

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 39/2012 OF 31ST JULY, 2012

BETWEEN

**ANHUI CONSTRUCTION ENGINEERING LIMITED
IN JOINT VENTURE WITH CHINA AERO-TECHNOLOGY
INTERNATIONAL ENGINEERING CORPORATION
(CATIC).....APPLICANT**

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Airports Authority in the matter of Tender No. **KAA/ES/JKIA/658/DB** for Design/Build tender for construction of the Greenfield Passenger Terminal Complex and associated works at Jomo Kenyatta International Airport.

BOARD MEMBERS PRESENT

Ms. Judith A. Guserwa	- Member (in the Chair)
Mrs. Loise Ruhiu	- Member
Eng. C. A. Ogut	- Member
Ms. Natasha Mutai	- Member
Amb. C. M. Amira	- Member
Mr. Akich Okola	- Member
Mr. Sospeter Kioko	- Member
Mr. Joshua W. Wambua	- Member

IN ATTENDANCE

Mr. C. R. Amoth	- Secretary
Ms. Judy Maina	- Secretariat

PRESENT BY INVITATION

Applicant-Anhui Construction Group Engineering Limited

Issa M. Mansur	-Advocate
Nganga Mbugua	-Advocate

Procuring Entity-Kenya Airports Authority

George Kamau	-Legal Officer
Allan Muturi	-GM-Procurement
Victor Arika	-Legal Officer
Margaret Muraya	-Procurement
Simon Githaiga	-Engineer
Jonah Biwott	-Procurement Assistant

BACKGROUND OF THE AWARD

Request for Proposals

Request for Proposals was advertised in the local print media on 22nd and 23rd June 2011. One hundred and twenty (120) bidders purchased the tender document following the advertisement. Five (5) firms submitted proposals by the submission deadline on 17th November, 2011.

Technical and Financial Proposal Received

The Technical and Financial proposal were submitted by the following firms:

- 1) Anhui Construction Engineering Group Co. Ltd (ACEG) & China National Aero-Technology International Engineering Corporation (CATIC) joint venture
- 2) Beijing Construction Engineering Group Co. Ltd. (BECG) & Sinohydro Corporation Ltd. Joint venture
- 3) Larsen & Toubro Ltd.
- 4) Citi Bank (Submitted an Financial Proposal Only)
- 5) SIFIKILE

The Technical Proposals were opened in public while the Financial Proposals were held safe until finalization of the technical evaluation.

Table 1a indicates the details of the firms that submitted the Technical and Financial proposals.

Table 1a-Details of Firms that submitted Proposals on 17th November 2011

Firm No	Name and address	Associating firms and areas of specialization	Nationality of lead firm
1	Anhui Construction Engineering Group Co. Ltd. (ACEG) Address 230002 325 Wuhu Road, Baohe District, Hefei City, China	Joint Venture with China Aero-Technology International Engineering Corporation Ltd. (CATIC) Consultants: • Pascall &	Chinese

	<p>Tel: +86 13960455510</p> <p>Contact: Huang Hongyou</p>	<p>Watson Architects Ltd.</p> <ul style="list-style-type: none"> • Triad Architects Ltd. • URS-Scott Wilson • Millar Management 	
2	<p>Beijing Construction Engineering Group Co. Ltd.</p> <p>No.1 Gunalian Road, Xuanwu District, Beijing, 100055, China</p> <p>Tel: +8610-639227207</p> <p>Fax: +8610-63928055</p> <p>Contact: Qin Chao</p>	<p>Joint Venture with Sinohydro Corporation Ltd.</p> <p>Consultant</p> <p>AECOM Asia Company Ltd.</p>	Chinese
3	<p>Larsen & Toubro Limited, Construction, Buildings & Factories Mount Poonamalfee Road, Manapakkam, P B. No. 979, Chennai - 600 089. INDIA</p> <p>Tel: 044 2252 6000, 22528000 Fax: 044 2249 33'7</p> <p>WWW.Lntecc.com</p>	None	Indian
4	Citibank	Financial proposal only	

5	SIFIKILE	Africa Airport Design Group Theunissen Jankowitz Architects Boogartman & Partner Architects Ambro Afrique Consultants	South Africa
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Appointment of Evaluation Committee

The evaluation team comprising the following Seven (7) members was appointed to carry out evaluation of the Technical proposals under the chairmanship of Eng. Francis Ngigi

EVALUATION OF TECHNICAL PROPOSALS

General Approach

The evaluation team adopted the evaluation criteria in the RFP. Out of the five proposals received, only four(4) were subjected to technical evaluation as Citibank submitted financial proposal only

Mode of Carrying Out the Evaluation

Each member independently went through each of the technical proposal and summarized any shortcomings observed against the requirements of the RFP which was then presented in the second committee meeting held to finalize the assessment of proposals on the preliminary evaluation.

The Four (4) proposals received were subjected to a preliminary evaluation to determine those that met the minimum mandatory requirements. The

mandatory requirements as per clause 3.2.2 of the appendix to instruction to bidders were:

- i) Shall be an entity legally incorporated in the country of domicile or a joint venture linking such entities for purposes of carrying out and completing the works in this Tender
- ii) Shall provide evidence of past experience
- ii) Shall provide evidence of have carried and completed at least 1 No. Similar sized International Airport project in the last ten (10) years.
- iii) Shall provide evidence of having carried out and completed at least one other urban mixed use commercial development of a similar floor area in the last five (5) year.
- iv) Shall have consultancy capability through having designed and supervised the construction of at least one similar sized International Airport project in the last five years.
- v) Shall meet Minimum average annual construction turnover of US\$200million or equivalent in other currencies for the entity or for the lead firm. The turnover shall be calculated as total certified payments received for contracts in progress or completed, within the last FIVE_(5) years
- vi) The bidder shall submit a letter of commitment/ interest or intent to finance the project from a financier(s).
- vii) The bidder shall provide a tender surety of KES 300 Million
- viii) The bidder shall provide schedules on suitability of specialty equipment to be evaluated under Appendix to Instruction to Tenderers annex 6 item 4.

- ix) Power of Attorney committing the signatory to the Bid to sign the Bid
- x) Joint Ventures Shall submit copies of their joint Venture Agreement as per bid requirements
- xi) Information on past Non-Performance and Litigation History
- xii) Submission of Audited Accounts for the last 5 years
- xiii) Details of Key Personnel and their CV's

Table 1b, details the preliminary evaluation against mandatory requirements to determine which firms would qualify for detailed technical evaluation.

Table 1 b- Preliminary Evaluation / Analysis

Item	CRITERIA	B IDDERS			
		1. ACEG + CATIC	2. BCEG + SINOHYDRO	3. LARSEN & TUOBRO	5.SIFIKI LE
1	Bidder including Join Venture Partners or all members of the Consortium Shall meet eligibility requirements stipulated in the Bid Document Appendix to Instruction to Tenderers' Clause 3.2.1 and 3.2.2.				
	Eligibility Requirements Shall be:				
(a)	The Bidder shall be an entity legally incorporated in the country of domicile or a joint venture linking such entities for purposes of carrying out and completing the works in this tender	Provided Documentation	Provided Documentation	Provided Documentation	Did not Provide
(b)	Evidence of previous experience. These shall be completion certificates from past Clients/Employers. Evidence of works carried out as per the requirements in Clause 3.2.2 shall be provided	Provided	Provided	Provided	Did not Provide

Item	CRITERIA	B ID DERS			
		1. ACEG + CATIC	2. BCEG + SINOHYDRO	3. LARSEN & TUOBRO	5.SIFIKE
	Qualification Requirements				
(i)	Lead Contractor Shall have carried and completed at least 1 No. similar sized International Airport Project in the last ten (10) years. The size shall correspond to the number of contact gates and aircraft stands	Provided <ul style="list-style-type: none"> Shenzen BoAn Internatinal Airport 	Provided <ul style="list-style-type: none"> T3 Beijing Capital Internatio nal Airport T3 	Provided <ul style="list-style-type: none"> Indira Gandhi Interna tional Airport 	Did not Provide
(ii)	Lead Contractor Shall have carried out at least one other urban mixed use commercial mixed use commercial development of a similar floor area in the last five (5) years.	Provided <ul style="list-style-type: none"> Apartment Building for Hefei shiji Jinguan Hotel 	Did not Provide <ul style="list-style-type: none"> World Trade Center does not meet floor area criteria Microsoft China Resource center does not meet floor area criteria 	Provided <ul style="list-style-type: none"> ICICI Bank Buildin g 	Did not Provide
(iii)	The Lead Design Consultant in the Design/Build team shall have designed and supervised the construction of at least one similar sized International airport project in the last five (5) years.	Provided <ul style="list-style-type: none"> Terminal 5 Heathrow airport 	Did not Provide – Provided documents of projects undertaken by AECOM US Inc and not AECOM Asia Ltd. which is what is associated firm in the bid	Provided <ul style="list-style-type: none"> Indira Gandhi Interna tional airport as an EPC project with in-house Consul tants 	Did not Provide
(iv)	Project Financing : The bidder shall provide a letter of intent from the financier to fund the works as per the terms and conditions of the Bid	Provided <ul style="list-style-type: none"> China Developm ent Bank China Exim Bank 	Provided <ul style="list-style-type: none"> China Exim Bank 	Provided <ul style="list-style-type: none"> Deutsc he Bank 	Did not Provide
(v)	The Bidder Shall provide a tender surety of KES 300 million	Provided <ul style="list-style-type: none"> Commerci al Bank of Africa 	Provided <ul style="list-style-type: none"> Kenya Commerc ial Bank 	Provided <ul style="list-style-type: none"> Citi Bank 	Did not Provide
(vi)	The Bidder Shall provide schedules on suitability of specialized equipment	Provided	Provided	Provided	Did not Provide

Item	CRITERIA	B IDDERERS			
		1. ACEG + CATIC	2. BCEG + SINOHYDRO	3. LARSEN & TUOBRO	5.SIFIKI LE
2	Number of bids submitted by the Bidder	One	One	One	
3	General Completeness of the bid	Bid Complete	Bid Complete	Bid Complete	Did not Provide
4	Non Performance/Litigation history All pending litigation shall in total not represent more than <u>Thirty</u> percent (30 %) of the Bidder's net worth and shall be treated as resolved against the Bidder.	None	None	None	Did not Provide
5	Partial Tender	Bid complete	Bid complete	Bid Complete	Bid Incomplete
6	Registration of bidders firms: All bidders (including JV Partners or member firms to a consortium) shall submit their Certificates of Incorporation or Registration	Provided	Provided	N/A	Did not Provide
7	Joint Ventures: Joint Ventures shall submit copies of their Joint Venture Agreement as per the bid requirements	Provided	Provided	N/A	Did not Provide
8	Signing of Bids; Bid shall be signed by the authorized person(s) of the bidder as per requirements of the bidding document	Signed	Signed	Signed	Did not Provide
9	Power of Attorney: Bid shall be signed by the authorized person(s) of the bidder as per requirements of the bidding document	Huang Hong You	Qin Cho	T Krishna	Did not Provide
10	Bid Validity	Contained in financial	Contained in financial	Contained in financial	Did not Provide

