions of Section 63 (1) and (2) of the Public Procurement & Disposal Act, 2005 on correction of arithmetic errors should apply. In conclusion, it argued that the Procuring Entity had not informed it to date of the correction and was in breach of its fundamental rights.

In response, the Procuring Entity denied that it had breached section 82 of the Public Procurement & Disposal Act, 2005. It stated that it had acted in full compliance of Section 82 of the Public Procurement & Disposal Act, 2005 read together with the Request for Proposals documents and adhered strictly to the expressed criteria as spelt therein. It further submitted that Applicant had produced figures whose basis they could not explain. It stated that the arithmetic correction was done as per clause 5.7 of the RFP document which reads as follows:

'The evaluation committee will determine whether the Financial Proposals are complete (i.e., whether they have costed all items of the corresponding Technical Proposals; if not, the Client will cost them and add their cost to the initial price), correct any computational errors, and convert prices in various currencies to the single currency specified in the Data Sheet. The official selling rates used, provided by the source indicated in the Data Sheet, will be those in effect on the date indicated in the Data Sheet. The evaluation shall exclude those taxes, duties, fees, levies, and other charges imposed under the applicable law; and to be applied to foreign and non-permanent resident consultants (and to be paid under the contract, unless the consultant is exempted), and estimated as per § 3.7.'

The Procuring Entity stated that in accordance with the above criteria, all noticeable errors were corrected before assignment of financial scores in line with clause 5.8 of

the RFP. It further stated that the applicant's proposal did not have the highest combined technical and financial score, contrary to the allegations by the Applicant.

The Procuring Entity submitted that it evaluated proposals in accordance with the conditions of the RFP. It further submitted that any notification of the correction to the Applicant would be tantamount to canvassing. It argued that the applicant scores as set out in paragraph 3 of the Request for Review had no basis and amounted to self evaluation.

Regarding the financial bid, the Procuring Entity submitted that the Applicant's bid as at the tender opening was KShs.32, 893,375.00, while the corrected bid price was KShs.35, 901,375.00. Finally, the Procuring Entity noted that the Applicant in its Request for Review had stated that it was willing to offer the services at a minimum of KShs.10, 000,000.00. It argued that, in making this 'new offer', the Applicant was acting in contravention of the Act that formed the basis of its Request for Review.

On its part, the interested candidate stated that it did not have details of the corrections that were being discussed. It further stated that its score was the highest evaluated and the Procuring Entity was entitled to make corrections. It argued that the Applicant was entitled to make any clarifications on clause 5.7 of the RFP document. It admitted that its bid had an error of 212 dollars which was too small to make a difference. It submitted that even if the Applicant had been notified of the correction, the only choice it had was to accept or withdraw the bid. In conclusion, it stated that it would be irregular if bidders had to negotiate with the Procuring Entities on the RFP.

The Board has carefully considered the representations of the parties and the information availed before it and notes that the criteria for correction was provided for at clause 5.7 of the RFP document and the Procuring Entity correctly applied the provisions of that Clause. Further, the Board noted that Evaluation process was conducted in accordance with Section 82 of the Public Procurement & Disposal Act, 2005.

In addition, the Board further notes that Section 63 (1) and (2) of the Public Procurement & Disposal Act, 2005 on correction of arithmetical errors and

notification to tenderers, apply to other Tenders and not Request for Proposals. The Act and Regulations do not require Procuring Entities to notify tenderers on correction of errors in Request for Proposals. The Board further notes that Procuring Entity used the corrected costs of the three bids in computing the financial score. In the combined Technical and Financial score, the successful bidder had a score of 76.00% while the Applicant had a score of 74.94%.

With regard to the offer of a minimum cost of Kshs. 10,000, 000 that the Applicant alleged that it was willing to perform the works at, the Board finds the offer was not in line with the Public Procurement process.

Accordingly these grounds of appeal fail.

Ground 5

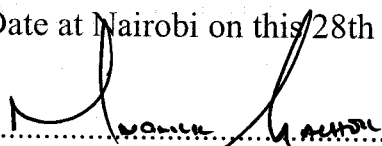
The Applicant alleged that as a result of the Procuring Entity's actions, it was bound to suffer loss and damage as set out at paragraph 5 of its Request for Review. In conclusion it urged the Board to annul the Procuring Entity's decision, award it the contract. It also prayed for costs of the review.

In response, the Procuring Entity stated that from the facts it had provided on the review that the perceived losses of the applicant were not justified. It therefore requested the Board to dismiss the appeal and direct the Applicant to pay costs.

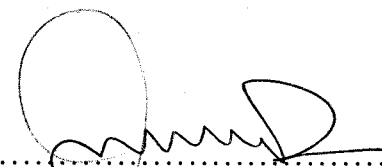
The Board holds that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business therefore the Procuring Entity is not liable for such costs.

Taking into account all the foregoing matters, the Request for Review fail and the Procurement process may proceed.

Date at Nairobi on this 28th day of April, 2008.


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**CHAIRMAN
PPARB**


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**SECRETARY
PPARB**

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