

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 15/2009 OF 30<sup>th</sup> APRIL, 2009**

**BETWEEN**

**JOEL E. D. NYASEME AND ASSOCIATED..... (APPLICANT)**

**AND**

**NATIONAL OIL CORPORATION OF KENYA.... (PROCURING ENTITY)**

Review against the decision of the Tender Committee of National Oil Corporation of Kenya dated the 15<sup>th</sup> April, 2009 in the matter of Tender for The Proposed Modern Laboratory and Office Complex at South C.

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Loise Ruhiu	-	Member
Ms. J. A. Guserwa	-	Member
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Ms. Pamela K. Ouma	-	Holding brief for the Secretary
Ms. Kerina A. Rota	-	Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Joel E. D. Nyaseme and Associates**

- Mr. Maosa Thomas - Advocate, Maosa & Co Advocates
- Mr. Joel Nyaseme - Architect
- Mr. S.R. Ndeda - Architect
- Mr. C.M. Mwebi - Quantity Surveyor

### **Procuring Entity, National Oil Corporation of Kenya**

- Mr. Mwaniki Gachuba - Procurement Manager
- Mr. Christopher M'Maiti - Company Secretary
- Mr. David Wainaina - Operations Manager
- Ms. Esther Mwangi - EHS Manager

### **Interested Candidates:**

- Architect. Mugure Njendu - Partner, Gitutho Associates
- Mr. Alex S. Masika - Advocate, Designworth Architects Ltd
- Mr. P. S. Kariuki - Quantity Surveyor, Designworth Architects Ltd
- Mr. Danson Gatimu - Architect, Designworth Architects Ltd
- Ms. Euginia Murunga - Procurement Manager, Kenchuan Architects Ltd

## **BOARD'S DECISION**

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

## **BACKGROUND**

The Ministry of Energy and National Oil Corporation of Kenya intended to construct a Laboratory and office complex at Bellevue South C and wished to appoint a consultant to carry out the design, supervision and contract administration for the proposed facilities.

The tender was advertised as an Expression of Interest (EOI) on 24<sup>th</sup> September, 2008 and closed on 21<sup>st</sup> November, 2008. Nine bidders qualified and were invited to submit their bids by 15<sup>th</sup> December, 2008. These firms were:

1. Gitutho Associates
2. Mutiso Menezes International
3. Edon Consultants International Limited
4. Kenchuan Architects Ltd
5. Design Worth Architects
6. Joel E. D. Nyaseme & Associates
7. Associated Architects
8. Mruttu & Associates

The Request for proposal closed/opened on 15<sup>th</sup> December, 2008 and bidders notified on 29<sup>th</sup> December, 2008 that they had passed the first phase of the technical evaluation. They were to make a presentation before the management of the Procuring Entity on 8<sup>th</sup> January, 2009. The presentations were postponed.

On 14<sup>th</sup> January the Procuring Entity revised the terms of reference and requested the bidders to re-submit their bids since the financial bids had not yet been opened. The bidders were to resubmit the bids on 23<sup>rd</sup> January, 2009 but later extended to 4<sup>th</sup> February, 2009. Seven bidders returned their bids and

the opening was done before bidders representatives who chose to attend.

They were:

1. Gitutho Associates
2. Mutiso Menezes International
3. Edon Consultants International Limited
4. Kenchuan Architects Ltd
5. Design Worth Architects
6. Joel E. D. Nyaseme & Associates
7. Associated Architects

## **EVALUATION**

The evaluation was conducted by a committee consisting of members from the Ministry of Energy and the National Oil Corporation of Kenya.

### **Preliminary Evaluation:**

The committee evaluated for responsiveness to the requirements of the Terms of Reference. Four bidders were declared non responsive at this stage and could not be evaluated further. These were Ms. Gitutho Associates, Mutiso Menezes, Edon Consultants International Limited and Kenchuan Architects Ltd.

### **Technical Evaluation:**

The three remaining bids were subjected to a technical evaluation based on the following criteria.