Item	CRITERIA	B ID DERS			
		1. ACEG + CATIC	2. BCEG + SINOHYDRO	3. LARSEN & TUOBRO	5.SIFIKI LE
11	Submission of Audited Accounts for the last five years	Provided	Provided	Provided	Did not Provide
12	The lead contractor shall meet Minimum average annual turnover of US\$200million or equivalent in other currencies within the last FIVE (5) years	Provided – Kshs. 174.40 Billion	Provided – USD. 2.74 Billion	Provided – USD. 6.318 Billion	Did not Provide
13	Deviations/Omissions/Reservations	None	None	None	
14	Minimum Key Personnel Requirement: CV's shall be provided for the Key personnel .	Provided	Provided	Provided	Did not Provide
	Remarks	Qualifies for detailed evaluation	Does not qualify for detailed evaluation	Qualifies for detailed evaluation	Does not qualify for detailed evaluation

Detailed Technical evaluation

The following 2 (two) firms listed in table 2 were found to have met the mandatory requirements and were therefore qualified for detailed examination:

Table 2- Qualified firms for detailed technical evaluation

No.	Qualified Firm's Name	Nationality	Region
1	ACEG & CATIC JV	Chinese	Asia
2	Larsen & Tuobro	Indian	Asia

The completeness of the two firms was checked in accordance with Clause 2.3.4 of the instruction to bidders and noted as detailed table 3:

Table 3 - Completeness to the requirements of the RFP

	ACEG & CATIC	Larsen & Tuobro Ltd
Authorized Representative	Mr. Huang Honyou	Mr. T . krishna
Initialing of Pages	Pages initialed	Not initialled
Previous Experience	Provided	Provided
Comments on TOR	Provided	Provided
Methodology & Work Plan	Provided	Provided
Proposed Staff	Provided	Provided
Signed CV's	CVs signed	CVs signed
Team Leader	Huang Hongyou	S Venkatesh
Completeness of Presentation	Complete	Complete

Conclusion of the completeness check

There were no major omissions in the proposals and the evaluation committee accepted the two proposals for detailed evaluation.

Detailed Technical Evaluation and Rating

1) Building Form and Function:

- **Theme:** overriding theme in the entire design
- **Aesthetics:** Landmark building with Contemporary look & feel.
- **Style:** appropriate form and style taking into consideration local context

- **Function:** Efficient layout and spatial resolution to enhance passenger flows and processes.

2) **Building Performance:**

- **Cooling and Ventilation System:** Meet/exceed requirements for comfort.
- **Energy management control system:** Meet/exceed requirement. Meet demands of complex control strategies for both artificial lighting and Air-conditioning.
- **Natural Lighting:** Meet the required day lighting levels and distribution

3) **Structural Design:**

- **Innovativeness:** How novel is the structural system?
- **Cost effectiveness:** is the structure cost effective?
- **Large Spanning Structures:** Few structural elements in occupied spaces

4) **Interior Design:**

- **Theme :** consistent with overall theme, form and style of terminal building
- **Aesthetics:** Effective use of desirable visual elements and creative use of internal finishes etc.

5) **Sustainable measures:**

- **Sustainable Measures:** Recycling, demolition waste, water conservation, recycled materials, etc.

- **Indoor Air Quality:** Control strategies for indoor air quality, low VOC materials, etc.
- **Alternative Energy:** Utilization of alternative energy technologies.
- General Compliance with LEED-NC 2009

6) Bidder's Organization, Work Plan and Methodology:

- Overview and understanding of the project
- Quality assurance in the Design
- Bidders overall organization to carry out and deliver the Works including organization of the firms and completeness of the management and site teams: a) Design and Construction Supervision, b) Construction works
- Methodology for carrying out the works: a) Design and Construction Supervision and b) Construction works
- Works program, task coverage and resources allocation in Design, Construction Supervision, Construction works
- Availability and mobilization plan of Construction equipment
- Quality management plan in Construction works and supervision of construction works
- Environmental management plan
- Testing, commissioning, training and operational readiness

7) Bidder's previous experience in similar works:

- Airport works with characteristics similar to the proposed passenger terminal complex Construction works

- Airport works with characteristics similar to the proposed passenger terminal complex Design and Construction Supervision Consultancy Services
- Urban mixed use commercial development with similar or above floor area Construction works
- Suitability of proposed specialized equipment in this bid shall be assessed the following:. 5
- For each of the above, provide name of manufacturer, ISO standard for the equipment, a letter of reference from a major hub airport home to a major carrier from any of the following alliances: Star Alliance, Sky Team and One World.
- Also, confirmation that a two year warranty shall be provided required

8) Bidder's Personnel Key Competencies:

- Educational & Professional Qualifications of Key Personnel
- Overall Experience
- Pertinent Experience
- Experience in the Region

Strength and Weaknesses of the Firm

After detailed technical evaluation, the following was noted as strengths and weaknesses of the seven firms.

i) M/S ACEG & CATIC JV

Strengths

- The firm is well established and has wide experience in similar assignments.

- The firm showed good understanding of the scope of consultancy services and construction works.
- The Theme Concept design was excellent
- The proposed methodology and approach was comprehensive
- Personnel proposed for the assignment have sufficient pertinent experience in similar works.

Weaknesses

- There presentation on Quality Assurance in Design was fair. The bidder concentrated their write up on quality assurance during construction.
- Some of the proposed personnel although had vast pertinent experience had little experience in the region.
- The bidder did not confirm the warranty period for the proposed specialized equipment

ii) M/S LARSEN & TUOBRO

Strengths

- The firm is well established. Has good specific experience related to the assignment.
- The bidder has demonstrated good understanding of the objectives of the assignment as detailed in organization approach and methodology.

Weaknesses

- Proposed personnel had very little experience in the region and some of them had no pertinent experience. Further the bidder's submission on details of tasks undertaken by proposed staff was poor as some of them were not detailed.
- The bidder had indicated that proposed personnel were in-house as the firm is multi-disciplinary, however the proposed staff for Airport Planner and Architect are not in-house employees. No details were provided to indicate where the personnel had been sourced from and the relationship with L & T was not clear.
- The bidder's quality management plan in construction works and supervision of construction works was poor. The bidder submitted a Quality Management Plan (QMP) for Abu Dhabi Airport instead of what they were proposing for JKIA, an indication of cut and paste.
- It was noted that most of the methodology submission by the bidder was generic rather than specific for the project.
- The bidder did not submit documentation on Seats in the submission for specialized equipment.

Results of the Detailed Technical Evaluation

The results of the detailed technical evaluation are as summarized in Table 3.4

Table 3.4: Summary of Technical Scores and Ranking

BIDDER'S NAME	ACEG & CATIC	Larsen & Tuobro
<i>Criteria</i>	<i>Scores</i>	<i>Scores</i>
Building Form and Function	24.45	18.00
Building Performance	18.07	12.29
Structural Design	17.43	13.75
Interior Design	9.00	6.07
Sustainable Measures	17.70	12.14
Sub-total	86.86	62.21
Total (Weighted against 45)	39.09	28.00
Organization, Work Plan & Methodology	23.35	17.24
Proposed staff	23.52	17.50
Total Score^a	85.96	62.74
Rank	1	2

Table 3.5 gives a summary of the technical scores.

Table 3.5: Summary of Technical Scores

	Concept design rating (Max 45)	Organization work plan and methodology (Max 28)	Bidders competence and key personnel (Max 27)	TOTAL SCORE (MAX 100)
ACEG & CATIC JV WITH Pascall and Watson	39.09	23.35	23.52	85.96

Recommendations of the Technical Evaluation

In accordance with the evaluation criteria, the qualifying score for further consideration in the evaluation is 70%.

It is therefore recommended that financial proposals for the following firm be opened and evaluated to conclude the evaluation and make recommendations for award.

- i) ACEG & CATIC JV in association with Pascal & Watson consultants, having scored 85.96.

FINANCIAL EVALUATION

Issues Faced During Evaluation

The Financial Proposal for the Technically Qualified Bid was publicly opened on 9th December 2011. There were no major issues faced during the evaluation, the exchange rate used for conversion of prices into common currency was the Central Bank of Kenya Rates applicable on 28th October 2011 a copy attached at Annex V (Miscellaneous Annexes).

The financial proposals were checked for completeness and responsiveness to the RFP requirements. Table F1 below summarizes the findings of the preliminary examination of the proposals.

Table F1-Completeness and responsiveness to the requirements of the RFP

	ACEG + CATIC
Not more than 3 currencies	√
Use of Standard Forms	√
Original and Copy	√
Completeness of Presentation	Complete

Adjustment made to the prices

The financial proposal for the technically successful firm was checked for the following and adjustment made to the prices as noted here below:

- i) Arithmetic errors
- ii) Consistency between the Technical and Financial Proposals

Arithmetic Errors & Corrections Arising from Inconsistencies

There was one arithmetic error noted in the Financial Proposals as follows:

ACEG + CATIC- (Submitted – Kshs. 64,752,521.00)

The Financial Proposal contained one arithmetic error. On Page Nine of the BQ the bidder under the Collection for Electricals indicated a total of Kshs. 3,410,000,000.00 instead of the corrected sum Kshs. 3,403,788,100.00 thereby have a net effect of -ve 6,231,900.00 on the bid sum. Considering 10% Contingency and 5% Consultancy supervision Charges the overall effect of the error on the bid sum is -ve 7,166,685.00. The corrected bid sum is therefore **Kshs. 64,745,354,315.00** against submitted Kshs. 64,752,521.00.

Table F2 - comparison of Pre-Bid Estimate and Financial Proposal

Item No.	Description	Unit	Lump Sum Price (KSHS) Pre-Bid Estimate	Lump Sum Price (KSHS) Corrected ACEG + CATIC
	Construction Related Cost Collection			
1	General Costs		485,048,609.38	3,000,000,000.00
2	Design Related Costs		11,017,779.70	2,800,000,000.00
3	Architectural Works, Finishes, Furniture and Fitting		8,882,548,299.72	9,980,000,000.00
4	Structural Costs		10,313,625,525.79	7,893,700,000.00
5	Geotechnical costs		1,085,644,792.19	500,000,000.00
6	Mechanical Costs		15,571,874,797.04	3,861,550,000.00
7	Electrical Costs		5,200,058,144.40	3,403,768,100.00
8	Utilities Costs		1,528,836,172.86	5,610,250,000.00
9	Transportation Costs		3,346,751,053.32	10,370,000,000.00
10	Dewatering and Ground Water Control		73,244,298.53	190,000,000.00
11	Special Airport System		12,819,427,143.71	8,600,690,000.00
12	DayWorks		77,594,600.00	90,350,000.00
13	Subtotal		59,395,671,216.64	56,300,308,100.00
14	Add 10% Contingency		5,939,567,121.66	5,630,030,810.00
	Add 5% For Employer's Consultancy Supervision		2,969,783,560.83	2,815,015,405.00
Grand Carried to Form of Tender			68,305,021,899.13	64,745,354,315.00

Distribution of Bid Price.

