

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 34 /2011 OF 26th JULY, 2011

BETWEEN

ARPRIM CONSULTANTS.....APPLICANT

AND

CENTRAL BANK OF KENYA.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Central Bank of Kenya dated 12th July, 2011 in the matter of Tender No. CBK/07/2010/2011 for Consultancy Services for Building Construction Works for the Central Bank of Kenya Central Parking.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Mrs. Loise Ruhiu	-	Member
Ms. Natasha Mutai	-	Member
Amb. C. M. Amira	-	Member
Mr. Joshua W. Wambua	-	Member

IN ATTENDANCE

Mrs. Pamela K. Ouma	-	Holding brief for the Secretary
Ms. Maurine Namadi	-	Secretariat

PRESENT BY INVITATION

Applicant, Arprim Consultants

Mr. Cecil Miller	-	Advocate, Miller & Company Advocates
Mr. Sollo Spear	-	Clerk, Miller & Company Advocates
Mr. Joseph Maina	-	Architect
Mr. Jared Momanyi	-	Architect
Mr. John Njagi	-	Quantity Surveyor
Mr. A. G. Mambo	-	Engineer

Procuring Entity, Central Bank of Kenya

Mr. Mohammed Nyaoga	-	Advocate, Mohammed Muigai Advocates
Mr. Muthomi Thionkolu	-	Advocate, Mohammed Muigai Advocates
Mr. Munabi Okubasu	-	Pupil, Mohammed Muigai Advocates
Mr. Joseph Mutava	-	Lawyer

Interested Candidates

Prof. Albert Mumma	-	Advocate, Edon Consultants
Mr. Charles Aguara	-	Advocate, Edon Consultants
Mr. Jerry Ndong	-	Architect, Edon Consultants
Qs. Robinson Kariguh	-	Quantity Surveyor, Quantibill Consult
Mr. Guyo Roba	-	Quantity Surveyor, Quintbill Consult
Mr. Daniel Odhiambo	-	Engineer, Otieno Odongo & Partners
Mr. Peter Ngugi	-	Engineer, Mecoy Consultants

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

Advertisement

The tender for Consultancy Services for Building Construction Works for the Central Bank of Kenya Central Parking was advertised on 1st October 2010. The short listed bidders namely Arprim Consultants; Edon Consultants International Limited; and Symbion Kenya Limited were invited to submit their Request for Proposals (RFP) documents on 4th April, 2011. A mandatory pre-proposal briefing conference was held on 7th April, 2011 at the Procuring Entity's Presentation room.

Closing/Opening:

The Request for Proposal documents were closed/opened on 10th May, 2011. Only two bidders namely Arprim Consultants and Edon Consultants International Limited submitted their proposals. Only the technical bids were opened at this stage while the financial bids were recorded and left unopened.

EVALUATION

The Evaluation was carried out in four stages namely Mandatory Evaluation; Compliance with the Terms of Reference; Presentation by Consultants; and Financial Evaluation stages.

1. Compliance with Mandatory Requirements

The Evaluation Committee considered the extent of compliance with mandatory conditions, completeness of tender for each category of services as listed:

- Attended pre-proposal briefing conference on 7th April 2011.
- Submitted properly bound soft and hard copies of preliminary/sketch designs with comprehensive design methodology and estimated cost of the project.
- Submitted one original and one copy of Technical, Presentation Materials and Financial Proposals.
- Submitted presentation materials in a separate envelope as part of the bids to be received during the designated tender opening date and time.
- Submitted Bid Bond of Kshs.100,000

Both tenderers met all the mandatory requirements and passed to the next stage of evaluation.

2. Compliance with Terms of Reference

The Evaluation Committee evaluated the proposals submitted by the bidders to confirm compliance with the terms of reference issued and the result were as tabulated below:

