

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

**REVIEW NO. 16/2008 OF 14<sup>th</sup> APRIL, 2008**

**BETWEEN**

**MRUTTU SALMANN & ASSOCIATES (APPLICANT)**

**AND**

**CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES**  
**(PROCURING ENTITY)**

Appeal against the decision of the Tender Committee of Catering & Tourism Development Levy Trustees dated the 31st March, 2008 in the matter of Request for Proposals for Consultancy services for Construction of the Headquarters and Office Block for Catering & Tourism Development Levy Trustees.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms. Loise Ruhiu	-	Member
Eng. C. A. Ogut	-	Member

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **Applicant, Mruttu Salmann & Associates**

- Mr. Alex S. Masika - Advocate, Masika & Koross Advocates  
Mr. Oduor Awour - Advocate, Masika & Koross Advocates

### **Procuring Entity, Catering & Tourism Development Levy Trustees**

- Mr. Fredrick Orego - Legal Officer  
Mr. Patrick Jones Kimathi - Procurement Officer

### **Interested Candidates**

- Mr. Mathew O. Oseko - Advocate, Otieno & Kungu Associates  
Mr. Philip Kungu - Partner, Otieno & Kungu Associates  
Mr. Nelson Otieno W'mosi - Partner, Otieno & Kungu Associates  
T. G. Vaulkhard - Director, Triad Architects  
Ms. Naomi Ndolo - Architect, Cadplan Architects

## **BOARD'S DECISION**

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

## **BACKGROUND**

The Catering and Tourism Development Levy Trustees (CTDLT) advertised for expression of Interest (EOI) for the provision of consultancy services on 2<sup>nd</sup> October, 2007. The EOI closed on 26<sup>th</sup> October, 2007. Nine bidders were pre-qualified and invited to submit Technical proposals by 6<sup>th</sup> March, 2008.

Five bids were submitted from the following consulting firms:-

- a) Mruttu Salmann & Associates
- b) Symbion International
- c) Otieno & Kungu Associates

- d) Cadplan Architects; and
- e) Triad Architects

The Bidders were to submit Technical Proposals only as per Clause 1.2 and Appendix 1 of the Request for Proposal (RFP).

### EVALUATION

The Evaluation Committee was chaired by Mr. Samuel K. Ngari, a Senior Levy Inspector. It prepared an evaluation matrix that was based on the evaluation criteria as contained in clause 5.3 of the RFP document.

The summary results of the evaluation were as tabulated below:-

No.	Description of criteria.	Max	Symbion	Triad	Kungu	Cardplan	Mruttu
1.	Specific Experience of the Consultant related to the assignment	30	24	27	24	23	25
2.	Adequacy of the proposed work plan and methodology in responding to terms of reference	30	14	18	30	11	26
3.	Qualifications and competence of the key Staff for the Assignment	30	24	30	30	30	16
4.	Suitability for the transfer of technology programme(training)	10	5	10	4	0	0
<b>TOTAL POINTS</b>		<b>100</b>	<b>67</b>	<b>85</b>	<b>88</b>	<b>64</b>	<b>67</b>

The Evaluation Committee recommended M/s Otieno and Kungu Associates the highest scoring bidder to be invited for negotiations.

The Tender Committee of the Procuring Entity awarded the tender to the recommended bidder on 31<sup>st</sup> March, 2008

### **THE APPEAL**

Mruttu and Salmann Associates lodged the Request for Review on 14<sup>th</sup> April 2008. It was represented by Mr. Alex S. Masika, Advocate and Mr. Odour Awour, Advocate. The Procuring Entity was represented by Mr, Fredrick Orego, Legal Officer and Mr. Patrick Kimathi, Procurement Officer. The interested candidates present included Otieno and Kungu Associates represented by Mr. Mathew O. Oseko, Advocate; Mr. Philip Kungu, Partner and Mr. Nelson Otieno W'mosi, Partner. Others were Triad Architects and Cadplan Architects represented by Mr. T. G. Vaulkhard, Director and Ms. Naomi Ndolo, Architect respectively.

The review is based on seven grounds and the Board hereby deals with them as follows:-

### **GROUND 1, 5, AND 6**

The Board has noted that these are general statements that are not supported by any breach of the Act or Regulations as required under Regulation 73(2) (a) of the Public Procurement and Disposal Regulations, 2006.

Indeed, the Applicant did not argue these grounds at the hearing and the Board need not make any finding on them.

### **GROUND 2**

The Applicant submitted that the Procuring Entity breached Section 81(2) (g) as read together with Section 2 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the "Act"). The Applicant argued that Clause 5.3 of the Request for Proposal (RFP) did not state the minimum qualifying score for a bidder to be considered responsive at the technical evaluation stage. To the Applicant, the

failure to set the minimum score made the tendering process non-competitive contrary to Section 2 of the Act.