<b>NO.</b>	<b>CRITERIA</b>	<b>SCORES</b>
1.	Consultants' approach/methodology in the design work including work plan, specifications, list of standards to be used and comments on ToR, commissioning the construction works as well as contract administration.	5 marks
2.	Names and profiles of consultants to be part of the consortium	5 marks
3.	Written references of at least three (3) previous experiences in the last five (5) years for similar assignments for each Consultant in the consortium	5 marks
4.	Resumes of the proposed key professional staff including a Resident Engineer and a Safety Officer	5 marks
5.	Estimated cost of project	5 marks
6.	Time schedule for design work up to the contract stage	5 marks
7.	3D - architectural presentation and illustration on power point (to be presented to the client at a time and date to be determined) <ul style="list-style-type: none"> <li>• Elevations</li> <li>• Plans</li> <li>• Aerial presentation</li> <li>• Interiors</li> <li>• Landscaping</li> <li>• Externals</li> </ul>	30 marks
8.	Creativity and originality <ul style="list-style-type: none"> <li>• Uniqueness</li> <li>• Futuristic/innovative</li> <li>• Originality</li> <li>• creative</li> </ul>	25 marks
9.	Professional indemnity cover	5 marks
10.	Tender surety	5 marks

Only bidders with a technical score of 70 % and above would qualify for the opening of their financial bids. There was no report on the presentation of the bidders bid in power point to the management or evaluation committee.

The summary report of the technical evaluation was as tabulated below:-

<b>FIRM</b>	<b>SCORE OUT OF 95</b>	<b>SCORE OUT OF 100</b>	<b>RANKING</b>
Design Worth Architects	71.8	75.5	1
Joel E. D. Nyaseme & Associates	67.125	70.7	2
Associated Architects	53.3	56.1	3

Associated Architects was disqualified at this stage as it did not attain the stipulated 70% cut off mark. The Evaluation Committee recommended the opening of the financial bids of Messers. Design Worth Architects and Interior Designers and Joel E. D. Nyaseme and Associates.

### **Financial Evaluation:**

The Procuring Entity appointed the financial evaluation committee to evaluate the two bids that were responsive at the technical stage. The committee was chaired by Mr. Charles Wachira.

The results of the evaluation were as tabulated:

Item	description	Designworth Architects	Joel E. D Nyaseme & associates
1.	Architects/lead consultants	7,867,001	18,438,750
2.	Quantity Surveyors	4,403,666	15, 093, 750
3.	Structural & Civil Engineers	3, 156,999	11,889,000
4.	Mechanical and Electrical Engineers	2,083,335	9,436,250
5.	Land Surveyors	488,083	2,055,000
6.	Resident Engineers	0	7, 252,200
7.	Interior Designer	0	792,200
8.	Environmentalist	0	4, 590,000
9.	Safety Officer	0	4, 200, 000
10.	Clerks of works	0	4, 350,000
11.	Discount	-99,084	0
	<b>Total</b>	<b>17,900,000</b>	<b>78,097,150</b>

The committee therefore recommended the award of the contract to Design, Supervise and administrate the construction of Modern National Laboratory & Office Complex at South C be awarded to Ms. Design worth Architects as it had quoted the lower price of the two responsive bidders.

### **THE TENDER COMMITTEE DECISION**

In its Meeting No. 53 held on 27<sup>th</sup> March, 2009, the Tender Committee deliberated on the Evaluation Committee recommendation and deferred the award of the tender to Design worth Architects. It directed the Procurement Manager to seek clarifications regarding costing for several experts not included in the tenderers' schedule of prices.

In the Tender Committee meeting No. 54 held on 8<sup>th</sup> April, 2009 the Committee was informed that the tender document did not require tenderers to name specific experts and that the said requirement was left to the tenderer's discretion. The committee awarded the tender to Designworth Architects at 4.6 %of construction cost which was 17,900,000 exclusive of VAT. In addition, it directed that the Procuring Entity to hire and pay the Clerk of Works directly.

### **THE REVIEW**

This Request for Review was lodged on the 30<sup>th</sup> day of April, 2009 by Joel E.D. Nyaseme & Associates against the decision of the Tender Committee of National Oil Corporation of Kenya dated 15<sup>th</sup> April, 2009 in the matter of a Request for Proposal for Architectural Consultancy (for a Modern National Oil Laboratory and Office Complex at South C, Nairobi).

The Applicant was represented by Mr. Thomas Maosa, Advocate, while the Procuring Entity was represented by Mr. Mwaniki Gachuba, the Procurement Manager.

The Applicant in its Request for Review has raised twenty-one (21) grounds of appeal.