- i) The Pre- Bid estimate for the works is **Kshs. 68,305,021,899.13** including taxes.
- ii) A summary comparison of the Pre-Bid estimate and the financial bid including all taxes based on the Sectional Bill Totals is as tabulated below:

From Table F2, it is noted that the financial bid is -5.21% as compared to the pre-bid estimate. The bidder is within the margin of 25% of the pre-bid estimate.

No front loading was observed in terms of elemental comparison of bid prices with the pre-bid estimate, but it was noted that pricing for General Costs, Design Related Costs, Utilities Costs, Transportation Costs and Dewatering & Ground Water Control was high compared to the pre-bid estimate.

Proposal to Finance the Project

The bidder has submitted two Letters of Intent/Interest to Finance the Project from China Development Bank Corporation and China Exim Bank respectively. The Bidder has met the conditions set out in the Bid Document with respect to the Financing Proposal.

The scoring for the Financing Proposal was as indicated in Table F3.

Table F3: Scoring for the Financing Proposal

No	Criteria	Points	Evaluators							Average
			A	B	C	D	E	F	G	
1	Terms of the Loan Tenderers shall propose the tenor of the loan including the repayment period and the grace period. KAA prefers a long term loan of at least 20 years, with a grace period of at least 5 years. - <i>Bidder gave the repayment period of between 20 -25 years with a grace period of 5 - 7 years</i>	20		20	15	20	20	20	20	19.17
2	Interest Tenderers shall indicate both fixed and floating interest rate options. The floating rate shall be based on a 6 month LIBOR plus/minus margin, if applicable. - <i>The bidder indicated a Fixed Interest of 2% - 6% and Floating Interest of 2% - 4 % with a commitment fee of 0.25% - 0.5%</i>	20		12	15	15	15	18	15	15
4	Security of the loan The secured obligations shall be secured by a pledge to receivables that are not encumbered to other loans. However, Tenderers can propose other forms of security or other forms of security arrangements provided that such arrangements are acceptable to KAA and will not result in material increase of cost to KAA. KAA does not offer its immovable assets as security. However, consideration can be made on providing the Greenfield Terminal as security.	20		20	20	20	20	18	18	19.33

5	Other charges arising from the facility Tenderers will be required; as part of the proposal, to quote any other charges that will be applicable to the facility. Other transaction costs on accounts to be maintained for the facility shall also be tabulated. Such cost may include ledger fees, prepayment penalties, commissions and others which may be specified in the proposal.	20		20	20	20	20	20	20	20
6	Conditions Precedent Tenderers shall state or list the conditions that shall be fulfilled by KAA before a drawdown request is satisfied. If none, please indicate.	20		20	20	20	20	20	20	20
	Currency of the Facility Bidders must indicate the currency of the facility. The financing is expected to be in United States of America dollars(USD) or a combination of Kshs and USD.	Mandatory	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	
	Facility repayment intervals KAA intends to repay the loan in semi-annual installments of both principal and accrued interest over the term of the loan. Tenderers shall submit a schedule indicating the annual repayments for the principal and interest covering the full term of the loan. Tenderers can also indicate other favorable repayment intervals.	Mandatory	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	

Availability of the Facility Bidders must confirm that funds are available, for drawdown, on signing of the contract for the construction of Greenfield terminal works. Bidders must indicate preferred disbursement methods e.g Advance, reimbursement, direct payment etc.	Mandatory	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	
Mode of Operation Tenderers shall indicate the structure of operating the loan and repayment methods as applicable.	Mandatory	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	
Total Cost Summary Tenderers shall be required to prepare a summary of all possible cost to be incurred including interest cost but excluding proposed third party payment charges and indicate the effective borrowing cost per annum.	Mandatory	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	Submitted	
TOTAL	100		92	90	95	95	96	93		93.50

NB – Total Score reduced to a weighting of 10%

The combined Technical and financial scores were as follows:

Table F 4 – Combined Technical and Financial Scores

	Technical Evaluation			Financial Evaluation		Financing Evaluation		Combined Evaluation	
Bidders Names	Technical scores ^a S(t)	Weighted scores S(t) x T ^b	Technical rank	Financial scores ^c S(f)	Weighted scores S(f) x F ^d	Financing scores ^a S(Fn)	Weighted S(fn) x Fn ^e	Scores S(t) 0.6T + S(f)0.3 F+ 0.1Fn	Rank
ACEG + CATIC	85.96	51.58	1	30.00	30.00	94.00	9.40	90.98	1

Recommendations of the Evaluation Committee

From the foregoing the Evaluation Committee recommended that the Design/Build Tender for the Construction of the Greenfield Passenger Terminal Complex and Associated Works at JKIA be awarded to Anhui Construction Engineering Group Co. Ltd. (ACEG in Joint Venture with China National Aero-Technology International Engineering Corporation (CATIC) at the corrected Tender Sum of Kshs. 64,745,354,315.00 (Kenya Shillings Sixty Four Billion, Seven Hundred and Forty five Million, Three Hundred and Fifty Four Thousand Three Hundred and Fifteen only) including all taxes.

TENDER COMMITTEE DECISION

The Kenya Airports Authority Tender Committee at its Meeting No. 175 held on 15th December, 2011, under Minute No. 2, adjudicated the subject tender and approved award as per the recommendation of the Evaluation Committee. The Tender Committee further recommended the following:

1. Provision of cost estimate which should be competitive in comparison to similar projects in other countries.
2. Final contract be executed only after financial negotiations with the financier were concluded.
3. The award price be in US Dollars
4. Handling of all issues during negotiation of specific terms such as warranties on equipment and other associated terms.

The Successful Bidder was notified of the outcome of the tender via a letter dated 16th December, 2012.

In its meeting No. 206 of 27th July, 2012 (Special), the Tender Committee was informed of the resolution passed by the KAA Board of Directors in its meetings of 21st February, 2012 and 22nd May, 2012, respectively, to terminate the contract for the construction of the Greenfield Terminal Complex which had been awarded on 15th December, 2011 to M/s An Hui Construction Engineering Group Ltd and M/s China Aero-Technology International Engineering Corporation.

The Tender Committee considered the Board of Directors' resolutions and resolved that, due to the position taken by the Board of Directors, the continuation of this tender in its current form may not be tenable. Consequently, it recommended the termination of the tender.

There is no evidence that the decision to terminate the tender was communicated to the Applicant or reported to the Public Procurement Oversight Authority.

THE REVIEW

This Request for Review was lodged on the 31st day of July, 2012 against the purported decision by the Kenya Airports Authority made on the 26th day of July, 2012 in the matter of Tender No. KAA/ES/JKIA/658/DB for Design/Build Tender for construction of the Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport. The Applicant has raised 20 grounds as the basis for the review and seeks the following Orders:

- i) **The Board annuls and/or quashes the purported resolution made by the Kenya Airports Authority on 26th July 2012 or any other resolution, act or decision seeking to terminate the procurement process with respect to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.**
- ii) **The Board directs the Kenya Airports Authority to execute a Contract with the Applicant with respect to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport forthwith.**
- iii) **The Board restrains the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.**

- iv) **The Board restrains the Minister for Transport, the Permanent Secretary and the Ministry of Transport, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.**
- v) **The costs of this Request for Review be awarded to the Applicant.**

PRELIMINARY OBJECTION

At the commencement of the hearing the Board noted that the Procuring Entity had filed three grounds of Preliminary Objection in the following terms:-

1. **Time limitation:** The request for review is time-barred as it is contrary to Regulation 73 (2) -(c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as “the Regulations”) which stipulates that Request for Review under Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the Act”) shall be made within fourteen (14) days of the notification under the Act.
2. **Lack of Request for Review Grounds statutorily required by Section 93 of the Act’s threshold:** As drafted and presented to the Board, the request for review has no legal backing of Section 93 of the Act and the Regulations in so far as the *jurisdiction of the Board is concerned under the law*, in that:

- (i) The Request for Review has not presented any grounds on loss or damage suffered by the Applicant due to breach of the duty imposed on the Procuring Entity by the Act or the Regulations, for consideration by the Board. (***Section 93(1) of the Act***).
- (ii) The appeal is frivolous, in that, there is neither oral nor written termination notice issued to the Applicant in respect of **Section 36** of the Act. Therefore, the Request for Review is completely contrary to the spirit of the Act and Regulations.

3. **Lack of merit for want of jurisdiction:** As this tender has been under investigation, the Request for Review is premature as the Review Board power's is only invited under section 106 in respect of review of the order of the Director-General made under section 105 of the Act

The Board noted that before the issues of the Preliminary Objection could be argued, the Applicant sought directions from the Board on the basis that the subject matter before it was also being investigated by the office of the Director General of PPOA as evidenced by the pleadings filed before the Board.

The Applicant further stated that it was aware the matter had also been discussed before Parliament and the Speaker of the National Assembly had directed three sub-committees dealing with Transport matters to investigate the matter and submit its report to the House on or before the 31st of August, 2012. It therefore sought to know from the Board the direction the instant matter would take in view of the cited matters.

On its part, the Procuring Entity stated that it had disclosed in its response to the Applicant's Request for Review that the matter was under investigation by the Director General of the Public Procurement Oversight Authority (POA) and they were still waiting for his report. It also confirmed that the matter was discussed in Parliament and the Speaker had directed investigations to be carried out touching on the matter.

The Board has considered the issues raised by the Applicant and the Response by the Procuring Entity and noted as follows:-

1. The subject tender is indeed a matter of investigation by the Director General of PPOA having been referred to his office by the Permanent Secretary Ministry of Transport.
2. The subject matter before the Board has also been the subject of discussion in Parliament in the recent past and is still being investigated by the relevant Parliamentary House Committees.

The Board is alive to the Provisions of Section 114 of the Act which provides as follows:-

"114. (1) No investigation shall be commenced or continued under this part, and no order shall be made under this part, in relation to an issue that the Review Board is reviewing or has reviewed under Part VII.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.

In view of the foregoing provisions, the Board therefore holds that the Request for Review as filed is properly before it for determination

irrespective of investigations by other independent bodies. Therefore, the Board hereby directs that the matter before it will proceed to hearing within its mandate under Section 93 of the Act which provides as follows;

“(1) Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

(2) The following matters shall not be subject to the review under Section (1)-

- a. The choice of a procurement procedure pursuant to part IV;*
- b. A decision by the procuring entity under Section 36 to reject all tenders, proposals or quotations;*
- c. Where a contract is signed in accordance to section 68; and*
- d. Where an appeal is frivolous.*

The Procuring Entity argued that the Board lacked jurisdiction to entertain the instant application because it was not premised on the provision of Regulation 73 of the Act.

