

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 31/2010 OF 21ST MAY, 2010

BETWEEN

MRUTTU SALMANN & ASSOCIATESApplicant

AND

SPORTS STADIA MANAGEMENT BOARDProcuring Entity

Request against the decision of the Tender Committee of Sports Stadia Management Board dated 14th June, 2010 in the matter of tender No. SSMB/RFP/004/09-10 for Consultancy Services (Consortium) - International Sports Academy, Kasarani.

BOARD MEMBERS

Mr. P.M. Gachoka	-	Chairman
Amb. C. M. Amira	-	Member
Ms. Natasha Mutai	-	Member
Mr. Joshua W. Wambua	-	Member
Mr. Sospeter Kioko	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. M. Obuya	-	Secretariat
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION

PROCURING ENTITY- SPORTS STADIA MANAGEMENT BOARD

1.	Mr. A. Thangei	-	Advocate
2.	Mr. M. Mbaria	-	Advocate
3.	Mr. Benjamin Sogomo	-	Chief Executive Officer
4.	Mr. Gabriel Komora	-	Deputy Director
5.	Mr. Frazier A. A. Tombe	-	Ag. Procurement Officer

APPLICANT- MRUTTU SALMANN & ASSOCIATES

1.	Mr. Chacha Odera	-	Advocate
2.	Ms. Georgina Ogalo	-	Advocate
3.	Mr. Isaac Mruttu	-	Principal Architect
4.	Mr. Maxwell Odongo	-	Engineer
5.	Mr. N. Ngahu	-	Office Superintendent

INTERESTED CANDIDATE- K&M ARCHPLANS

1.	Mr. Mutua Molo	-	Advocate
2.	Mr. James Kimathi	-	Managing Director
3.	Qs. Robinson Kariguh	-	Quantity Surveyor
5.	Mr. A. G. Mambo	-	Engineer

INTERESTED CANDIDATE- CONTE DESIGNS

1. Qs. Bernard Massam - Quantity Surveyor

BOARD'S DECISION

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

BACKGROUND OF AWARD

The Procuring Entity advertised for Expression of Interest (EOI) for the proposed International Sports Academy on 18th December 2009. The bids closed/opened on 19th January, 2010 and out of the twenty seven bids that were received at the EOI, four (4No.) were prequalified to submit proposals.

They were;

1. K&M Arch plans
2. Conte Design Team
3. Tectura International
4. Muruttu Salmann and Associates

The bids from the prequalified consultancy services (consortium) were opened on 03/03/2010. Three bids out of the four were received. Tectura International did not respond.

EVALUATION

Evaluation was carried out in two stages namely Preliminary and Technical. There was no competition on fees - the fees were stated under clause 2.1.2 as to be based on *The Conditions of Engagement and Scales of Fees for Professional Services for Building Works, 1987 Edition and any amendments thereto prepared by the Ministry of Public Works.*

PRELIMINARY EVALUATION:

The bids were evaluated for responsiveness on the following parameters:

1. Completeness of the consortium
2. Professional Registration
3. Company Profile
4. Tax Compliance Certificate

PRELIMINARY EVALUATION FINDINGS

Criteria	PROFESSION									
	Architect	QS	Structural	Civil	Electrical	Mechanical	Interior design	Structured cabling	CCTV Surveillance	Landscape Expert
Completeness of consortium	✓		✓		✓	✓	✓	✓	✓	✓
Professional Registration	✓		✓		✓	✓	✓	✓	✓	✓
Company profile	✓		✓		✓	✓	✓	✓	✓	✓
Tax Compliance Certificate	✓		✓		✓	✓	✓	✓	✓	✓
Comments	The Electrical Engineer in all the consortiums have indicated they handle structured cabling and CCTV Surveillance									
Remarks	All the firms met the requirements under the preliminary criteria as ticked above and thus they qualify for the next stage of evaluation.									

All the bidders were responsive at the Preliminary Evaluation stage.

TECHNICAL EVALUATION:

The bids were further subjected to a technical evaluation.

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

	Criteria	Maximum Score (%)	Bidder 1	Bidder 2	Bidder 3
FORM (I)	Firms experience in handling projects of similar nature	30	27.00	23.52	21.24
FORM (II)	Adequacy of the proposed work plan and methodology to the terms of reference	25	25.00	23.61	25.00
FORM (III)	Qualifications and competence of the key staff for the assignment	30	21.37	16.87	23.19
FORM (IV)	Outline design proposal and estimated construction cost including professional fee	15	12.49	7.50	12.99
Total Score		100	85.86	71.50	82.42

RECOMMENDATION OF THE EVALUATION COMMITTEE

The Evaluation Committee members recommended to the Sports Stadia Management Board Tender Committee that the project be awarded to Bidder No. 1, M/s. Mruttu Salmann & Associates of P.O. Box 12986-00400 Nairobi with the estimated cost of KShs. 1,579,778,165.00 (Inclusive of VAT) and with the highest score of 85.86%. They observed that the consortium had met most of the conditions stipulated within bid documents especially financial outlays, composition of Professional staff and functionality of the designed academy facilities.