The Board deals with them as follows:-

**Grounds 1 - 7, 18, 19, 21**

These are statements backed by no breach of the Act or Regulations and as such the Board cannot make any findings on them.

**Grounds 8 - 11, 13**

These grounds have been consolidated because they raise similar issues regarding the responsiveness of the financial bid quoted by the successful tenderer.

In these grounds, the Applicant alleged that the Procuring Entity breached clauses 2.4.1 and 2.4.5 of the Request for Proposal together with the provisions of Sections 38, 58 and 64 of the Act and Regulations 47 and 48 by accepting and considering the financial bid of the successful candidate who it alleges did not comply with the requirements of the Tender Document. The Applicant averred that the successful candidate's bid did not take into account the time required to complete the contract as outlined in the Tender Document and was therefore unworkable. It further averred that the successful candidate's bid was contrary to the professional ethics as stipulated in the Architects and Quantity Surveyors Act, Cap 525 of the Laws of Kenya.



In its response, the Procuring Entity stated that it was not a candidate in the tender proceedings and therefore was not capable of breaching Sections 38, 58 and 64 of the Act. It further stated that it was incapable of breaching Section 64 of the Act together with Regulations 47 and 48 because the provisions thereof applied only to financial evaluation and not to technical evaluation.

The Procuring Entity averred that the determination of any breach of the provisions of the Architects and Quantity Surveyors Act, Cap 525 of the Laws of Kenya, did not fall within the purview of this Board. It further averred, that in any event, Section 5(1) of the Public Procurement and Disposal Act, 2005, overrides the Architects and Quantity Surveyors Act, Cap 525. In conclusion, the Procuring Entity stated that it had no control over the successful candidate's financial proposal and that the successful candidate had the right to submit its financial proposal in the manner that it did.

An interested candidate, Associated Architects, stated in its written submission to the Board that it was impractical for any consultancy firm to carry out the contract at the successful bidder's quoted fee. It further stated that the acceptance of the successful bidder's quotation was unethical and was contrary to the Architects and Quantity Surveyors Act, Cap 525.

The Successful Candidate, Designworth Associates, fully supported the submissions of the Procuring Entity, and stated that it had adhered to clauses 2.4.1 and 2.4.5 of the Request for Proposal, in light of the issued Addendum to the Request for Proposal. It averred that the Fourth Schedule A.2(g) of the Architects and Quantity Surveyors Act, Cap 525, provides that where an Architect is commissioned by the Government of Kenya to undertake professional work in accordance with the special scale of charges agreed between the Government and the Profession, the Architect shall not be bound

to adhere to the scale specified therein except in regard to any matter not described in the said special scale.

The Board has carefully examined the documents submitted before it and the parties' submissions.

With regard to the alleged breaches of Sections 38, 58, 64 of the Act, and Regulations 47 and 48, the Board notes as follows:

- i) that Section 38 deals with the matter of inappropriate influence on tender evaluation;
- ii) that Section 58 deals with the matter of submission and receipt of tenders;
- iii) that Section 64 deals with responsiveness of tenders; and
- iv) that Regulations 47 and 48 deal with preliminary evaluation of tenders and rejection of non-responsive tenders respectively.

The Board finds that the Applicant has not provided evidence to demonstrate how the above Sections of the Act and its Regulations were breached. Therefore, based on the foregoing, the Board finds that this limb of the grounds of appeal fails.

With regard to the alleged breach of Clauses 2.4.1 and 2.4.5 of the Request for Proposal, the Board notes the requirements for the preparation of the Financial Quotation under Clauses 2.4.1 and 2.4.5 of the Request for Proposals provided as follows:-

***Clause 2.4.1 - In preparing the financial quotation the candidate is expected to take into account the time required in completing the assignment as outlined in the RFP. The financial quotation will be quoted in fees per day or month. The financial quotation may also include other costs as necessary,***

*which will be considered as reimbursable. It will then give the total cost of the assignment.*

*Clause 2.4.5 - The financial quotation must comply with the law governing the profession of the candidate.*

The Board has examined the successful candidate's financial bid document and finds that the successful candidate had quoted its fees per day and month and thus had complied with the requirement of Clause 2.4.1 of the Request for proposal.