In response, the Procuring Entity argued that it did not breach Section 81(2) (g). It submitted that the tendering process was competitive and was done in accordance with the Act and the Regulations. It further submitted that it carried out an Expression of Interest (EOI) in October, 2007. After the Expression of Interest and the prequalification process, it invited a total of nine bidders to submit technical proposals. It stated that a total of six bidders returned the technical proposals but one of them was disqualified for returning its proposal late.

The Procuring Entity further submitted that the remaining five proposals were subjected to an evaluation using the criteria set out in the Request for Proposal.

It argued that the Applicant had misapprehended the procedure applicable to this procurement process. It referred the Board to the Request for Proposal which required the Bidders to submit technical proposals only. It stated that a financial proposal was not required as the fees payable would be in accordance with the Ministry of Roads and Public Works conditions of Engagement and scale fees for Professional Services for Building Works, 1987 Edition.

Finally, the Procuring Entity submitted that the Evaluation Committee undertook the technical evaluation in line with Clause 5.3 of the Request for Proposal as read together with Appendix A. It argued that Clause 5.3 was amended by Appendix A which provided that the bidders were to submit technical proposals only.

The successful bidder associated itself with the submissions of the Procuring Entity. It submitted that the Procuring Entity had set out the procedure in the Request for Proposal document which was clear to all parties. It further argued that for the

Applicant to submit at the hearing that financial proposals were necessary was a clear departure from what was required.

On their part, Triad Architects and Cadplan Architects both argued that the RFP document was flawed and could not result in a fair competition. Triad Architects argued that they had sought clarification from the Procuring Entity on whether a financial proposal was required and it stated that they were informed that a financial proposal was not required.

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

The Board has noted that Section 81(1) and (2)(g) of the Act provide as follows:-

**“81(1) The Procuring Entity shall give each person who it determines is qualified to be invited to submit a proposal a request for proposals and a copy of the terms of reference.**

**(2) The request for proposals shall set out the following:-**

- (a)** .....
- (b)** .....
- (c)** .....
- (d)** .....
- (e)** .....
- (f)** .....

**(g) Anything else required, under this Act or the regulations to be set out in the request for proposals.”**

The Board has further noted that Clause 1.2 of the Request for Proposal stated as follows:-

**“ 1.2 The Consultants are invited to submit a Technical Proposal and a Financial Proposal, or a Technical Proposal only as specified in Appendix “A” for consulting services required for the assignment named in the said Appendix. A Technical Proposal only may be submitted in assignments where the Client intends to apply standard conditions of engagement and scales of fees for professional services as is the case with Building and Civil Engineering Consulting services. In such a case the highest ranked firm of the technical proposal shall be invited to negotiate a contract on the basis of scale fees. The proposal will be the basis for Contract negotiations and ultimately for signed Contract with the selected firm.”**

The Board has also noted that Clauses 1.1 & 2.1, 1.2, 4.3 and 5.3 of Appendix A to the Request for Proposal states as follows:-

**“1.1 & 2.1 The name of the Client is the Chief Executive, Catering and Tourism Development Levy Trustees**

**The method of selection is:**

**1.2 Technical and Financial Proposals are requested: No  
A Technical Proposal only is required: Yes**

**The name, objectives, and description of the assignment are as per the terms of reference (T.O.R.).**

**4.3 The Proposal submission address is: The Chief Executive, Catering and Tourism Development Levy Trustees, Shell & BP House, 4<sup>th</sup> Floor, Harambee Avenue, P.o Box 46987, Nairobi.**

**Information on the outer envelope should also include: Request for Technical Proposal for Consultancy Services for Completion Works in one envelope only.**

**5.3 The highest scoring responsive bidder will qualify for further negotiation with the Employer in accordance with Clause 6.0 of these conditions.”**

It is clear from the Request for Proposal, that the Bidders were required to submit a technical proposal only as set out in Clause 1.2 in Appendix A of the Request for Proposal. As indicated in Clause 5.3 of Appendix A, the highest scoring responsive bidder would qualify for further negotiations with the Procuring Entity.

Therefore, the method chosen by the Procuring Entity did not require the stating of the minimum qualifying score as it only needed the highest scoring bidder for further negotiations.

Further, the Request for Proposal provided that the fees for the professional services was to be determined in accordance with the Ministry of Roads and Public Works Conditions of Engagement and Scale fees for Professional Services for Building Works, 1987 Edition. It was clear to the bidders from the outset that a financial proposal was not necessary. Indeed, the Board has noted that the Applicant submitted a technical proposal only.



The Board has further noted that the evaluation was done in accordance with the criteria set out in the Request for Proposal, pursuant to Section 82(1) and (4) of the Act which provide as follows:-

**“82(1) The Procuring Entity shall examine the proposals received in accordance with the request for proposals.**

**82(4) If the request for proposals provides for additional methods of evaluation the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.”**

Upon examination of the evaluation report, the Board has noted that the Bidders in this tender were evaluated on the same criteria as per the Request for Proposal. The Applicant was the 3<sup>rd</sup> highest evaluated bidder with a score of 67% compared to the score of 88% scored by the successful bidder.