However, the Evaluation Committee Members also noted that if the client had the requisite financial resources, then the design proposal presented by Bidder No. 3 (M/s. K & M Arch plans Ltd) with the estimated cost of Kshs. 3,964,409,830.95 (exclusive of VAT) and being the 2nd highest score of 82.42% would have been the best design proposal for the proposed International Sports Academy.

TENDER COMMITTEE DECISION

In its meeting dated 19th March, 2010, the Tender Committee deliberated on the recommendation of the evaluation committee and made the following observations.

1. That they concurred with the evaluation report. However, they noted that Mruttu Salman & Associates did not attach audited accounts.
2. That in the professional fee criteria of award, K&M Arch plans were awarded 2 out of 2 points but should have been awarded 5 out of 5 points, thereby adjusted their total marks by three points from 82.42 to 85.42.
3. That the budget estimates for the project were 1.6 billion and the committee would limit it-self to those estimates.

The Tender Committee corrected the marks awarded to K&M Arch plans in the professional fee criteria from 2 out of 2 points to 5 out of 5 points thereby adjusted their total marks by three points from 82.42 to 85.42.

The Tender Committee indicated that the financial proposal for K&M Archplans of Kshs. 3,964,409, 800.00 (subject to VAT 16%) included new items proposed by the firm. This was despite the fact that the proposal by the successful bidder had a budgetary cost estimate for "*items captured in TOR*" at Kshs. 3,964,409, 800.00 (subject to VAT 16%) and for "*items not captured in TOR but are necessary.*" at Kshs. 494,490,500.00(subject to VAT 16%). The Committee noted that the cost indicated as per the RFP was Kshs. 1,721,625,000.00(subject to VAT) and not Kshs. 3,964,409,830.95. The Tender Committee therefore revised the final K&M Archplans cost proposal for the academy to be Kshs. 1,997,085,000.00 (VAT inclusive).

After the corrections by the Tender Committee, the new scores and estimates were as follows:

Bidder	score	Professional fees %	Professional fee amount	Total Estimates
Bidder 1	85.86%	10.76%	170,000,000.00	1,579,778,165.00
Bidder 2	71.50%	12%	111,483,372.00	1,206,993,308.00
Bidder 3	85.42%	13.5%	269,606,475.00	1,997,085,000.00

The Tender Committee then awarded the tender to K&M Arch plans Ltd at a cost of 13.5% of the total cost, estimated as two hundred sixty nine million,

six hundred and six thousand, four hundred seventy five shillings
(269,606,475/=)

Bidders were notified of the award vide letters dated 3rd May, 2010.

THE REVIEW

This Request for Review was lodged on the 21st day of May, 2010 by Mruttu Salmann & Associates against the decision of the Tender Committee of the Sports Stadia Management Board dated 3rd May, 2010 in the matter of Tender No. SSMB/RFP/004/09-10 for Consultancy Services (Consortium) - Architectural/Landscape Architecture/Quantity Surveying/ Electrical/Mechanical/Civil & Structural Engineering Services for The Proposed International Sports Academy at Kasarani, Nairobi.

The Applicant was represented by Mr. Chacha Odera, Advocate while the Procuring Entity was represented by Mr. Alex Thangei, Advocate and the successful candidate was represented by Mr. Mutua Molo, Advocate.

The prayers of the Applicant were that:-

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1. The Award Committee's decision be reversed and the award nullified forthwith.
2. The Tender be awarded to the Applicant as provided for under Section 66(4) of the Act and Regulations 50(3) of the Regulations.”

The Applicant in its Request for Review raised two grounds of review and the Board deals with them as follows:-

Ground 1 Breach of Sections 2, 53, 66 and 67 of the Act, and Regulations 49, 50 and 66

The Applicant alleged that the tender had been awarded unfairly to the Successful Bidder in breach of the said Sections of the Act, and that it was not done in accordance with the said Regulations. It further alleged that by failing to do so, the Procuring Entity did not award the tender to the lowest tenderer. It stated that from the Procuring Entity's Tender Committee's minutes on the award of the tender, the Evaluation Committee had awarded it a score of 85.86% whereas the Successful Bidder had scored 82.42%. It further stated that the Tender Committee adjusted the Successful Bidder's score after the members noted that the Successful Bidder scored 2 points out of a possible 2 marks in the professional fee criteria, whereas the criteria should have been marked out of 5, thus the bidder should have scored 5 points out of a possible 5. It averred that the Tender Committee then adjusted the Successful Bidder's score by 3 points from 82.42% to 85.42%. The Applicant further averred that even with that adjustment, it was still the bidder with the highest score and that it should have been awarded the tender. It concluded by stating that it had submitted its proposal in accordance with the Request for Proposal and having scored the highest marks should have been awarded the tender.