With regard to Clause 2.4.5 of the Request for Proposals which stated that the financial quotation must comply with the law governing the profession of the candidate, the Board finds that the Procuring Entity **did not provide procedures and criteria in the Request for Proposal for how a bidder would calculate fees in line with the law governing the professions.**

With regard to the law governing the professions in respect of fees, the Board notes By-law 45(3)(r) to the Architects and Quantity Surveyors Act, CAP 525, Revised Edition 1978, (CAP 525), which states that an architect or quantity surveyor **may be deemed by the Board (of Registration of Architects and Quantity Surveyors)** to be guilty of professional misconduct if he deviate from charging less than the charges laid down in the Fourth or Fifth Schedule without notifying the Board of his intention to do so and receiving the Board's sanction thereto.

The Board also notes the following By-laws to CAP 525 in respect of determination of unprofessional conduct:

45(2) Unprofessional conduct or professional misconduct in relation to a charge against a registered person shall be conduct which the **Board (of Registration of Architects and Quantity Surveyors)** deems after due enquiry to be such; and

46(1) Inquiry into the conduct of a registered person may be instituted by the **Board (of Registration of Architects and Quantity Surveyors)** upon the Board's initiative or upon complaint addressed to the Board in writing, made by or on behalf of any person alleging unprofessional conduct on the part of a registered person.

The Board finds that the Architects and Quantity Surveyors Act makes ample provision for complaints arising under that Act. It would therefore be contrary to the provisions of that statute for this Board to purport to take up jurisdiction over alleged wrongs under that statute as held in the Board's decisions in applications no. 14/2009 between Lins Consult Architect & Interior Designer dated 4<sup>th</sup> May, 2009; and no. 24/2006 between Kinyua Koech and Local Authorities Pension Trust dated 21<sup>st</sup> June, 2006.

On the issue of whether there is conflict between CAP525 and the Public Procurement and Disposal Act, 2005 (the Act), the Board notes Section 5(1) of the Act states that where there is a conflict between the Act and any other Act or regulations in matters relating to procurement and disposal, the provisions of the Public Procurement and Disposal Act shall prevail.

Accordingly, this limb of the grounds of appeal also fails.

## **Grounds 12, 14 - 16**

These grounds have been consolidated because they raise similar issues regarding the proceedings at the opening of the financial bids and the subsequent evaluation of the bids.

In these grounds, the Applicant alleged that the Procuring Entity failed to conduct the financial opening proceeding as required under Clause 2.8.2 of the Request for Proposal by not reading at the financial bids opening, the name of the candidate, its technical score and price. It further alleged that by so doing, the Procuring Entity breached Regulation 45 and Section 66(2) of the Act which stipulates that the evaluation and comparison of tenders shall be done using the procedures and criteria set out in the tender document. It stated that in the absence of the technical scores and breakdown of price, the determination of the financial score using the formula specified in Clauses 2.8.3 and 2.8.4 of the Tender Document would have been impossible. It further stated that by so doing, the Procuring Entity breached Sections 81 and 82 of the Act.

In its response, the Procuring Entity denied that it had breached Regulation 45 and stated that both the technical scores and financial proposals of the technically qualified bidders were read aloud during the financial bids opening. It further stated that it was incapable of breaching Section 66(2) of the Act because the said section did not apply to the opening of tenders but to tender evaluation.

The Procuring Entity submitted that the Applicant had not requested to be furnished with a breakdown of the successful candidate's financial bid as provided for under Regulation 66(2) nor was it entitled to receive such details. It concluded that it had carried out the evaluation of bids in accordance with the amendment to the Request for Proposal together with the provisions of

Sections 81 and 82 of the Act, and that the Applicant had never sought clarification on the amendment as provided for under Section 53(2) of the Act.

The successful bidder supported the Procuring Entity's submissions and stated that the Applicant had disregarded the addendum to the Request for Proposal which contained additional details that bidders were to factor in their proposals including the criteria that the work shall be awarded to the lowest financial bidder.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that the tenders for the Request for Proposal were closed/opened on 15th December, 2008. The Board further notes that on 14th January, 2009, the Procuring Entity, through its Ag. Procurement Manager informed the bidders that the Terms of Reference had been reviewed and that bidders were to include and factor in the additional details in their bids. The Board observes that the Procuring Entity proceeded to issue a document titled 'Original Tender Documents'. The Board further observes that the new document contained Terms of Reference for engagement of a consultant to carry out design, supervision and contract administration, which included terms of reference for both technical and financial parameters together with new evaluation criteria. The new evaluation criteria were that only bidders with a technical score of 70% and above shall qualify for opening of financial bids, and that the work shall be awarded to the lowest financial bidder. The Board notes that these criteria were different from the combined technical and financial formula contained in the original Tender Document. The Board further notes with concern that the Procuring Entity did not avail to the Board the minutes of the first technical evaluation.