Terms of Reference(TORs)	Edon International Consultants	Arprim Consultants
Car Park Silo Car park: This is intended to be the main use of the building, with parking capacity of about 500 vehicles/parking bays. The	<p>Option 1: Fully automated with parking for 648 on 14 floors.</p> <p>Option 2: Ramp & drive with parking for 619 cars on 14 on</p>	<p>Option 1: Ramp & drive with parking for 623 cars on 8 floors.</p> <p>Option 2: Fully automated with parking for 774 cars on 8 floors.</p>

following additional features are also to be incorporated:	floors.	Option 3: Lifts & drive with parking for 615 cars on 7 floors.
Conference hall at the uppermost floor;	<p>Proposed conference hall with a capacity of 400 seats and can be divided into two separate halls on the 14th (uppermost) floor.</p> <p>Three (3) small meeting rooms (caucus room) adjacent to the conference hall.</p> <p>Provided for a VIP lounge.</p> <p>Provided a kitchenette.</p> <p>Has provided for furniture store.</p> <p>Has provided lobbies with balconies.</p>	<p>Proposed a layered conference hall into three levels (floor) with theater style seating on 8th to 10th floors. 1384 seats capacity.</p> <p>Three (3) medium size meeting rooms adjacent to the conference hall.</p> <p>Two (2) caucus rooms.</p> <p>Three (3) control and translation rooms.</p> <p>Has provided lobbies with balconies.</p>
General office space;	<p>Has provided:</p> <p>Open plan office space in the parking silo with necessary cloakrooms, lifts and staircase covering part of 1st, 2nd, 3rd and 4th floors in the parking silo</p> <p>Offices on mezzanine, 2nd and 3rd floors in the currency centre.</p> <p>Green environment to the offices on three (3) levels and a roof garden.</p> <p>Footbridge connecting to existing building on three levels.</p>	<p>Has provided extensive offices that are:</p> <p>Landscaped and zoned but still open plan.</p> <p>Adjacent meeting rooms to serve these offices.</p>
Auxiliary facilities such as workshops, generator room,	Water tanks on basement three (3) level.	Water tanks relocated at the space next to existing service yard.

switch room, etc;	Generator, switch room, transformer rooms and store on basement 1 level. Borehole incorporated into the building as an atrium.	Generator, transformer and power room on ground. Accessible directly from the service road. Borehole incorporated into the building as an atrium.
Vehicular connectivity to existing CBK building;	Designed a ramp and maintained the existing road into service yard. Entry through the existing service yard.	Designed a ramp and maintained the existing road into service yard. Entry through the existing service yard.
Museum for Currency and Bank artifacts with convenient and secure access for the general public.	Occupy ground and mezzanine floors. Proposed administration offices, researcher's offices, archives, conservation room, microfilming on basement three (3) level. Has provided a restaurant with associated facilities. Has provided for a gift shop, audio visual rooms, waiting lounges, coffee bar, VIP lounge and gallery on the mezzanine floor.	Occupies part of ground, first, second and third as a ramp display system. Restaurant on third floor connecting the museum with a bird's eye view of the museum display. The restaurant is on the third floor roof garden.
Currency Centre It is intended to extend the existing main Currency Centre in the CBK Headquarters Building towards the existing ancillary buildings within the compound. The extended Currency Centre shall integrate the services for the proposed car park silo and the ancillary buildings. The scope entails:	The area for serving Bank customers is on the ground floor. Note preparation area. Proposed a new Banking hall and general office space. Lift and staircases. Reception & security check. Secured loading and offloading bay for three (3) cars.	Maintained current banking hall in the existing building. The existing office spaces have been maintained. Currency processing room has been extended to include machine room (all equipments on ground floor), cloak rooms, security room, screening room, changing rooms, staff lounge and kitchenette, offices and workshop for currency

<p>Creation of efficient road access and circulation for decongested and secure vehicular traffic flow</p>	<p>Cloakrooms for both male & female. Management and security offices on mezzanine floor.</p>	<p>machines. Currency operations on one floor. Elaborate spaces for security screening for personnel.</p>
<p>for cash-in-transit vehicles and bank customers;</p>	<p>Has provided open parking for CIT vehicles and chase cars on the ground floor. Proposed a new vault of 546.34 sq. m. on basement level. Provided tunnel connecting with existing vault. Provided a service lift.</p>	<p>Separate and secured loading and offloading yards for large trucks up to 40ft containers and CIT vehicles on ground and basement 1 respectively. Dedicated parking for 16 No. CIT vehicles. Dedicated parking for 22 No. escort cars for CIT vehicles. Dedicated meeting point for CIT and their escorts before leaving the building. Two (2) exit routes for CIT vehicles. Proposed new vault on split level system allowing for 700 sq. m. per level totaling to 1400 sq. m. Provided a tunnel connecting the new vault and the existing vault designed for mechanized system or laser guided forklift. Provided for three (3) bullion lifts all capable of taking forklifts. One bullion lift is active and the other two are provisional. Provided for a dedicated cash handling route connecting existing currency centre, new service yard, new lifts and existing bullion lifts on ground floor.</p>
<p>Creation of adequate Reception Area for CBK customers i.e. commercial banks;</p>	<p>Has provided: The area for serving Bank customers is on the ground floor. Reception and security check.</p>	<p>Has provided: Separate deposit and withdrawal service areas for CIT vehicles on basement one (1). Separate waiting room for commercial banks and CIT staff</p>