In its response, the Procuring Entity stated that it had awarded the tender fairly and to the lowest evaluated and responsive bidder in accordance with the Act and the Regulations. It submitted that its Tender Committee had a duty to consider the Evaluation Report submitted to it and that it was not there to merely ratify the recommendations contained in the Evaluation Report. It further submitted that Regulation 11(2) (a) as read together with Regulation 12(6) (d) gave the Tender Committee some power to make adjustments which it duly did.

It averred that it had not changed or altered the substance of the Evaluation Report. It further averred that its Tender Committee had deliberated, as it ought to have done, the Evaluation Report submitted by the Evaluation Committee and it had noted arithmetical errors in the computation of the Successful Bidder's score. It stated that the Tender Committee subsequently made the necessary correction and adjusted the score from 82.42% to 85.42%. The Procuring Entity further claimed that the Applicant was not responsive, as envisaged by Section 64(1) of the Act, in that it had not based its fees on the Conditions of Engagement for Building Services and Consultants 1987 Edition; and that it had failed to make provision for a gymnasium which was a tender requirement. It concluded that the Tender Committee took into consideration all these points, and under Regulation 48(1) rightly rejected the Applicant's tender; and subsequently proceeded to award the tender to the Successful Bidder in accordance with Sections 2 and 66 of the Act.

The Successful Bidder fully supported and associated itself with the Procuring Entity's submissions.

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

The Board notes that according to the Tender Document clauses 2.1.2 and 2.7.1, the tender would be awarded to the bidder with the proposal that shall have satisfied the mandatory requirements, scored the highest points and passed the due diligence process; and that the successful bidder would be invited for negotiations.

The Board has reviewed the Evaluation Committee's Technical Evaluation Report and the Tender Committee's Minutes, in respect of the evaluation procedures leading to the award of the tender and makes the following observations:-

- i) The Evaluation Committee subjected all the three bids received to preliminary evaluation and all three bidders were deemed to be responsive and these proceeded to technical evaluation;
- ii) The Evaluation Committee, after carrying out the technical evaluation determined the Applicant to have the highest score of 85.86% and recommended that the tender to be awarded to the Applicant. It had also commented that *if the Procuring Entity had the requisite financial resources, then the design proposal presented by the Successful Bidder with*

the estimated cost of KShs. 3,964,409,830.95 (exclusive of VAT) and being the second highest score of 82.42% would be the best design proposal;

- iii) The Tender Committee met to award the tender and on deliberating on the Evaluation Committee's Tender Report, noted that, the Applicant's bid did not have its audited accounts. Further, that the Successful bidder had been awarded 2 points out of a possible 2 instead of 5 points out of a possible 5 points in the *professional fee criteria*. The Tender Committee subsequently adjusted the Successful Bidder's score by 3 points from 82.42% to 85.42%;
- iv) The Tender Committee then stated that *the Evaluation Committee had indicated that the best Design was that of the Successful Bidder* and the Tender Committee also noted that the Successful Bidder had provided for the gymnasium facility while the other bidders had not;
- v) The Tender Committee noted that the Tender Document had not specified the cost limit or budget, but that the Procuring Entity's budget was estimated at KShs. 1.6 billion and KShs. 192 million for consultancy services, and as such the Tender Committee agreed that the Evaluation Report should be compared with the said budget allocation;
- vi) The Tender Committee noted that the Successful Bidder's cost estimates had included new items proposed by the bidder and consequently, the Tender Committee adjusted its bid estimate from KShs. 3,964,409,830,95 to KShs. 1,721,625,000.00 (exclusive of VAT);
- vii) The Tender Committee concluded by stating that the Evaluation Committee had indicated that the design proposal by the Successful

Bidder was the best proposal for the project and members subsequently agreed to award the tender to the Successful Bidder at a cost (fee) of 13.5% of the total cost estimated as KShs. 269,606,475/= (i.e. 13.5% of KShs. 1,997,085,000/=).

The issue before the Board under this ground of Request for Review is to determine the duties of the Evaluation Committee and the Tender Committee in evaluation and award of tenders.