It added that Regulation 73 to the Act also excluded the Board from entertaining matters that were not made within 14 days of the occurrence of the alleged breach complained of, or of the notification of the award.

It submitted that the Request for Review as filed by the Applicant lacked the legal backing of Section 93 of the Act and Regulations thereto in so far as jurisdiction of the Board is concerned as there was no cited breach of the provisions of the Act nor any written or oral communication of the termination notice issued to the Applicant.

On the issue of the Preliminary Objection, the Procuring Entity submitted as follows:-

- 1) Time limitation:** The Request for Review is time-barred as it is contrary to Regulation 73 (2)-(c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") which stipulates that a Request for Review under the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") shall be made within fourteen (14) days of the notification under the Act.
- 2) Lack of Request for Review Grounds statutorily required by section 93 of the Act's Threshold:** As drafted and presented to the Board, the Request for Review has no legal backing of Section 93 of the Act and the Regulations in so far as the *jurisdiction of the Board is concerned under the law*, in that:
 - (i) The Request for Review has not presented any grounds on loss or damage suffered by the Applicant due to breach of the duty imposed on the Procuring Entity by the Act or the Regulations, for consideration by the Board. (*Section 93(1) of the Act*).
 - (ii) The appeal is frivolous, in that, there is neither oral nor written termination notice issued to the Applicant in respect of **Section 36** of the Act. Therefore, the Request for Review is completely contrary to the spirit of the Act and Regulations.
- 3) Lack of merit for want of jurisdiction:** As this tender has been under investigation, the Request for Review is premature as the Review Board's power is only invited under Section 106 in respect of review of the order of the Director-General made under Section 105 of the Act.

Finally, it argued that the Request for Review as filed was therefore premature and the same should have been filed in another jurisdiction as envisaged under Section 99 of the Act.

In response, the Applicant stated that the objection as filed was not a preliminary objection based on law as it touched on issues of fact relating to the notification of the award of tender.

It argued that the Procuring Entity's reference to the provisions of Sections 67 and 83 was misplaced as the same had no relevance to the application as filed. It added that the application as filed was not based on non-notification of the award of tender. It submitted that the application is challenging the purported nullification of the award by an entity that did not have the legal mandate so to do.

It further submitted that its Request for Review was premised on Section 93 of the Act which section empowers the Board to deal with all matters filed before it as envisaged by the said section.

It argued that the notification of the award created legal obligations that were binding in law and the Board was duty bound to ensure compliance of such obligations within the parameters of the law.

It stated that termination of an award by the Procuring Entity under Section 36 of the Act could not be effected after the notification of the award and acceptance of the same.

It referred the Board to a High Court Decision in *H.C.C.C. No. 1260 of 2007 inter Selex Sistemi Integrati* in which the High Court held that:

"In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the applicants and

the interested party, and even the 2nd Respondent. This cannot be a situation covered by the ouster clause under Section 36 (1) of the Act. It is my finding and decision that the ouster clause under Section 36 (1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the procuring entity that actuated the proceedings. I therefore hold that both the 1st Respondent and this court has jurisdiction to consider and review the decision of the 2nd Respondent, the procuring entity, to terminate the awarded Tender”.

It stated that the Board had a duty to ensure that the Procuring Entity acted within the provisions of Section 2 of the Act which clearly stipulates the objectives of the Act.

It further referred the Board to its wide powers as envisaged at Section 98 of the Act which empowers the Board to carry out its mandate in ensuring compliance with the Act and the Regulations thereto.

Finally, it submitted that Article 227 of the Kenya Constitution 2010 supported its cause as it required a procurement process that was fair, transparent and competitive among other things. In that regard, it argued that the Constitution enjoined the Procuring Entity to comply with the legal provisions of the Law especially in matters of integrity and transparency.

With regard to the time limitation, the Applicant argued that although it was notified of the award of tender vide the Procuring Entity's letter of 16th December, 2011 nothing had happened within 14 days from the said date of the notification to warrant it moving the Board. It stated that on the 26th of July, 2012, it became aware that the Board of Directors of the Procuring Entity “purported” to annul and/or cancel the award of tender made to it.

It added that it moved the Public Procurement Administrative Review Board within four days of learning of the move by the said Board of Directors. Therefore, it maintained that the time bar did not arise as it had exercised its right of review under Section 93 of the Act and not Regulation 73 as argued by the Procuring Entity. It therefore prayed to the Board to overrule the objection to pave way for the hearing of the Application on merit.

In reply, the Procuring Entity informed the Board that the award of the tender was neither terminated nor annulled as alleged by the Applicant. It further stated that in fact, it had entered into negotiations with the financiers appointed by the Applicant (being the Successful Bidder) and is indeed in the process of negotiating the terms of the contract with the appropriate parties.

The Board has carefully considered the submissions of the parties and the documents that were submitted before it and makes the following findings.

On the issue of Jurisdiction, the Board notes that Sections 68 and 93 of the Act provide as follows:-

Section 68:-

- 1) *"The person submitting the successful tender and the procuring entity shall enter into written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under Section 63.*
- 2) *The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification.*
- 3) *No contract is formed between the persons submitting the successful tender and the procuring entity until the written contract is entered into"*

Section 93:-

- 1) *"Subject to provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a Procuring entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed.*
- 2) *The following matters shall not be subject to the review under subsection (1)-*
 - (a)The choice of a procurement procedure pursuant to Part IV;*
 - (b)A decision by the Procuring Entity under Section 36 to reject all tenders, proposals or quotations;*
 - (c)Where a contract is signed in accordance to section 68; and*
 - (d)Where an appeal is frivolous"*

The Board notes that although the Procuring Entity awarded the Applicant the tender vide its notification letter of 16th December, 2011, it has not executed the **contract** in terms of the provisions of Section 68(2) of the Act. The Board further notes that although the notification letter issued to the Applicant did not specify the time within which the contract would be signed, the same stated as follows:-

"The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee".

Pursuant to the foregoing, the Procuring Entity has confirmed to the Board that the negotiations alluded to in the aforementioned letter are underway with the relevant parties and in fact there has not been any annulment and/or termination of the tender award as alleged by the Applicant.

Therefore, the Board finds that the issue of whether or not there has been annulment or termination of the tender before signing of the contract is a

matter that falls within the jurisdiction of the Board. This decision is guided by the holding in the case of *Republic-vs.- P.P.A.R.B, H.C.C.C. No. 1260 of 2007* already cited above.

On the issue of time bar, the Board notes that the Applicant lodged its Application for Review premised on the Provisions of Section 93 of the Act and not Regulation 73 as alleged by the Procuring Entity.

The Board further notes that the Application as filed by the Applicant does not fall under those matters itemized at Section 93(2) of the Act as set out above. In these premises, the Board finds that the objection based on limitation of time would have been sustained if the application had been lodged pursuant to the provisions of Regulations 73 to the Act which regulation envisages appeals by unsuccessful bidders.

Accordingly, all the limbs of the Preliminary Objection fail.

In view of the above holding, the Board orders that the Request for Review as filed proceed to hearing on merits.

When this matter came up for hearing on 21st August 2012, the Applicant's advocate on record, Mr. Issa, was unable to attend on grounds of ill health as attested to by a letter from his doctor to that effect, and accordingly, through Mr. Nganga Mbugua, who was holding brief for him, informed the Board that he had been instructed by Mr. Issa to move the Board for adjournment.

Upon hearing the motion for adjournment, the Board granted the application and directed the parties as follows:

1. That the Applicant should inform the Board when the matter comes up for hearing on 22nd August 2012, as to from where, and how, it obtained the documents annexed to its pleadings as exhibits.

2. That the Procuring Entity should inform the Board as to the status of the implementation of the project, which is the subject of this Application.

The reason for the request by the Board to Applicant to furnish it with information as to the source of the documents referred to above was that, upon careful consideration of the nature of the documents, the Board had formed the impression that they appeared not to have been procedurally obtained in accordance with Section 44 of the Act and accordingly, might not therefore, *prima facie*, properly be before the Board.

Pursuant to the direction by the Board, the Applicant filed with the Board an affidavit sworn by one I Zheng Yi, dated 21st August, 2012, setting out the sources of the exhibits annexed to the Applicant's pleadings. On its part the Procuring Entity availed to the Board a document dated 21st August, 2012, and headed **"Implementation of Jomo Kenyatta International Airport Expansion Public Procurement Administrative Review Board Brief by Kenya Airport Authority"**, herein referred to as the "Brief", which sets out in detail the genesis of the project and its current status.

When the matter resumed for hearing on 22nd August, 2012, the Procuring Entity informed the Board that it wished to raise a Preliminary Objection based on its pleadings, according to which it sought the directions of the Board on the issue, and upon there being no objection by the Applicant to the motion, the Board directed the parties to proceed to argue the Preliminary Objection.

On its part, the Applicant sought direction of the Board regarding information obtained from the Hansard Report of the proceedings in Parliament on 16th August, 2012, according to which, the Minister for

Transport had informed the Parliament that the Director General of the Public Procurement Oversight Authority had commenced investigations.

Accordingly, the parties proceeded to argue these issues as preliminary matters. As set out in the ruling herein above, the Board found that the Preliminary Objection was without merit and, accordingly, directed that the matter should be heard on its merit.

Following this ruling, the parties proceeded to argue the case on its merits as directed by the Board.

On the question of the source of the documents attached as exhibits to the Applicant's pleadings, the Applicant stated that the documents were placed under its doors by an unknown party as indicated in the affidavit sworn by I Zheng Yi. It argued that in any event, the documents were now in the public domain by reason of the fact that, according to the Hansard Report of the Parliamentary proceedings on 16th August, they were tabled before the House and admitted. The Applicant further argued that insofar as the public procurement process is of public nature and is conducted in the public interest, all documents and information generated through the process are of public interest and are thus subject to access by the public in accordance with Article 35(1)(a) of the Constitution of Kenya 2010 which states that:

***"Every citizen has the right to access to
(a) information held by the State; and..."***

The Applicant submitted that in light of this provision of the Constitution, and the fact that the Procuring Entity had not denied the authenticity of the documents, they should be admitted.

While admitting the fact that there may be situations where production of documents may not be permissible because of the public interest, the Applicant stated that it was incumbent upon the court to weigh the public interest against the need to ensure that administration of justice was not frustrated by withholding documents which must be produced in evidence in order for justice to be done. It argued that in weighing the public interest and the harm that might be done to it by the production of documents, against the interest of ensuring that justice is done by the production of documents which are claimed to touch on the public interest, the Court, or the Board, as the case may be, must look at those documents. In support of this contention, the Applicant cited the case of ***Baseline Architects Ltd & 2 Others Vs. National Hospital Insurance Fund Board Management [2008] eKLR***, in which the court stated at page 2 that:

"In any event the nature of the harm (to the public interest) would need to be clearly examined and I think it is wrong to adopt a procedure which would restrict and/or prevent a judge from making an independent evaluation of the issues before him for determination. All in all it is desirable that a judge should have all the relevant materials before him, in order for him to limit/delimit the boundaries of what is eligible for production by a party. In my view the fact that the production of the document in a particular litigation prejudices to a party's case or assist the other side is no such plain overruling principle of public interest. It is for that reason that judicial officers are expected to examine the documents in order to test the injury to the state would not result due to disclosure."

