

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO 25/2014 OF 19TH JUNE, 2014

BETWEEN

SUZAN GENERAL TRADING JLTAPPLICANT

AND

KENYA AIRPORTS AUTHORITY PROCURING ENTITY

Review against the decision of Kenya Airports Authority in the Matter of Tender No KAA/197/2013-2014 for Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (JKIA), Nairobi.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|----------------|
| 1. Josephine Mong'are | - In the Chair |
| 2. Hussein Were | - Member |
| 3. Nelson Orogut | - Member |
| 4. Rosemary Gituma | - Member |
| 5. Weche Okubo | - Member |

IN ATTENDANCE

1. Philemon Kiprop - Secretariat
2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - Suzan General Trading JLT

1. Ngaca D. Gacugia - Advocate
2. Mercy Koskei - Advocate
3. Nzuki Musyoki - Legal Assistant

Procuring Entity - Kenya Airports Authority (KAA)

1. Ken Ogeto - Advocate
2. Tom nyambu - Advocate
3. Augustine Moenga - lawyer
4. George Kamau - Legal Officer, KAA
5. Catherine Kariuki - Counsel
6. Margaret Muraya - Manager, Procurement
7. Benard Bosire - Procurement Assistant

Interested Party -Hoggers Limited

1. George Ng'ang'a Mbugua - Advocate

BOARD'S DECISION

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

BACKGROUND

The Procuring Entity, the Kenya Airports Authority, advertised the tender for Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (JKIA), Nairobi, Kenya in the *Standard* newspaper on 17th January, 2014 and in the *Daily Nation* newspaper on 20th January, 2014. The tender was closed and opened on 14th March 2014.

The Procuring Entity's tender evaluation committee evaluated the tenders and recommended the award of the tender M/s Hoggers Limited at a concession fee of Kshs. 500,000/= per annum as minimum annual guarantee and an annual concession rate of 8% of annual total sales and a building rental fee at the prevailing rate of Kshs. 2,000/= per square foot per annum. The Tender Committee of the Procuring Entity approved the recommendation of the Evaluation Committee and awarded the tender to M/s Hoggers Limited. The Applicant, M/s by Suzan General Trading JLT, having been aggrieved by the decision of the Procuring Entity to award the tender to M/s Hoggers Limited moved to the Public Procurement Administrative Review Board (The Board) under Review Case No. 16/2014 of 6th May, 2014 and sought the orders of the Board to nullify the tender decision of the Procuring Entity

and to substitute the decision of the Procuring Entity with that of the Review Board awarding the tender to Suzan General Trading JLT as the successful Tenderer with the lowest evaluated price.

The Board, in the said review, heard the parties and on 3rd July, 2014 issued the following orders material to this Application: -

1. The award of the tender to the successful bidder, Messrs Hoggers Limited is hereby annulled.
2. The Procuring Entity is directed to re-evaluate the tenders of the three most responsive bidders for both technical and financial evaluation in accordance with the criteria set out in the tender documents and the findings of this Board.
3. The Procuring Entity is directed to complete the entire process, including award within seven (7) days from the date of this decision.

Pursuant to the orders of the Board, the Procuring Entity carried out a re-evaluation and award of the tender. The bids were subjected to a technical and financial evaluation as applicable to determine compliance with the requirements of the tender as follows: -

TENDER RE-EVALUATION

The Evaluation Committee of the Procuring Entity (PE) re-evaluated the three responsive bids for compliance with the criteria stated in tender documents and came up with the following results: -

a) Technical Evaluation

The PE's tender evaluation committee checked the tender documents to determine the Tenderers' substantive responsiveness based on the criteria stated in the tender documents and came up with the following analysis sheet with scores: -

	TECHNICAL REQUIREMENTS	Score	BIDDER NUMBER		
			1	2	4
1.	Design Concept and Fit-out <ul style="list-style-type: none"> • Illustrate proposed fast food facility concepts and provide detailed drawings of the design including; <ul style="list-style-type: none"> ○ Perspectives ○ Materials and colors ○ Construction details ○ Indicative fit-out timeframe • Bidders to submit lay-out plans depicting proposed fit-out, location of various product lines 	10	7.8	8.5	9.3
2.	The Proposal: Brands and Product lines <ul style="list-style-type: none"> • Provide a detailed proposal containing the following: <ul style="list-style-type: none"> • Business Plan, outlining the total investment including a five (5) year cash flow statement. • Proposed international brand and product lines. 	25	21.0	20.0	20.3
3.	Marketing Plan <ul style="list-style-type: none"> • Provide a marketing plan detailing budgets, strategies and techniques proposed to stimulate and promote the awareness of the retail business including; <ul style="list-style-type: none"> ○ Proposed branding of shops. ○ Target Market & Market research. ○ Merchandising plan. • Discounts and marketing incentives. 	10	8.3	8.0	9.0
4.	Pricing Policy <ul style="list-style-type: none"> • Provide details of proposed pricing policy, including how you will ensure that prices will be competitive. 	5	4.0	3.3	3.8
5.	Customer Standards and Quality Control <ul style="list-style-type: none"> • Provide details of its Customer Service Standards and quality control procedures, including: <ul style="list-style-type: none"> ○ Customer service policy ○ Complaints handling procedures; ○ Return/exchange policy; 	5	4.5	4.5	4.8