The Board has further examined the document issued on 14<sup>th</sup> January, 2009, by the Procuring Entity to the bidders and finds that the document is an amendment to the Terms of Reference only and not a standard Request for Proposal document, and as such the new document issued was not a new Request for Proposal but an Addendum. In any event, the Procuring Entity could not issue a new Request for Proposal without terminating the original one.

The Board notes the provisions of Section 53(1) of the Act for the manner in which an addendum is to be issued by the Procuring Entity:-

*A Procuring Entity may amend the tender documents **at any time before the deadline for submitting tenders** by issuing an addendum.*

The Board finds that the Procuring Entity issued the Addendum to the Request for Proposal on 14<sup>th</sup> January, 2009, after the deadline for submitting tenders which was on 15<sup>th</sup> December, 2008, and by so doing breached Section 53(1) of the Act.

Consequently, the Board finds that the entire procurement process was flawed.

Accordingly, these grounds of appeal succeed.

### **Ground 17**

In this ground, the Applicant alleged that the Procuring Entity flouted Regulations 12(8) and (9) which stipulate that observers be invited to attend tender committee meetings where the value of the contract is estimated to be above Kshs. 50million.

In its response, the Procuring Entity stated that it had not breached the said Regulations because the value of the contract was considerably below Kshs. 50 million.

The Board has carefully examined the documents submitted before it and the parties' submissions.

The Board notes that the tender which had been recommended for award by the Procuring Entity's Evaluation Committee to its Tender Committee was for Kshs 17,900,000 exclusive of VAT, and that this was the only bid, under this procurement, being considered for award by the Tender Committee. The Board finds that as this amount is below the Kshs 50 million stipulated in Regulation 12(8) which requires observers at tender committee meetings, the Procuring Entity did not breach the said Regulations.

Accordingly, this ground of appeal fails.

## **Ground 20**

In this ground, the Applicant alleged that the Procuring Entity failed to disclose and furnish it with the reasons for the rejection of its bid contrary to the provisions of the Act and Regulations made there under.

In its response, the Procuring Entity stated that the Applicant had not requested from it such information as provided for under Regulation 66(2) and therefore, the Procuring Entity was under no obligation to furnish the Applicant with such information.

The Board has carefully examined the documents submitted before it and the parties' submissions.



The Board notes that Regulation 66 (2) provides as follows:-

***“Where so requested by an unsuccessful tenderer a Procuring Entity shall within fourteen days after a request, provide written reasons as to why the tender proposal or application to be pre-qualified was unsuccessful.”***

The Board finds that the Applicant did not request from the Procuring Entity reasons as to why its tender was not successful, and therefore, the Applicant could not expect to have received such information from the Procuring Entity.

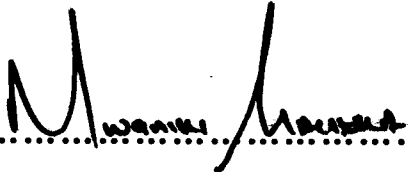
Accordingly this ground of appeal fails.

Taking into account all the above matters, the Board finds that grounds 12, 14, 15 and 16 have succeeded and the breach by the Procuring Entity of Section 53(1) by introducing a new document during the evaluation process was improper and renders the entire procurement process a nullity.

Accordingly, the Board orders, pursuant to Section 98 of the Act, that the decision to award the tender to the successful tenderer is hereby nullified.

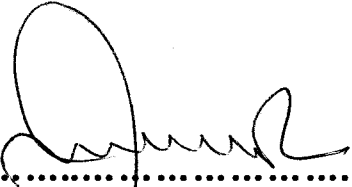
The Board further orders that the Procuring Entity may re-tender through restricted tendering method by inviting all bidders who participated in the Request for Proposal.

**Dated at Nairobi on this 26<sup>th</sup> day of May, 2009**



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**Signed Chairman  
PPARB**



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**Signed Secretary  
PPARB**