The Applicant argued that although in the ***Baseline*** case cited above the judge found that the documents could not be produced, the distinction

between that case and this application were twofold. First, in the *Baseline* case, the documents sought to be produced were not produced at the time of the arbitration and, accordingly, it was not open to the party seeking to produce the said documents subsequently to do so. Secondly, the said documents were marked "confidential" and it would be inappropriate to admit such documents without compromising the principle of advocate/client privilege.

It further distinguished the instant case and that of *Baseline* on the ground that whereas arbitration proceedings are private, procurement proceedings, by virtue of the fact that they entail use of public funds, are public, and accordingly, the Board is entitled to have access to records of their proceedings.

The Applicant further cited the case of *Conway Vs. Rimmer and Another [All England Law Reports, 1968]*, in which the issue of the clash between the public interest that no harm shall be done to the public interest or to the nation by disclosure of certain documents, and the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done, was discussed by the House of Lords. It argued that this case supported its claim that the documents under consideration did not touch on the public interest, and should therefore be admitted as their non admission would frustrate the administration of justice.

Regarding the provisions of Section 44 of the Act, the Applicant argued that those provisions were no longer applicable in view of Article 35 of the Constitution which now makes it clear that information held by the State is accessible to a citizen. It further argued that, in any event, Section 44 of the

Act applies where it is for the purpose of a review under Part VII, which was the situation in this case. The Procuring Entity further submitted that it was clear under Section 44 that disclosure of information is only prohibited under two circumstances, namely, where:

1. such disclosure would impede law enforcement; and
2. such disclosure would not be in the public interest.

In its view, these two tests were not met in this case. It stated that moreover, according to the section, prohibition against disclosure applied only where the information is given by an employee or agent of the procuring entity or member of a board or committee of the procuring entity, which was not the case here, as the documents were submitted to the Applicant by some unknown person, who slipped the documents under the Applicant's door, and not by any of those specified in the Section.

In response, the Procuring Entity opposed the admission of the documents annexed to the Applicant's pleadings stating that they had been obtained unprocedurally. It argued that the Applicant was under duty to comply with Section 27(4) of the Act, which requires contractors, suppliers and consultants to comply with the Act and regulations, and that by obtaining the documents under review other than as permitted under Section 44 of the Act, it had breached the statutory duty imposed on it by Section 27(4) of the Act. It stated that if the Applicant wanted to know what was going on, nothing would have been easier than for it to write to the Procuring Entity to seek information. It submitted that by obtaining the documents in the manner in which it had done, the Applicant demeaned the objectives of the Act as set out in Sections 2(c) and (d) of the Act.

As to reference to Article 35 of the Constitution by the Applicant, the Procuring Entity stated that the exercise of the Article must be done in an open manner. It stated that it was not proper that a bidder should be in possession of information, such as the Applicant had, unless such information was obtained through the proper channels, as set out in the Act. It further stated that it has always been the practice of the Procuring Entity to respond to inquiries raised by bidders, and that if the Applicant had sought information in the proper way, such information would have been availed to it.

In conclusion, the Procuring Entity stated that it had compiled the status report as requested by the Board and was prepared to present it. It further stated that it had presented the same information in the status report to Parliament.

The Board has carefully considered the submissions by the parties and the documents presented before it and makes the following findings and decision.

The issue of the propriety of admitting these documents was raised by the Board on the first day of the proceedings when it realised that the documents appeared to have been obtained irregularly. The reason for concern by the Board as to the source of the documents is based on the well-established principle of equity, which states that *"he who comes before the court of equity must do so with clean hands."* Accordingly, therefore, the Board felt that it was important that at the very outset it was necessary that the Applicant should enlighten the Board as to how the documents, which prima facie, seemed to be the property of the Procuring Entity, came into its possession before a determination could be made as to their admissibility.

The thrust of the Applicant's argument in support of the admission of the documents can be summarised as follows:

1. The documents were in the public domain in light of the fact that they had been tabled in Parliament on 16th August, 2012 during the proceedings in the House when the subject procurement was debated therein.
2. Article 35 of the Constitution allows citizens accesses to information held by the State, notwithstanding the provisions of Section 44 of the Act, and that in any event, Section 44 only restricts disclosure of information where the information is disclosed by employees or agent of the procuring entity or a member of a board or committee of the procuring entity, where such disclosure would impede law enforcement; or would not be in the public interest.
3. That in deciding as to whether a document should be disclosed in the course of judicial proceedings, the court or a tribunal, should consider on the one hand, the public interest that might be harmed by disclosing a document, and on the other, the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

It is a notorious fact that this tender has been the subject of intense media coverage in the last few weeks in which the contents of the subject documents have been widely quoted, sometime verbatim. It is not clear where the media obtained the documents from, but what is certain is that, in one way or another they must have obtained them from some source. The question which arises is, what is the source of these documents? As will be seen subsequently in this decision, these documents have been circulating in various Government Ministries among which, there has been a raging and

bitter debate as to whether the tender was properly awarded, virtually since the decision was made by the Procuring Entity to award the tender to the Applicant in December 2011. It could well be the case that whoever made them available to the media might have obtained them from any of these Ministries. It is also possible that the source of the leakage could be the Procuring Entity itself where, as will be seen subsequently in this decision, there have been equally serious internal divisions on the award of the tender.

In a situation like this, it is difficult to determine where a breach of security may have occurred which led to these documents floating all over the place. On its part, the Applicant has sworn an affidavit deponing that the documents were slipped under its door by some unidentified person who thought that the Applicant might be interested in them. Given the fact that the tender has generated serious division among the people who are supposed to guard the confidentiality of government transactions, it is entirely possible that the documents fell into the hands of the Applicant from among these sources.

It is a matter of procurement law of this country that the procurement process should be confidential, primarily in order to safeguard the confidentiality of the business information which is made available to a Procuring Entity for the purpose of evaluating tenders. In this process, each bidder opens its heart to the Procuring Entity, as it must, and avails to it information which it would not in the normal course of events disclose to anyone else, in order to maintain its competitive advantage. It is this need for confidentiality which Section 44 of the Act seeks to safeguard, and to that end, enjoins the Procuring Entity to not disclose any information, except in respect to situations set forth in the Section.

In this case, the Procuring Entity appears to have been lax with its records, partly due to the infighting within the organisation, and it is this that may have contributed to the documents falling into the hands of the Applicant. In short it is the Procuring Entity that must be blamed for failure to safeguard its own documents.

Furthermore, as stated hereinbefore, the matter has been the subject of debate in Parliament at which the documents were tabled and their contents discussed. It is not clear where the documents tabled in Parliament came from. Accordingly, the documents having been tabled in Parliament, the Board takes judicial notice of the fact that the documents are in the public domain.

On the issue as to whether or not disclosure of these documents touch on the public interest, having read the said documents, the Board finds that their contents do not affect the public interest so as to justify their non-disclosure.

Taking the above facts into account the Board directs that the documents be admitted.

Regarding its prayer number one, namely that the Board should annul and/or quash the purported resolution made by the Board of Directors of the Procuring Entity on 26th July 2012 or any other resolution, act or decision seeking to terminate the procurement process with respect to the tender in question, the Applicant submitted that in light of the statement by the Procuring Entity during the hearing of the motion on Preliminary Objection that there was no annulment of the procurement process and that the process was still on-going, the Board should make a finding that notification of award of tender issued on 16th December 2011, was still valid.

There is no dispute about the fact, following evaluation of the tenders by the Evaluation Committee of the Procuring Entity, the Applicant emerged the winner. The evaluation was carried out in three stages, namely, the preliminary evaluation stage; the technical evaluation stage; and the financial evaluation stage. Consequent upon this, the Applicant was notified vide a letter dated 16th December, 2012, that its bid was successful. The last paragraph of the said letter states that ***"The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee."*** It responded to the said letter by dating, and signing the letter on 19th December 2011, as instructed, and returned the same to the Procuring Entity. Further, subsequent to this, the Applicant by a letter dated 19th December 2011 accepted the offer. These facts have not been disputed by the Procuring Entity, nor has it taken any steps to withdraw the letter. Indeed, the Procuring Entity stated during the hearing that, it had not terminated the tender proceedings which gave rise to the letter of award, and that, pursuant to the paragraph of the letter quoted above, it was still negotiating with the Applicant. If it is still negotiating with the Applicant, it can only do so based on the letter of offer, and this act is, in the view of the Board, a tacit acknowledgment by the Procuring Entity that the letter of award is still valid.

It is clear to the Board that based on the above, the Procuring Entity regards the letter of award as still subsisting. Accordingly, the Board finds that the notification of award dated 16th December 2011 is still valid.

Regarding its prayer number 2 that the Board should direct the Kenya Airports Authority, the Procuring Entity, to execute a Contract with the Applicant, the Applicant stated that the contract was in two parts, namely, the Design and Build aspect, and the Financing Contract. It further stated

that, as far as the Design and Build Contract is concerned, there was nothing further to negotiate as the prices and the design had been agreed upon, a fact which had not been controverted by the Procuring Entity, and that if there was goodwill on the part of the Procuring Entity, the contract should have been signed. The Applicant argued that notwithstanding the statement in the letter of notification that the execution of the contract was to be done upon conclusion of negotiation, Section 68(2) of the Act must be construed to mean that the signing of the contract must take place within a reasonable period. It averred that if it was the position of the Procuring Entity that the whole negotiation process has not been concluded, and thus the contract cannot be signed, then the fault lies with the Procuring Entity as the Applicant had supplied all the information needed to enable the negotiations to be concluded.

It argued that Section 68(2) of the Act, which provides that the contract shall be entered into within the period specified in the notification under Section 67(1), must be construed to be a reasonable period. It argued that in any event, Clause 3.28.5 of the Request for Proposals specified that ***"The parties to the contract shall have it signed within 30 days from the date of notification of the contract award unless there is an administrative review request"***, which period had long lapsed.

In conclusion, the Applicant submitted that since there was no dispute regarding the Design and Build Contract, the Board should order the Procuring Entity to formalise the Contract with the Applicant based on its powers under Section 98(b) of the Act. It further urged the Board that in exercise of this power it should set the time limit within which the parties should sign the contract.

In response to the Applicant's prayer number 2, the Procuring Entity stated that in terms of Sections 84 and 85 of the Act, negotiations were allowed and that there was no certainty as to which way they will go. It argued that given this fact the Board could not compel the parties to enter into a contract as claimed by the Applicant as entering into a contract required a meeting of the minds. It further argued that given the fact that the Procuring Entity is under a line Ministry, which must be consulted in the entire process; the fact that there are other parties which are involved in the process of negotiation; the fact that even within the structure of the Procuring Entity there must be internal consensus; and the fact that even the Cabinet is seized of the matter; it would not be practical to implement an order to enter into a contract, and to do so within a specified timeline, as argued by the Applicant. The Procuring Entity further submitted that in any event, the award to the Applicant was based on preliminary designs, and that negotiations involving all stakeholders were still needed for the final designs to be agreed upon.