	<ul style="list-style-type: none"> o Acceptance of credit cards and foreign currencies Provide details of your method of auditing these procedures.				
6.	Personnel Provide details of staff selection and training procedures to be met by retailers and give estimates of; <ul style="list-style-type: none"> • Staff training, recruitment and retention programs Total number of staff proposed to be employed on the premises, to cater for the peak and off-peak times.	5	4.5	4.8	4.8
7.	Financial performance, EPOS and Recording System <ul style="list-style-type: none"> • Bidders shall give details of proposed electronic point of sale system (EPOS) that will have the capability of linking to KAA POS system. • Bidders to describe method of recording transactions daily/weekly/monthly/annual turnovers including sales analysis of product groups and sub-groups. 	10	9.0	7.3	8.8
	Total	70	59.0	56.3	60.5

All the three bidders attained the requisite technical score and proceeded to financial re-evaluation.

b) Financial Evaluation

The PE's evaluation committee subjected the three bids to financial evaluation and were scored as follows:

	FINANCIAL REQUIREMENTS	Remarks	BIDDER		
			Suzan (1)	Kuku (2)	Hoggers (4)
PART A	Minimum Annual Guarantee <ul style="list-style-type: none"> • Minimum annual Guarantee (Kshs.) 500,000/- 	<i>Bidders to sign Statement of Financial Compliance</i>	<i>Complied</i>	<i>Complied</i>	<i>Complied</i>
PART B	Concession fees	<i>Max of 20 points to</i>	7.5%	6.5%	8%

	Bidders to propose a Concession Rate based on the total sales. (This shall later be captured by EPOS once installed). Bidder's proposal on concession rate expressed as a percentage of sales.%	<i>be scored on pro-rata basis</i>			
	Points		18.75	16.25	20
PART C	Cash Flow	<i>Max 10 points</i>	5years concessi on fee Kshs. 132,303, 752/- (USD 1,530,21 4X86,444)	5years concessi on fee Kshs. 29,426,6 86/- (6.5% of 452,718, 249 total sales for 5 years)	5years concessi on fee Kshs. 133,339, 170/-
	Points		9.93	2.41	10
	Sum total		28.68	18.66	30.00

c) Total Scores

The total scores were arrived at by adding the total technical evaluation score and the total financial evaluation score. The result was as follows:

	REQUIREMENTS	REMARKS	BIDDER		
			Suzan (1)	Kuku (2)	Hoggers (4)
1.	Technical evaluation	<i>Max 70 points</i>	59	56.25	60.5
2.	Financial evaluation	<i>Max 30 points</i>	28.68	18.66	30.00
	Sum total		87.68	74.91	90.50

	Ranking		2	3	1
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d) Evaluation Committee's Recommendation

The Procuring Entity's Tender Evaluation Committee recommended that the tender for Development and Management of an International Branded Fast Food Outlet at Jomo Kenyatta International Airport Terminal 4, Tender No. KAA/197/2013-2014, be awarded to M/s Hoggers Limited, the bidder having scored the highest combined tender score.

TENDER COMMITTEE'S DECISION

After the re-evaluation as ordered by the Board, the Tender Committee of the Procuring Entity met on 10th June, 2014 and approved the Evaluation Committee's recommendation for award of the contract to M/s Hoggers Limited at a concession fee of Kshs. 500,000/= per annum as minimum annual guarantee and an annual concession rate of 8% of annual total sales and a building rental fee at the prevailing rate of Kshs. 2,000/= per square foot per annum.

The Successful Bidder was duly notified by a letter dated 10th June, 2014 that it's tender was successful. The Applicant was also notified of its unsuccessful bid at the same time.

THE REVIEW

This Request for Review was lodged by Suzan General Trading JLT (the Applicant), against the decision of Kenya Airports Authority (Procuring Entity) to award Tender No KAA/197/2013-2014 for the Development and Management of an International Brand Fast Food Outlet at JKIA to M/s Hoggers Limited and for declaring the Applicant's bid as unsuccessful.