		Separation of CIT staff and CBK staff Provided currency preparation rooms.
Creation of a modern Note Counting/Processing Centre.	Proposed Note Counting & Processing room on 1 st floor of the currency centre. Proposed shredding room on the first floor 1 st floor of the currency centre Provided cloakrooms.	Proposed currency operations on one floor. Existing currency processing room has been extended to include machine room (all equipments on ground floor), cloak rooms, security room, screening room, changing rooms, staff lounge and kitchenette, offices and workshop for currency machines. Has provided security screening rooms for personnel.
d) Vehicular access	Ramp connecting existing building and proposed parking. Connection from Haile Selassie service lane into new facility (two lane road). Connection to ground floor service yard. Connection to Harambee Avenue through Bima House and Treasury and NBK and Bima lanes (exit from parking). Circular road around the site exiting to Haile Selassie. Proposed overhead road across Haile Selassie Avenue into Factory Road.	Ramp connecting existing building and proposed parking. Connection from Haile Selassie service lane into new facility (four lane road). Connection to ground floor service yard. Connection to Harambee Avenue through Bima House and Treasury and NBK and Bima lanes (exit from parking). Possible exit route/road between Herufi House and Treasury building. Circular road around the site exiting to Haile Selassie.
Other Requirements		

The completed complex shall be provided with: Adequate street lighting and other essential services;	Provided street level lighting provided.	Provided street level lighting provided.
Attractive soft and hard landscaping;	Provided roof gardens. Terraced gardens on three (3) office floors.	The office spaces have terraced gardens. Has provided garden at the restaurant.
Rain water harvesting installation with efficient system for drainage, harvesting and storage of rainwater;	Has provided for rain water harvesting.	Has provided for rain water harvesting.
Modern ICT installation to make the complex ICT compliant.	Has incorporated parking management system with the following features: Non-intrusive vehicle security scanning Has incorporated parking management system including slot allocation. ICT compliant.	Has incorporated parking management system with the following features: Non-intrusive vehicle security scanning. ICT compliant. Has proposed automation of the vault operations by use of pallet sizing, conveyor belts and laser guided forklifts.

The technical scores were awarded independently by the evaluators then consolidated to get the average scores. The Average scores for the bidders were as follows:

Bidder	Score
Edon Consultants	- 89.55
Arprim Consultants	- 90.33

3. Presentation by Consultants

The bidders then made their presentations to the Evaluation Committee and the Bank Management on 8th June 2011. M/s Edon Consultants scored an average of 88.33 while Arprim Consultants scored 87.33.

COMBINED TECHNICAL AND PRESENTATION SCORES

To arrive at the total score by the bidders, the following formula was to be used:

$$S = 0.6ST + 0.4SP$$

Where:

S is the total combined scores of Technical and Presentation scores;

ST is the technical score out of 100%;

SP is the presentation score out of 100%.

Only candidates who attained a combined total score of 75% and above were to be invited for opening of their Financial bids. The Combined Technical and Presentation scores were as tabulated:-

Description	Edon	Arprim
Technical Score (ST)	90.36	92.33
Presentation Score (SP)	88.33	87.33
Total (0.60TS +0.40SP)	89.55	90.33

The two consortiums scored above the 75% pass mark and, therefore, qualified to proceed to the Financial Proposal Opening stage.

4. Financial Evaluation (Professional Fees)

The Financial proposals of Edon Consultants and Arprim Consultants were opened on 9th June 2011. At the opening it was noted that each bidder submitted a copy and one original document. The bidders were informed that

in accordance with the Request for Proposal (RFP) document, there were no scores to be awarded for the Financial proposal.