In reply, the Applicant submitted that there were no negotiations contemplated as the award had been made to it following the evaluation of its proposal by the Procuring Entity. Regarding the statement by the Procuring Entity that it was carrying out the process through internal consultations, the Applicant stated that based on the Brief on the status of the project presented by the Procuring Entity, it was clear that there were actors involved who are not contemplated in the Act, who had interfered with the process. It urged the Board to shield the process from such interference, which was the basis for its prayers numbers 3 and 4.

As to Article 35 of the Constitution, the Applicant averred that access to information as set out in that Article did not require that a party seeking such information should write a letter in order to obtain it.

Regarding the assertion by the Procuring Entity that there had to be a meeting of the minds on the Design and Build Contract, the Applicant reiterated its claim that there were two separate contracts. In its view, the Design and Build Contract was awarded to it following evaluation in which it emerged the winner, and therefore there was nothing to negotiate.

As regards the Financing Contract, the Applicant stated that as early as 11th January, 2012, the China Development Bank, which was the proposed financier of the project, sent the financing terms and conditions to the Procuring Entity, and that the terms were never rejected. It stated that it had not been informed by the Procuring Entity about any difficulties it was facing in accepting these terms and conditions and that in fact there had been no indication from the Procuring Entity that it had been in touch with the proposed financier regarding the terms and conditions of the Finance Contract. It further stated that as far as it was aware, the funds were available from the proposed financier. It submitted that the correspondence contained in the brief submitted to the Board by the Procuring Entity suggest that failure to conclude the Financing Contract had nothing to do with negotiations. The Applicant stated that it had never received any communication from the Procuring Entity as to why negotiations between the Procuring Entity and the financier were not proceeding since January 2012 after submitting the name and the terms and conditions of the proposed financier.

In conclusion, it urged the Board to grant its prayers as set out in its pleadings.

The Board has carefully considered the submissions by the parties and the document presented before it and makes the following findings and observations.

The Board notes as follows:

1. That this Request for Review is unique in the annals of procurement disputes that have been referred to the Board for adjudication, in that for the first time, the complaint is filed by the successful bidder, and not by a losing bidder.
2. That the project arose from the recommendations of a consultant who was engaged by the Kenya Airports Authority in 2008 to review the Authority's master plan in keeping with ICAO requirement.
3. That the review took into account in particular the business development strategy of Kenya Airways up to the year 2020, and projected traffic by other players at the airport through to the year 2030.
4. That on the basis of traffic projections, a decision was made to the proposed Greenfield Terminal Complex, which is the subject of the tender that led to the dispute under review.
5. That on 9th March 2011, the Board of Directors of the Authority (KAA) met after a meeting with the Minister for Transport and approved the Project.
6. That following this decision by the Board of Directors of the Authority, the Authority advertised an international tender for the project in newspapers

on 22nd and 23rd June 2011, as well as on its website, by which it requested interested bidders to submit proposals for the implementation of the project.

7. That the tender notice required the bidders to, among other things, provide a financier who would engage KAA directly. The tender documents provided the minimum terms for the financing agreement and the deadline for submission of proposals was 21st September, 2011.

8. That this deadline was extended to 25th October and further to 17th November, 2011, at the request of some bidders.

9. That following this advertisement, 120 prospective bidders collected the Request for Proposals (RFP) documents, but only five bidders returned the RFP document, duly completed.

10. That this was a two envelope bid according to which, bidders submitted separate envelopes for their Technical Proposals, and Financial Proposals, respectively.

11. That on 14th November 2011, the Permanent Secretary in the Office of the Prime Minister wrote to the Permanent Secretary, Ministry of Transport pointing out that ***"the project as currently structured does require mobilization of massive resources with approval of various arms of government....and that therefore recommend that the on-going procurement process to stop immediately and that you commence the mechanism of seeking Cabinet approval of the same by way of a Cabinet Memorandum."*** The letter was copied to the Head of Public Service, the Permanent Secretary, Ministry of Finance and the Managing Director, KAA.

12. That the evaluation committee established by the Procuring Entity conducted the evaluation of the proposals in three evaluation stages, namely, preliminary, technical and financial using evaluation criteria set out in the RFPs. The Board further notes that arising out of this exercise only two bidders proceeded to the technical evaluation stage.

13. That on 14th November 2012, the Permanent Secretary in the Office of the Prime Minister wrote to the Managing Director of KAA requesting for a brief on the status of the project and suggesting that Cabinet approval be obtained before the matter proceeds. The letter was received by KAA on 18th November, which was the day of closing/opening of the RFPs.

14. That on 21st November, 2011, the Procuring Entity responded to the letter from the Office of the Prime Minister seeking permission to continue with the evaluation of the tenders and subsequently paid a courtesy call on the Prime Minister who granted permission to the Authority to continue with the evaluation of the tenders.

15. That on evaluating the technical proposals, only one bidder, the Applicant in these proceedings, moved to the financial evaluation stage, and upon the evaluation of its financial proposal, was considered responsive and consequently awarded the tender at the tender sum of **US 653,782,814.57**.

16. That the letter of notification of the award was dated 16th December, 2011 and informed the Applicant at paragraphs 2, 3 and 4, respectively as follows:

"By copy of this letter you are required to make arrangements with your proposed financier(s) for commencement of negotiations directly

with the Authority which shall not be earlier than fourteen (14) days from the date of this letter.

The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee.

Please sign and return a copy of this letter to signify your acceptance of this award."

17. That the Applicant through its authorised representative signed the letter on 19th December 2011, and returned it to the Procuring Entity.

18. That by a letter dated 19th December 2011, the Applicant wrote to the Procuring Entity informing it that: *"We will make arrangements with our proposed financiers for commencement of negotiations with the Authority."*

19. That on 10th January 2012, the Permanent Secretary, Ministry of Transport wrote to the Managing Director, KAA stating among other things, that *"Following consultation on this matter with the Honourable Minister for Transport, I have been directed to advise you to prepare a brief to the Cabinet on the progress of Development of Greenfield Terminal at JKIA so that the Hon. Minister may present the same to the Cabinet. You will recall that the Office of the Prime Minister requested for a brief on this project vide letter Ref.OPM1.INF/89/259 dated 14th November, 2011.*

I have further been directed to advise you that as the outcome of the bidding process has clearly not produced an acceptable minimum number of acceptable Technical and Financial Proposals that could be compared and

that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design, construction cost and completion time, etc, and financing should be an added advantage (perhaps through supply credit), as KAA would end up signing a separate financing agreement with a suitable financier."

20. That on 11th January 2012, China Development Bank, the proposed financiers, wrote to the Authority submitting a Term Sheet entitled *"Indicative Terms and Conditions, US\$546,000,00 Term Loan Facility For Kenya Airport Authority". The Term Sheet states that "Please note that the terms set out in the term sheet are indicative only and do not constitute an offer to arrange or finance the Facility."* The proposed loan to KAA and is to be guaranteed by the Government of Kenya.

21. That on 20th January 2012, upon receiving complaints, the Ethics and Anti-Corruption Commission collected documents on the project from KAA offices and commenced investigations on the complaints.

22. That on 8th February 2012, the Managing Director of KAA replied to the letter from the Permanent Secretary, Ministry of Transport, stating, inter alia, as follows:

"Five (5) bidders were evaluated, two (2) of which were knocked off after preliminary evaluation. The other three (3) were subjected to technical evaluation, of which two (2) did not attain pass mark to advance to financial bid opening. As per the procurement law, the most responsive bidder in technical evaluation who attained the required pass mark was subjected to financial evaluation."

This bid was then adjudicated and awarded by the Tender Committee in accordance with the prevailing law. All bidders were appropriately informed of the outcome. In the absence of any appeal from any bidder, we have proceeded to negotiate financing so that works can commence on time. KAA is committed to start construction works by August.

The tender documents did not require the bidder to have capability to finance the project by themselves as stated in the above letter. This tender was evaluated as a Design & Build basis. The requirement was for the bidders to source for a financier with whom the Authority would negotiate and sign a financing agreement.

Currently, KAA is negotiating financing with the financiers, namely China Development Bank and China Exim Bank, who had been proposed by the Successful Bidder. Upon conclusion of the negotiations, KAA will sign an agreement with the financier who offers the best terms."

23. That on 10th February 2012, the Permanent Secretary, Ministry of Transport responded to the letter from the Managing Director, KAA, cited immediately above stating, inter alia, *"...considering the magnitude of financial resources expected to be expended in the project, the Honourable Minister for Transport has directed me to instruct you not to commit the Kenya Airport Authority on any contractual arrangement on this proposed project until the issues raised by the office of The Prime Minister and this Ministry are resolved by the Cabinet as requested by the Office of the Prime Minister's letter Ref. OPM1/INF/89 dated 14th November, 2011 and as advised and requested in our letter Ref.MOT/AT/24/2 Vol.V/81 dated 10th January, 2012."*

24. That on 14th February, 2012, the Managing Director, KAA, wrote to the Hon. Attorney-General, seeking the Attorney-General's opinion on the issues raised in the letter from the Permanent Secretary dated 10th January, 2012, cited above.

25. That on 15th February, 22, 2102, the Ethics and Anti-Corruption Authority wrote to KAA clearing the tender process and allowing KAA to proceed with the project.

26. That on 21st February 2012, the Board of Directors of KAA met and resolved that *"KAA should annul the ongoing procurement process and re-start the same afresh."* One Member dissented stating, among other things, that *"..it is preferable to wait for the legal opinion earlier sought by Management from the Attorney-General and recommended by external counsel be received first."*

27. That on 22nd February 2012, the Attorney-General responded to the letter from the Managing Director of KAA, giving his opinion as requested vide the letter dated 14th March, 2012. In his legal opinion, the Hon Attorney-General considered the following legal issues and advised as follows:

1. Whether the bidding process produced an acceptable minimum number of technical and financial proposals.

The procedures to be followed in relation to open tendering are set out in Parts V and IV of the Act and the Public Procurement and Disposal Regulation of 2006, respectively.

It is noteworthy that none of the provisions in the Act and the Regulations specifies the minimum number of technical and financial proposals to be evaluated. The requirement for competition can only be inferred from the use of terms such as, "comparison of tenders", "ranking", and "lowest evaluated price."

An attempt to set a minimum number of bids to be evaluated is made in the PPDGM. Part (o) of section 7.2 (Open Tendering Method) states that:

"Where only one or two bids are determined responsive the procuring entity shall have the option of proceeding with the evaluation or determining the entire tender non-responsive."