To answer this, the Board notes the relevant Sections of the Act and the Regulations as follows:-

- i) Regulation 47 sets out how tenders are to be deemed responsive or non responsive, and who rejects non responsive tenders. The Regulations stipulate this as the role of the Evaluation Committee;
- ii) Regulation 11 sets out what actions in respect of approving tender recommendations, the Tender Committee may and shall not do. The Regulations allow the Tender Committee to approve a submission, or reject a submission with reasons, or approve a submission subject to minor clarifications by the Evaluation Committee. The Regulations stipulate that the Tender Committee shall not among other actions, modify any submission with respect to the recommendations for a contract award or in any other respect.

The Board therefore finds that the Tender Committee in making corrections to the Evaluation Committee's Tender Report and recommendations, and subsequently conducting its own tender evaluation and substituting the Evaluation Committee's recommendations with its own, acted beyond the powers granted to it under the Act and the Regulations thereof.

As regards the Procuring Entity's submissions that its Tender Committee had a duty to consider the Evaluation Report submitted to it and that it was not there to merely ratify the recommendations contained in the Evaluation Report, the Board is in agreement with this submission. However, the Tender Committee must follow the procedures set out in the Act and the Regulations. In this instance, the Tender Committee ought to have sought clarification on its queries on the Evaluation Report from the Evaluation Committee instead of making corrections on its own motion.

The Board further finds that the Tender Committee did not consider the Evaluation Committee's recommendation that the tender be awarded to the Applicant having scored the highest marks. Instead, the Tender Committee stated that the Evaluation Committee had indicated that the award be made to the Successful Bidder having the best Design. The Board finds that this statement is not correct based on the contents of the Technical Evaluation Report.

On the issue as to whether the Applicant was responsive or not, the Board finds that:-

- i) audited accounts were not a requirement of the Tender Document and the Procuring Entity conceded the same at the hearing;
- ii) the provision of a gymnasium was a requirement in the Tender Documents, and on perusing the Applicant's proposed drawings, the Board observes that a gymnasium was shown, but in the cost estimates, there was no direct reference to an estimate for a gymnasium;
- iii) the professional fees were indicated in the Tender Document under clause 2.1.2 as those based on *The Conditions of Engagement and Scales of Fees for Professional Services for Building Works, 1987 Edition and any amendments thereto prepared by the Ministry of Public Works*. The Board finds that the issue of non responsiveness on fees was not brought up by the Tender Committee and was an issue brought up by the Procuring Entity in response to the Request for Review.

Therefore, based on the foregoing, these grounds succeed.

Ground 2 Breach of Sections 67(1), 82(1) and 83(1) of the Act; and Regulation 66

The Applicant claimed that the Procuring Entity failed to notify it of the award and it was only upon its telephone enquiry on 14th May, 2010, that it was requested to collect its letter of notification.

In its response, the Procuring Entity stated that the Applicant had been notified together with the other bidders vide its letter dated 3rd May, 2010 in accordance with the Act and the Regulations.

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

The Board finds that the notification letters were dated 3rd May, 2010, but that the Procuring Entity did not produce any evidence to show when the letters were dispatched to the bidders.

The Board finds that Procuring Entities must at all times observe the requirements of Sections 67(1) and 83(1) on notification.

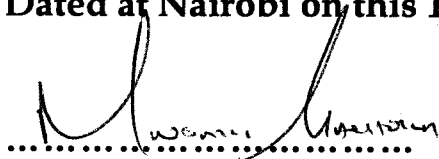
However, in this case, the Board notes that the Applicant did not suffer any prejudice in that it managed to file its Request for Review in time.

As the Board has already noted in Ground 1, the Procuring Entity's Tender Committee acted beyond the powers granted to it by the Act and Regulations by, proceeding to modify the Evaluation Committee's Tender Report and carrying out its own evaluation of the bids and substituting the Evaluation Committee's recommendation on the tender award with its own.

Therefore, taking into account the foregoing and the powers granted to the Tender Committee by Regulation 11, the Board orders, pursuant to Section 98 of the Act, that:-

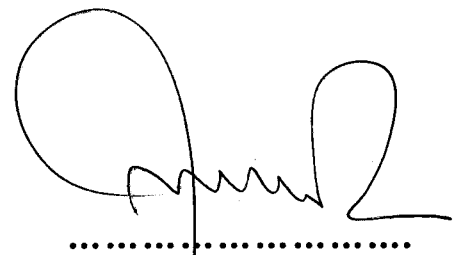
- i) The decision to award the tender to the Successful Bidder is nullified;
- ii) The Tender Committee's queries regarding the Technical Evaluation Report be referred to the Evaluation Committee for clarification; and
- iii) The Procuring Entity awards the tender in accordance with the Tender Document, the Act and the Regulations.

Dated at Nairobi on this 17th day of June, 2010



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Chairman, PPARB



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Secretary, PPARB