The Results of the opening of the financial proposals were as tabulated:-

Consortium	Financial Bid
Edon Consultants	Fee as per Cap 525 and ACEK Conditions of Engagement. It also gives absolute figures for Traffic Engineering and NEMA proposals.
Arprim Consultants	Fee based on Ministry of Public Works (Republic of Kenya) Conditions of Engagement and Scales of Fees for professional Services for Building and Civil Engineering Works)

RECOMMENDATIONS

The Evaluation Committee noted that the Evaluation was carried out in accordance with the provisions of the Public Procurement & Disposal Act, 2005 and Regulations 2006 and the Request for Proposal (RFP) document; and that the two consortiums, Edon Consultants and Arprim Consultants fulfilled the requirements of the Request for Proposal (RFP). The Evaluation Committee further noted that the two bidders were technically capable of undertaking the proposed project.

The Evaluation Committee noted that the difference between the two bidders score was 0.78%, and that the Ramp and drive option was recommended because of considerations of initial cost outlay, maintenance costs, power challenges and lack of local technical capacity.

A flyover across Haile Selassie Avenue may be considered after taking into consideration issues of security. The estimated cost for ramp and drive option for Edon Consultants International was Ksh.1.51 billion and Kshs.2.14 billion for Arprim Consultants, a difference of Ksh.630 million. The Evaluation

Committee noted that the Terms of Reference (TOR) were not sufficiently detailed and the scoring in the evaluation criteria did not give costing sufficient weight. In future the Committee stated that the TOR should be sufficiently detailed to ensure that it is clear and comprehensive and the cost component should be given a higher weight especially for projects of similar nature.

The RFP had envisaged that the highest scorer be recommended for negotiations; however, taking into account the material difference in the estimated costs of the proposals, the Evaluation Committee was unable to make a conclusive recommendation for award of the consultancy services.

One evaluator dissented to the decision of the Evaluation Committee and provided written reasons for the dissension and stated that he did not agree with the recommendations of the evaluation report and that the Evaluation Committee needs to adhere to the laid down procedures and Terms of Reference as initially set in the tender documents.

THE TENDER COMMITTEE DECISION

The Tender Committee in its meeting dated 21st June, 2011 deliberated on the Evaluation Report submitted to it. The Secretariat noted that Regulations 16 (9) & (10) required the Evaluation Committee to make a report assigning marks and recommending either the lowest evaluated tenderer or the bidder who had submitted the proposal with the highest score.

The Tender Committee noted from the evaluation that the difference in the scoring between the two bidders was minimal hence the firms were technically capable to undertake the project. It further noted that Arprim

Consultants were already consulting for the Bank at a project worth Kshs. 1.6 Billion while Eldon had a project worth Kshs. 300, million. The Tender Committee further noted that there was a cost difference of Kshs. 630 million between the two bidders.

After lengthy deliberations the Tender Committee awarded the Consultancy to Edon Consultancy International whose project estimates were generally cost effective and approved negotiations between the firm and the Bank on the technical proposals and fee structure.

THE REVIEW

The Applicant Arprim Consultants lodged the Request for Review on 26th July, 2011 against the decision of the Central Bank of Kenya in the matter of tender No.CBK/07/2010/2011 for Consultancy Services for Building Construction Works at the Central Bank of Kenya, Central Parking. The Applicant was represented by Mr. Cecil Miller, Advocate while the Procuring Entity was represented by Mr. Mohammed Nyaoga, Advocate. The Interested Candidate, Eldon Consultants was represented by Prof. Albert Mumma, Advocate.

The Applicant requests the Board for the following orders:-

- 1. "The decision of the Respondent dated 12th July 2011 be annulled.*
- 2. The review board gives directions to the Respondent for the Respondent to withdraw its letter dated 12th July 2011 and to re-admit the Applicant to this tender.*

3. The decision of the Respondent be rescinded.

4. The costs be awarded to the Applicant"

The Board deals with the three grounds of review as follows:

Grounds 1, 2 and 3 - Breach of Sections 2, 41(1), 59(3) and 66(2) & (3)(a) of the Act

These grounds have been consolidated because they raise similar issues on the failure of the Procuring Entity to invite the highest scoring bidder for contract negotiations.