In the instant tender, five firms submitted bids. One firm was disqualified. The remaining four firms were subjected to a three-step evaluation process. The first step was the preliminary evaluation and the four firms were subjected thereto after which two firms failed to meet the minimum mandatory requirements. Thus, only two firms proceeded to the second step, being technical evaluation. One firm was found unresponsive as a result of which only one firm proceeded to the third step - financial.

2. "Whether the bidders offered to provide finance."

We have already indicated that the eligibility criteria for the instant tender required the bidders to:

- (a) Submit a letter of commitment to finance the project from a financier(s); and
- (b) Source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

In this regard, the Successful Bidder submitted two letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank, respectively.

The fact that the two letters were submitted is sufficient proof that the Successful Bidder had sourced for the two financiers.

3. The directive to terminate the procurement proceedings and retender.

The Attorney-General advised that termination of procurement proceedings was permissible under Section 36 without entering into a contract, and that the procedure was that the bidders must promptly be notified. However, in this case Clause 3.27.2 of the request for proposals restricted the Employer to annul the tender process to *"any time prior to award of contract."*

The other situations where termination was permissible under:

1. Under Section 65 where the notification to all bidders that their bids were unresponsive implies termination; and
2. Where only one or two bids are determined responsive and the Procuring Entity has stated in the bidding documents that it shall opt to determine the entire tender process non-responsive, as per the PPDGM.

The Honourable Attorney-General advised that the implied annulment under Section 65 did not apply as there was a responsive bid, and that, option 2 did not apply as it was not expressly stated in the bidding documents.

The Honourable Attorney-General concluded by advising the Procuring Entity that:

"Thus, by seeking to terminate the procurement process after notification and acceptance of award of contract, the Authority will not only be contravening the provisions of Clause 3.27. 3 of the Request for Proposals but also acting in bad faith: thereby undermining the integrity and fairness of the procurement process."

28. That in short, the Honourable Attorney-General advised that:

- a) In opening one financial proposal, the process produced a Successful Bidder in accordance with the Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations.
- b) It was clear the bidders were not required to finance the project but were only to propose a financier(s) to KAA.
- c) Terminating the procurement proceedings will undermine the integrity and fairness of the procurement process.

29. That on 6th March, 2012, the Permanent Secretary, Office of the Prime Minister wrote to the Managing Director, KAA stating that:

"The purpose of this communication is to inform you that the matter has been forwarded for guidance by the Infrastructure Committee of Cabinet during its meeting scheduled to be held on 14th March 2012. In this regard, you are requested to submit a Cabinet brief for discussion during the meeting. Consequently, you are advised to withhold any further action on the existing procurement process until a policy direction is given by the Infrastructure Committee of the Cabinet."

By a copy of this letter, Permanent Secretaries are requested to brief their respective Ministers."

30. That on 7th March 2102, the Managing Director, KAA replied to the letter by the Permanent Secretary, Office of the Prime Minister attaching the requested Cabinet brief and confirming that further action on the procurement will be withheld pending direction on the matter.

31. That on 20th March, 2012, the PS, Office of the Prime Minister wrote to the MD of KAA requesting that document relating to the tender process be sent to a Mr. Kasuku of the Prime Minister's Office. The documents were delivered.

32. That on 20th March, 2012, the PS, Office of the Prime Minister, wrote to the Hon. Attorney-General requesting further analysis of the legal implications of terminating the procurement process.

That on 16th April 2012, the Hon. Attorney-General replied to the letter by the PS dated 20th March, 2012, whereby he reiterated his opinion dated 22nd February and further stating, among other things, that:

1. Since the exchange of an offer{by the Procuring Entity and the Applicant} gives rise to a binding legal relationship, it noteworthy signing of a contract is an act of formalizing the contract - that is, as a solemn record of an already complete and binding agreement between the parties.

2. Having noted the rights of the successful bidder have already crystallised and that a binding legal relation exists between the parties, the successful bidder is entitled to certain rights under the contract, such as damages and specific performance.

3. In view of the fact that the investigations by the EACC did not disclose any irregularity in the instant procurement process so as to warrant delay in

implementing the project, we are of the opinion that the project should be implemented, as tendered.

4. Termination will prompt the Successful Bidder to enforce its rights under the contract in the form of claims for specific performance.

33. That on 22nd of May 2012 the Board of Directors of KAA met and reaffirmed its resolution passed on 22nd February, 2012, that the procurement process for the Greenfield Terminal project be annulled and thereafter it be restarted afresh.

34. That on 14th June 2012, the PS, Ministry of Transport wrote to the Director General, Public Procurement Oversight Authority, requesting him to carry out investigation into the procurement process of the project.

35. That on 25th June, 2012, the Minister for Transport called a meeting with PS Ministry of Transport, KAA, Kenya Civil Aviation Authority, and Kenya Airways to discuss the way forward in implementing the project. At the meeting KQ was directed to engage a consultant to review the Greenfield design and make necessary recommendations. Further, the Minister informed the meeting that he was appointing a steering committee to oversee the project.

36. That on 10th July, 2012, the consultant appointed by KQ M/S Avia Solutions, UK held a kick off meeting with KAA, KCAA, and KQ.

37. That on 26th July, 2012, the Board of Directors of KAA held a special meeting at which they passed a resolution directed the Managing Director to cancel the award.

38. That on 26th July 2012 the Managing Director of KAA wrote to the Attorney-General requesting for legal direction on cancellation of the award.

39. That on 27th July, 2012, Acting Head of Public Service, Mr. Francis Kimemia wrote a letter to the Hon. Attorney-General regarding the resolution of the Board of KAA passed on 26th July, 2012, stating among other things, that:

"The Resolution seeks to direct the Managing Director, the Kenya Airports Authority to terminate the process and award of a Vision 2030 Contract, a matter which the Cabinet is already seized of and indeed directed the appropriate Cabinet Committee to resolve the outstanding issues and give feedback to the Cabinet.

In my opinion, it is in bad taste and disrespectful to Cabinet to attempt to compel the Managing Director to undertake such action behind the Cabinet Committee and the Cabinet itself. The Board should give time to the Minister for Transport to appraise the Cabinet and thereafter the Cabinet in its next meeting.

I am rather concerned because the this advice was given to the Permanent Secretary, Ministry of Transport personally in a meeting held on 24th July, 2012 at the Office of the President."

The letter was copied to: The PS, Office of the Prime Minister; the PS, Ministry of Finance; the PS, Ministry of Transport; the Chairman, KAA; and the Managing Director, KAA.

40. That on 27th July, 2012, the Tender Committee of KAA held an urgent meeting on the direction of the Board of Directors to cancel the tender, and observed that the implementation of the project was untenable and recommended termination of the tender.

41. That on 31st July, 2012, the Managing Director of KAA wrote to the Tender Committee advising that he was still awaiting direction of the Cabinet.

42. That on 6th August 2012, the consultant hired by KQ presented its review report to the Minister for Transport.

43. That on 13th August, 2102, the PS, Office of the Prime Minister wrote to the Acting Secretary to the Cabinet and the Head of the Civil Service, stating his objection to the Board instruction to the Managing Director to cancel the procurement process when it was pending before the Cabinet.

44. That on 16th August, 2012, the matter came up for debate in Parliament at the end of which the Speaker directed that it be referred for investigation to the joint committees on Transport, Public Works and Housing, Budget and Finance, Planning and Trade. The Speaker further directed that the Joint committee should file its report in the House "within the next 14 days."

45. That on 23rd August, 2012, according to media reports, the Board of Directors of KAA met and resolved to send the Managing Director on forced leave.

The Board has found it necessary to set out this detailed account of the chronology of events surrounding this matter for the following three reasons which constitute the Applicant's principal prayers:

1. To determine whether the Procuring Entity should be ordered to conclude the contract resulting from the award of the tender to the Applicant.
2. To determine whether there is/or has been interference by officers, servants and/or agents or any other person or officer in Kenya Airports Authority, in the procurement process in the tender under consideration, and if so, for the Board to restrain them from such interference.
3. To determine whether there is/or has been interference by the Minister for Transport, the Permanent Secretary and the Ministry of Transport, its officers, servants and/or agents or any other office whatsoever in the procurement process and to restrain them from interfering with the procurement process.

Dealing first with the prayer that the Board should order the Procuring Entity to execute a contract with the Applicant in respect to the tender in question, it is important to recall the ruling which the Board has made herein regarding the status of the letter of award dated 16th December 2011. The Board has ruled that, insofar as the Procuring Entity has not revoked the letter of award, the letter remains valid.

The Board has noted that the letter of notification of award required the Applicant to signify its acceptance of the award by signing the letter itself, which it did. This act by the Applicant constituted acceptance by it of the award which the Procuring Entity made to the Applicant as communicated by the letter. The consequence of this acceptance is that a legal relationship was formed between the parties which gave rise to certain mutual rights and obligations between them, which remained inchoate, pending the formalisation of the contract. Thus though a contract in a formal sense was not in place, it nevertheless existed in a legal sense, arising from the award by the Procuring Entity and acceptance of the award by the Applicant. The fact that such a legal relationship existed can be gleaned from Section 57(3) of the Act which provides that:

"Tender security shall be forfeited if the person submitting the tender -

(a).....

(b).....

(c) refuses to enter into a written contract as required under Section 68 or fails to furnish any required performance security."

It is evident from this section that upon awarding a contract to a successful bidder a procuring entity acquires the right to cash in the tender security, although there is no written contract between itself and the successful bidder, based on the legal relationship accruing from the offer by the procuring entity.

The Board notes the rider at the last paragraph in the letter of award quoted herein before which states that "The contract shall be signed by the parties after successful negotiations and the signing of a loan agreement with the

financiers and submission of the performance guarantee." The Procuring Entity has relied on this rider to argue that the letter of award is subject to successful negotiations of the Design and Build contract, which is the contract under review. It is apparent from the documents made available to the Board that no attempts whatsoever have been made by the Procuring Entity to carry out any negotiations, notwithstanding the fact that eight months have elapsed since it issued the letter of award. In fact it is clear from these documents, including the documents attached as exhibits by the Applicant that the Procuring Entity has no intention of carrying out such negotiations. Indeed, the Procuring Entity has been ordered by its Board of Directors to annul the proceedings. The Board therefore, does not accept the claim made by the Procuring Entity during the proceedings that negotiations are on-going.

The Board further notes Clause 3.28.5 of the RFP which states that:

"The parties to the contract shall have it signed within 30 days from the date of notification of contract award unless there is a an administrative review request."

There is no evidence that there was any request for review following the notification of award, and consequently there is no reason why the contract should not have been concluded within the specified period. As already stated above, the Procuring Entity has not taken any steps to bring to fruition any negotiations, if at all there was any basis for negotiations as claimed by the Procuring Entity, notwithstanding the paragraph of the letter of award cited above, and the provisions of Clause 3.26.6 Step 2(d) paragraph 3, which states that **"Kenya Airport Authority shall negotiate and sign an agreement with the best evaluated bidder."** Indeed, this would be strange in light of the

fact Section IV of the Tender Documents, the Technical Proposal consisted of, among other things, **Specifications, Drawings, and the financial proposals to include Bills of Quantities**, implying that these would have formed the basis for quantification of the value of the tender submitted by the Applicant, thereby contradicting the claim that there was something of a technical or financial nature left to be negotiated before the contract could be signed.