The Board has further noted that under Section 29(1) and (4) of the Act, Procuring Entities are required to use standard tender documents as may be prescribed. The said section provides as follows:-

**“29(1)For each procurement, the Procuring Entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.**

(2) .....

(3) .....

**(4) A Procuring Entity shall use such standard tender documents as may be prescribed”**

Under the Third Schedule to the Regulations, one of the prescribed standard documents is the standard tender document for Request for Proposals (selection of consultants). The prescribed standard Request for Proposals for selection of Consultants provides as follows at clause 2.1.2

**2.1.2 “The Consultants are invited to submit a Technical Proposal and a Financial Proposal, or a Technical Proposal only, as specified in the Appendix “ITC” for consulting services required for the assignment named in the said Appendix. A Technical Proposal only may be submitted in assignments where the client intends to apply standard conditions of engagement and scales of fees for professional services which are regulated as is the case with Building and Civil Engineering Consulting services. In such a case the highest ranked firm of the technical proposal shall be invited to negotiate a contract on the basis of scale fees. The proposal will be the basis for Contract negotiations and ultimately for a signed Contract with the selected firm.”**

In this tender, the Procuring Entity used the standard tender document and Clause 1.2 of its Request for Proposal is identical to Clause 2.1.2 of the standard tender document. The Procuring Entity ought to have customized the document and omitted the part on financial proposal which was not relevant in this tender. However, as the Board has already observed, Appendix A stated that the Bidders were to submit a technical proposal only. Therefore, no prejudice was caused to the bidders as a result of inclusion of the clauses that dealt with financial proposals. Indeed, no bidder submitted a financial proposal.

In view of the foregoing, the Board holds that there was no breach of Sections 2 and 81(2) (g) as argued by the Applicant.

Accordingly, this ground of Appeal fails.

### **GROUND 3**

This ground of the Appeal was withdrawn by the Applicant at the hearing.

### **GROUND 4**

The Applicant submitted that the technical evaluation committee of the Procuring Entity acted in breach of Section 82(5) of the Act by wrongfully and prematurely declaring the proposal by Otieno and Kungu Associates as the most responsive bidder. It further submitted that by requesting the successful bidder to submit its financial proposal, the Procuring Entity breached the procedures and the criteria set out in the Request for Proposal Document. The Applicant further argued that a financial proposal was the basis of an award by a Procuring Entity.

In response, the Procuring Entity reiterated its submissions that the Request for Proposal as amended by Appendix A provided that only technical proposals were to be submitted. It argued that its evaluation Committee followed the criteria in the Request for Proposal and after evaluation the successful bidder was the highest ranked bidder.

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

The Board has noted that Section 82(5) provides as follows:-

**82(5) The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).**

The Board has already observed that, this Request for Proposal required submissions of technical proposals only. The fees payable was to be in accordance with Ministry of Roads and Public Works Conditions of Engagement and scale of fees for professional services for Building Works, 1987 Edition.

Therefore, this tender was a competition on technical proposals only. This mode of procedure is recognized in the standard tender documents for professional services. Whereas, the Board is of the view that it is important for Bidders to compete on both technical and financial proposals, the method adopted by the Procuring Entity is not unlawful as argued by the Applicant.

The Board also finds clause 5.3 of the Request for Proposal sets out the evaluation criteria and the score attached to each. Thereafter, the Procuring Entity prepared a matrix based on the evaluation criteria contained in Clause 5.3. The bidders' technical proposals were then evaluated as per the matrix which was in accordance with the criteria included in the Request for Proposal document. The successful bidder had the highest score and was invited for negotiations in accordance with clause 5.3, Appendix "A" in the Request for Proposal document. As already observed, the Applicant was the third ranked bidder with a score of 67%.

In view of the foregoing, this ground has no merit and it also fails.

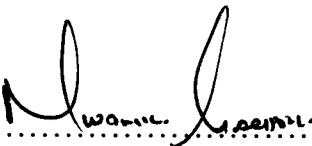
**Ground No. 7**

This is a statement of perceived losses/ damages arising from anticipated profit, which the Applicant would have made if it was awarded the tenders. In 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 other bidders.

In the circumstances the appeal fails and is hereby dismissed.

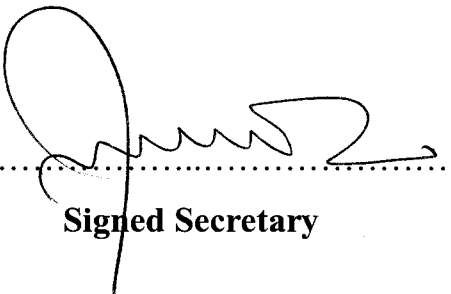
Accordingly, the procurement process may continue.

**Dated at Nairobi on this 14<sup>th</sup> day of May, 2008**



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**Signed Chairman**



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**Signed Secretary**

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