The Applicant alleged that the Procuring Entity breached Sections 2(b) and (c) of the Public Procurement and Disposal Act 2005 (herein after 'the Act') by failing to follow the ranking on the combined technical and presentation score as stated in Clause 2.0(6) of the Request for Proposal (herein after 'RFP'). It stated that the said clause provided that the consortia proposals would be ranked according to their combined technical and presentation scores. It further alleged that the Procuring Entity breached Sections 41(1), 59(3) and 66(2) & (3)(a) of the Act by failing to adhere to the RFP Clauses 2.0(7) and 6.4 which required the highest ranked consortium on the combined technical and presentation scores be invited for contract negotiations. It stated that Clause 6.4 of the RFP had provided that candidates with a combined score of 75% and higher would be considered for negotiations starting with the one with the highest combined total score and that in the event the negotiations did not culminate into an agreement, the next candidate would be invited for negotiations, and so on until an agreement would be reached with a qualified candidate.

In its response, the Procuring Entity averred that the primary objective of the public procurement system was economy and efficiency as set out in Section 2 (a) of the Act. It argued that all the other objectives set out in Section 2 were subsidiary to the primary objective of economy and efficiency. It further argued that in this light, Clause 2.0(6) of the RFP could therefore not override the express provisions of Section 85(2) of the Act as read together with Section 2(a) thereof.

The Procuring Entity submitted that the Applicant had a total combined score of 90.33 and that the Successful Bidder had a total combined score of 89.55, a difference of a negligible 0.78%. It further submitted that the financial bids of the two bidders were opened on 9th June 2011, and that the Applicant had quoted Kshs. 2,140,372,972 for a 'ramp and drive' option which option the Procuring Entity preferred. It stated that the Successful Bidder quoted Kshs. 1,514,540,158 for the same option; and thus the Successful Bidder's quote was Kshs. 630million cheaper than the Applicant's quote. It averred that in view of the negligible difference of 0.78% in the marks garnered by the two bidders and the large price difference of Kshs. 630million between the two proposals, its Evaluation Committee was unable to make a conclusive recommendation on the award of the tender. It further averred that this inability by the Evaluation Committee to make a recommendation on the award of the tender compelled the Procuring Entity's Secretariat to refer the matter to the Tender Committee for a conclusive and final decision.

The Procuring Entity submitted that the Tender Committee decided that in the unique circumstances of the case, it was fair, equitable and cost effective to award the tender to the Successful Bidder. It further submitted that Regulation 51(2) allowed the Tender Committee to make a decision on the award in the

absence of a conclusive recommendation by an Evaluation Committee on the award of a tender.

In response to the alleged breaches of Sections 59(3), 66(2) and 66(3)(a) of the Act, the Procuring Entity stated that the said sections regulated procurement by open tendering and were irrelevant in the tender under review which was under the Request for Proposals method. It further stated that Section 82 of the Act required Procuring Entities to consider both technical and financial proposals in awarding the contracts; and that it did so in this case. It therefore concluded that it could not have breached Sections 66(2) and (3) of the Act by allegedly introducing criteria extrinsic to the RFP because the consideration of financial proposals was imposed by law in Section 82 of the Act.

The Successful Candidate, Edon Consultants, fully aligned 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 the Procuring Entity's decision to commence negotiations with the Successful Bidder was on the basis that the combined technical evaluation and presentation scores for the Applicant (90.33) and the Successful Bidder (89.55) were very close (a difference of 0.78%) yet the Applicant's estimated cost for its proposed design was Kshs. 630million higher than the Successful Bidder's.

The issues for determination by the Board are therefore three fold:-

- i) Was the estimated cost of a design as proposed by a bidder, a Financial Proposal as envisaged under Section 82 of the Act;
- ii) What was the criteria in the RFP tender document for evaluating the estimated cost of a design as proposed by a bidder;
- iii) Did the Procuring Entity evaluate the estimated cost of construction in accordance with the RFP?

The first question that the Board deals with is:

Was the estimated cost of a design as proposed by a bidder, a Financial Proposal as envisaged under Section 82 of the Act?

The Board notes that Section 82 (5) provides that *“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 proposal, 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 notes that the Procuring Entity amended the requirements of the Financial Proposals under the RFP by a letter dated 7th April, 2011, whereby the bidders were not required to quote the actual amount of fees payable as part of the Financial Proposal; instead, the bidders were required to specify the preferred standard conditions of engagement and prescribed scales of fees applicable if awarded the contract.