The Board notes the legal advice which has been given by the Attorney-General as set forth hereinbefore in which he points out the fact, among other things, that as a result of the acceptance by the Applicant of the offer made to it by the Procuring Entity, legal rights had accrued which would entitle the Applicant to take legal action against the Procuring Entity. The Board concurs with this advice.

The question has arisen as to what power is vested on the Board to grant the prayer requested by the Applicant to the effect that the Procuring should be compelled to sign the contract. In his submission, the Applicant has pointed to Section 98(b) of the Act as the authority on which the Board should anchor its order.

The Section states that:-

"Upon completing a review the Board may do any one of the following--

(a).....

(b) give directions to the procuring entity with respect to anything to be done or redone."

The Board is satisfied that it has power to issue the order prayed for under this Section of the Act. The next question for consideration is what time limit

should the Board set within which the contract should be signed. The Applicant has argued that such time should be reasonable. On its part, the Procuring Entity has argued against such an order, pointing out that there are many internal as well as external stakeholders to be consulted and that such an order would be difficult to implement.

As to the reasonable time the Board is of the view that Clause 3.28.5 of the Tender Document cited above provides a barometer by which to measure reasonableness in the instant case. The said clause provided for signing of the contract to be 30 days from the date of notification of the award. The Board notes that the notification of award was made on 16th December 2011.

Taking the above matters into account the Board invokes its powers under Section 98(b) of the Act and orders the Procuring Entity to execute the contract for Design and Build with the Applicant within 30 days of this decision. This is so because the Procuring Entity confirmed to the Board that the question of finances was not an issue because they had budgeted for the project, and was not obliged to sign a finance contract with any financier proposed by the bidder.

Turning to the order prayed for by the Applicant that the Board restrains the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to **Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport forthwith,** the Board notes that the orders given by the Board of Directors raises a fundamental question as to the power exercisable by the board of a state corporation in matters of public procurement in Kenya. In this respect it is

necessary to look at the structures put in place by the procurement system in Kenya, as delineated by the Public Procurement and Disposal Act, 2006.

Parts II and III of the Act are relevant in this connection.

Part II, which is headed "**BODIES INVOLVED IN THE REGULATION OF PUBLIC PROCUREMENT**", establishes the Public Procurement Oversight Authority as a body corporate. Section 9 of the Act sets out the functions of the Authority, which in summary are of regulatory and oversight nature over the procurement system. In this respect, it is the apex body in Kenya's procurement system. Section 10 establishes the office of the Director-General as the Chief Executive of the Authority.

Section 21 establishes **the Public Procurement Oversight Advisory Board**. The functions of the Advisory Board are spelt out in Section 23 of the Act and can be summarised as to advise the Authority generally on the exercise of its functions.

Section 25 of the Act establishes **the Public Procurement Administrative Review Board** with the sole function of reviewing complaints by bidders who are aggrieved by the decision of a procuring entity. The orders it can give at the conclusion of a review are set out in Section 98 of the Act.

These bodies are not involved in the operational aspects of procurement. The bodies that are empowered by the law deal with the operational aspects of procurement are set out **under PART III of the Act**. Section 26 of the Act establishes a tender committee and a procurement unit within each public entity, and authorises the establishment of *"such other bodies as are required under the regulations for the purpose of making such decisions on behalf of a public entity."* The bodies established by the Regulations pursuant to Section

26 are Evaluation Committees as per Regulation 16. They are ad hoc committees appointed by the Accounting Officer in each public entity.

The composition of the Tender committees is specified in the Second Schedule of the Regulations.

An examination of these structures indicates that they are staffed solely by staff of public entities. This is not a matter of accident. The Board notes that a review of the history of Kenya's procurement system indicates that up until 2001 when the Exchequer and Audit Act (Public Procurement Regulations, 2001) took effect decision-making in the procurement process included board members of statutory corporation, and other actors, such as Cabinet Ministers. The decision to remove board members, the Cabinet Ministers and others from playing a role in decision making in procurement was aimed at removing interference by said persons in the procurement function, and to fix responsibility for decision in matters of procurement on professional staff of a public entity. To this end Section 27 of the Act puts responsibility for compliance with Act on the Accounting Officer and employees of a public entity.

Based on this brief analysis of the structures established by the Procurement Law of Kenya, and the rationale for the establishment of these structures, it is clear to the Board that the boards of statutory corporations have no place in the decision-making process in our procurement system. Responsibility for decision making is exclusively left to functionaries in a public entity, meaning that they are accountable for their decisions to all oversight bodies such as the Auditor-General, the Ethics and Anti-Corruption Authority, the Director-General of the Public Procurement Oversight Authority, and Parliament.

Taking the above matters into account, the Board finds that the decisions by the Board of Directors of Kenya Airports Authority, directing the Managing Director to terminate the tender proceedings has no basis in our procurement law as the Board of Directors of a statutory corporation has no such powers. The Board further finds that in any event, such a directive cannot be executed after the award has been made relying on the power conferred on a procuring entity under Section 36 of the Act, in light of the decision by the High Court in the case of *Selex Sistemi Integrati vs Public Procurement Administrative Review Board and Kenya Civil Aviation Authority [HCCC No.1260 of 2007]*. In that case, the learned judge stated that:

"In our present case the purported termination was done after award of the Tenders was communicated as confirmed by the both the Applicants and the interested party, and even the 2nd respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the Procuring Entity that actuated the proceedings."

In short, the court in the *Systemi* case laid down the principle that termination of a procurement proceeding is not available to a procuring entity once an award has been made and communicated. Accordingly the purported termination of the procurement proceedings as directed by the Board of Directors would not be implementable in this case.

As to whether the Review Board can direct the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement under consideration, the Board is of the view that having pointed out hereinabove that the Board of Directors of a

statutory corporation has no role to play in the procurement process, it is up to the Board of Directors of KAA to appreciate the limitation imposed on it and to act in accordance with the law.

Turning to the prayer by the Applicant that the restrains the Minister for Transport, the Permanent Secretary, and the Ministry of Transport, its officer, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of the Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport, the Board notes the correspondence emanating from the Ministry of Transport and other government agencies set out in this decision. These agencies include; the Office of the Prime Minister, the Office of the President, Parliament and the Board of Directors of Kenya Airports Authority.

It is clear from the many letters cited above and the statement by the Minister for Transport in Parliament on 16th August, 2012 that there is interference in the procurement process by government agencies that are not recognised by the Public Procurement and Disposal Act, 2005, in terms of decision making process in procurement.

In this regard, the Board notes the correspondence exchanged between the Office of the President, the Office of the Prime Minister, the Ministry of Transport, the Attorney-General, the Ethics and Anti-Corruption Authority, the Director-General of the Public Procurement Oversight Authority and the Managing Director of Kenya Airports Authority and the debate in Parliament on 16th August, 2012.

The only issue of concern to the Board is whether or not, as implied in the prayer by the Applicant under consideration, the actions by the Minister for Transport and the Permanent Secretary, Ministry for Transport, violate the provisions of the Public Procurement and Disposal Act, so as to justify the grant of the prayer by the Applicant that they should be restrained from interfering with the procurement process.

Reading the letters emanating from the Permanent Secretary and the statement by the Minister in Parliament, it is clear that they want the award annulled, and the process repeated, on the ground as stated in the letter by the Permanent Secretary dated 10th January, 2012, that the outcome did not ***"produce an acceptable minimum number of acceptable Technical and Financial Proposals that could be compare and that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design and build only."***

As already stated in this decision in connection with the Applicant's prayer that the Board should restrain the Board of Directors of KAA from interfering with the procurement process, the Procurement Law of Kenya is structured in such a manner as to recognise only certain actors in the decision process that leads to an award. As also already stated, the rationale for structuring the system in this manner was to remove the decisions from external interference as was the case before the promulgation of the 2001 Regulations, and to ensure that those who make decisions are accountable to the various oversight bodies for their actions.

It is clear to the Board that in our procurement system, all the government agencies mentioned herein before have no role to play in the decision making process in a procurement. It is also clear to the Board that the Permanent

Secretary has no role to play in the decision of another Procuring Entity, notwithstanding the fact that the entity in question is under the line ministry over which he has superintendence. His role in decision making is limited only to procurements which are under his ministry in his capacity as the Accounting Officer in the Ministry, as set forth in Section 27 of the Act.

In view of the above, the Board finds that the directions issued by the various government agencies listed above directing the Kenya Airport Authority to annul/or stop the procurement proceedings, and to start the process over, acted without authority under the Public Procurement Act of 2005. As stated previously in this decision, such directives could in any event, not be implemented, having regard to the High Court decision in the Sistemi case.

As stated in the this decision in respect to the prayer by the Applicant that the Board should restrain the Board of Directors of KAA from interfering with the procurement process, the Board declines to grant the prayer to restrain the Minister, and the Permanent Secretary, from interfering with the procurement process, but directs them to comply with the law.

Regarding the Financing Contract, the Board makes no finding on the matter as the Applicant is not a party to the proposed contract.

Taking all the above matters into account, the Board orders pursuant to Section 98(b) of the Act that the Procuring Entity signs the Contract for Design/Build with the Applicant within twenty eight (28) days of this decision as provided for by Clause 2.28.5 of the Request for Proposals.

The Board makes no orders as to costs.

OBSERVATIONS BY THE BOARD

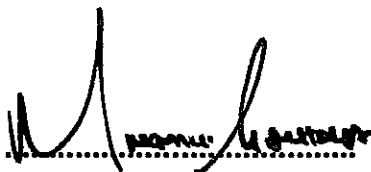
The Board observes that this Tender was awarded on December 16th 2011 following an evaluation process which led to the award of the tender to the Applicant as indicated above. The Board further observes that conclusion of the process through execution of the contract has been delayed such that, nearly nine months since the decision by the Procurement Entity, the project has not commenced.

The Board further observes that the procurement process has been widely criticized for being too bureaucratic and slow in delivering projects, especially infrastructure projects, to Kenyans in pursuit of Vision 2030.

The Board observes that very often, it is the kind of interference evident in this matter that is responsible for the delays in procurement processes, yet blame is shifted to the institutions involved in the procurement process and the law.

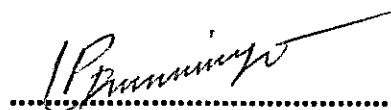
It is clear from the events set out in this case that the delay in concluding the procurement process was precipitated by interference by the agencies listed above and not the Board or the law itself.

Dated at Nairobi on the 29th Day of August, 2012.



CHAIRMAN

PPARB



FOR: SECRETARY

PPARB