The Board further notes that there was to be no scoring on the Financial Proposals; consequently technical proposals and the structure of fees were to be the only basis for contract negotiations as amended by the Procuring Entity in its letter dated 7th April, 2011 which provided Clauses 4 and 5 which stated as follows:-

4. *"The consortium will not be required to quote the actual amount of fees payable whether as a percentage, in figures or words as part of the Financial Proposal. Instead, the consultant is required to specify his/her preferred standard conditions of engagement and scales of fees for professional services and the relevant legal authority or legal framework (such as the Architects and Quantity Surveyors Act, Chapter 525 of the laws of Kenya) that will be applicable if awarded the contract.*

5. *There will be no scoring on the Financial Proposals. Consequently, technical proposals and the structure of fees will be the only basis for contract negotiations and ultimately the foundation on which the contract will be signed with the selected consortium."*

The Board has examined the Evaluation Report and notes that the technical evaluation and presentation evaluation was concluded with the result that the Applicant scored 90.33 and the Successful Bidder 89.55, and that with both bidders having attained the cut off mark of 75%, the financial bids of the two tenderers were opened on 9th June 2011 in line with Clause 6.3 of the RFP.

On examination of the Tender Opening Register for the financial bids and the evaluation report thereof, the Board finds that the bidders complied with the Procuring Entity's instructions that no fees were to be quoted and that bidders specified the preferred standard conditions of engagement and prescribed scales of fees applicable if awarded the contract.

The Board therefore finds that at the opening of the financial bids on 9th June 2011, the estimates for the cost of the bidders' designs were not disclosed as alleged by the Procuring Entity. The Board finds that these estimates were actually submitted by bidders as part of their technical proposals and evaluated by the Procuring Entity in the technical and presentation evaluations, and the results of the combined scores were announced at the opening of the financial bids.

Accordingly, the Board finds that the estimated construction cost of the designs submitted by the bidders were not Financial Proposals as envisaged under Section 82 of the Act.

The Board observes that there was no issue raised prior to opening of the financial bids as to the large difference in the estimates of the designs which would in any case have had no effect on the ranking of the bids as determined at the conclusion of the technical evaluation because the financial bids only quoted applicable fee scales. Therefore the Board finds that there would effectively be no combination of the financial evaluation with the results of the technical evaluation.

The second question that the Board is to answer is:

What was the criteria in the RFP tender document for evaluating the estimated cost of a design as proposed by a bidder?

The Board notes that under Clause 6.1 Technical Proposal, General Methodology and Design Criteria, the Procuring Entity had listed eight evaluation criteria itemized (A) through to (H) with a total score of 70 marks. Item (H) contained criteria for evaluation of the "Cost Estimate for the Project" and that the score allocated to it was 5, and that a total of 5 scores will be allocated to a realistic cost estimate. Other criteria under the General Methodology and Design Criteria were General methodology and terms of reference (3 marks); Evidence of Understanding General Scope of Work (7 marks); Specific Methodology by Each Member of the Consortium (20 marks); Presented Design Drawings (12 marks); Field Investigations and Site Analysis (8 marks); Work Program Tables and Charts (10 marks); Quality Assurance (5 marks).

The Board further notes that under Clause 6.2 Presentation scoring, the Procuring Entity listed seven attributes it was scoring, and that attribute 6 was on Credibility of the Estimated Cost of Construction and Total Cost of Ownership of Installations in the Proposed Complex, which had a maximum score of 10 out of 100 marks. Other attributes marked were:

Attribute	Marks
1. <i>"Candidate understands of scope of work and TOR</i>	- 10 marks
2. <i>Credibility of the proposed methodology for project planning, implementation, monitoring and closure</i>	- 20 marks
3. <i>Adequacy of resource outlay for the project</i>	- 20 marks
4. <i>Clear comparison of alternative designs and systems and justification for selection of the proposed design</i>	- 20 marks
5. <i>Suitability of the proposed design layout</i>	- 10 marks
7. <i>Report on level of success of similar designs</i>	- 10 marks"

The Board notes that Section 82(4) of the Act states that if the RFP document provides for additional methods of evaluation, the Procuring Entity shall conduct such methods in accordance with the procedures and criteria set out in the RFP. On examination of the RFP document, the Board finds that the only other evaluation method other than technical evaluation provided for in the RFP was evaluation of presentations. The Board did not find any criteria for evaluation of the differences in cost estimates of the bidders proposed designs, therefore in this regard; the Board finds no basis of asking the difference of Kshs. 630 million between the cost estimates of the Applicant and successful bidder as a ground for making the award.

The third question for the Board to deal with is:

Did the Procuring Entity evaluate the estimated cost of construction in accordance with the RFP?

The Board notes from the Evaluation Report that both the Applicant and the Successful Bidder were evaluated as per the evaluation criteria stated in the RFP with the result that the Applicant had a total combined score 90.33 and the Successful Bidder scored 89.55. These scores included marks for cost estimates for the bidders' proposed designs in terms of how realistic the estimates were and the credibility of the estimates.

The Board notes that at the hearing, the Procuring Entity's submitted that there was no issue with the scoring of the technical and presentation evaluations as done by the Evaluation Committee and that the main issue was that the bidders' combined scores were too close to discount the large cost difference between the Applicant's design proposal and the Successful Bidder's design proposal.

On examination of the Information to Consultants Clauses 2.0(6) and (7); and Clause 6.4, the Board notes that the RFP required the bidders proposals to be ranked according to their combined technical and presentation scores; and that candidates who will have attained a combined total score of 75% will be considered for negotiations starting with the bidder with the highest combined score.

The Board notes that even though the Evaluation Committee had evaluated the cost estimates as per the criteria set in the RFP, and the Applicant emerged

with the highest combined score, the Evaluation Committee did not make any recommendation on award of the tender and left it open to the Tender Committee to deliberate and make a decision on the award.

The Board notes that Regulation 51(1) prescribes what an evaluation report prepared by the Evaluation Committee shall comprise, and under Regulation 51(1)(i) the evaluation report shall contain a recommendation to award the contract to the lowest evaluated bidder. Therefore, the Board finds that Regulations envisage that under Regulation 51(2), the Tender Committee shall consider an evaluation report with a recommendation to award the contract to the lowest evaluated bidder and not a report which is inconclusive as to the recommendation on award of contract.

In conclusion, the Board finds that the bidders were evaluated by the Evaluation Committee in accordance with the evaluation criteria set out in the RFP with the result that the Applicant scored 90.33% and the Successful Bidder scored 89.55%; and that there was no criteria in the RFP for the evaluation of variances in the bidders' estimates of their designs which the Tender Committee considered after the decision on award was referred to it by the Evaluation Committee.

The Board therefore finds that by comparing the estimated costs of design of the two bidders and deciding that the estimated variance of Kshs. 630million was too large, the Procuring Entity applied a criteria that was not in the RFP document.

The Board also notes the Procuring Entity's submission at the hearing that during negotiations, the estimated costs of designs as submitted by the bidders could change either by increasing or decreasing depending on what design the Procuring Entity finally agreed upon with the successful tenderer.

The Board also observes that the source of cost estimates per square meter for the Applicant was the "The Quantity Surveyor official Journal on October-December 2010 vol. 12 Issue 004" published by the Institute of Quantity Surveyors of Kenya (IQSK) at Kshs. 45,800 per square meter whereas the Successful Bidder cost estimate was based on the prevailing competitive tender construction rates at Kshs, 35,000 per square meter. As the Board has already noted, the process of technical and presentation evaluation as conducted by the Evaluation Committee was done in accordance with the criteria set in the RFP; and further that the Procuring Entity had submitted at the hearing that it had no issue with the scoring as done by its Evaluation Committee.

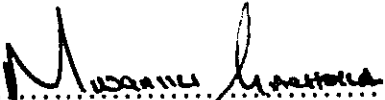
The Board also finds that all the requirements as set out under Section 2 are all equally important and none is more important than the other; and if they were, it would have been clearly set out in the Act.

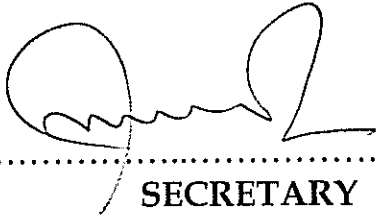
Accordingly, taking into account the foregoing these grounds of appeal succeed; as does the appeal in its entirety.

The Board orders, pursuant to Section 98(a) of the Act, that the award to the Successful Bidder is annulled. Further, the Board directs the Procuring Entity

pursuant to Section 98(c) of the Act to invite the Applicant, having scored the highest combined score, for contract negotiations in accordance with the Request for Proposal document.

Dated at Nairobi on this 22nd day of August, 2011


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CHAIRMAN
PPARB


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SECRETARY
PPARB

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