The Applicant requested the Public Procurement Administrative Review Board (the Board) to review the entire decision of the Procuring Entity and sought for the following orders: -

1. THAT this Request for Review be allowed;
2. THAT the award of Tender No. KAA/197/2013-2014 to Hoggers Limited be annulled;
3. THAT the decision of Kenya Airports Authority, as communicated through its letter dated 10th June, 2014, that the Applicant had not been successful in Tender No. KAA/197/2013-2014, be annulled;
4. THAT for sufficient cause provided by the Applicant, and in exercise of its unqualified statutory authority under Section 98 of the Procurement Act, the Review Board be pleased to:-
 - (a) declare the Applicant as the successful Tenderer under Section 66 of the Act; and

(b) Substitute the decision of the Procuring Entity with that of the Review Board awarding Tender No. KAA/197/2013-2014 to Suzan General Trading JLT as the successful Tenderer with the lowest evaluated price under Section 66 of the Act;

(c) Issue a direction to the Procuring Entity to proceed to negotiate and/or enter into a written contract with Suzan General Trading JLT in accordance with the tender documents.

5. **THAT** *Costs of and/or incidental to these proceedings, in any event, be borne by the Procuring Entity on a full indemnity basis.*

The Applicant raised three grounds of review namely that:-

1. That the Procuring Entity, not only in contravention of the directions given by the Review Board, but also the requirements of Sections 2, 31 and 66 of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as "the Act") as read together with the regulations thereunder, unjustifiably failed and/or ignored to identify, evaluate and objectively score the concession fees criteria, and as a result, ended up with a wrong scoring result in respect of the concession fee.
2. That the Procuring Entity, in contravention of the directions given by the Review Board, but also the requirements of integrity, fairness, objectivity and accountability secured by Sections 2, 31 and 66 of the Act, unjustifiably awarded the successful bidder marks for the cash flow statements while the same did not factually, legally and/or objectively support its proposed concession fees.

3. That by reason of all the above, the Procuring Entity, in both its technical and financial evaluation of the factors identified contravened the directions given by the Review Board under Section 98(b) of the Act as well as the requirements of integrity, fairness, transparency, objectivity and accountability secured by Sections 2, 31 and 66 of the Act, in such a manner as to amount to an unjustifiable denial of the Applicant's right to be declared the winning bidder with not only the highest combined technical and financial score, but also offering the best value for money.

PRELIMINARY ISSUES

The Board observes that there are Preliminary issues to be dispensed with before delving into the merits of the review. The issues are (a) the applicability of doctrine of *Res Judicata*; (b) The request by the Applicant to the Board to issue *ex-parte* orders to the Procuring Entity to provide additional information or documents to the Applicant; and (c) The filing of supplementary Grounds for Review by the Applicant.

The principle of *Res Judicata* was set in the case of Lotta vs. Tanaki [2003] 2 EA 556, which held as follows:

"The doctrine of 'Res Judicata' is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five

conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

It is clear in the collective mind of the Board that the instant Request for Review bears similarities to Application No. 16/2014 of 6th May, 2014 whose determination was on 3rd June, 2014. The tender is the same, the Applicant and Parties to the tender are the same, the documents being relied upon are the same and the award of the tender is the same. The Board is however of the view that the issues before it in the instant Request for Review concern the implementation of the orders of the Board as determined in Review No. 16/2014 of 6th May, 2014. In the current Request for Review the Board is being invited to determine whether its Order that was issued on Review No. 16/2014 was complied with in full. This, in itself, is a new issue that was not canvassed or available for litigation in the previous Request for Review No. 16 of 2014. The Board therefore finds that the principle of *Res judicata*, as an *Estoppel* to the proceedings cannot be deemed to apply in the current Application before it. The Board will therefore proceed to hear the matter as filed on merit and the ground is therefore hereby dismissed.

The 2nd preliminary issue before the Board is the request by the Applicant to the Board to issue *ex-parte* orders directing the Procuring Entity to disclose some additional information to it relating to the evaluation criteria applied to the tender. The request by the Applicant is brought under Section 44 (3) as read together with Section 45 (2) (e) of the Public Procurement and Disposal Act. This information sought by the Applicant was to facilitate the Applicant in canvassing its Request for Review before the Board. In particular the Applicant requested for objective informative summary of the re-evaluation report that complies with Section 45(2) (e) of the Act as read together with the Board's decision in Application 16 of 2014.

~~In the exercise of this right, the Applicant, vide its letter of 12th June, 2014, had requested the Procuring Entity to furnish it with the information and it was not until 18th June, 2014 that the Applicant received copies of the re-evaluation report from the Procuring Entity. The Applicant further alleged that the Procuring Entity deliberately failed and/or ignored to provide the Applicant with an objectively informative summary of the re-evaluation report that fully disclosed or demonstrated the objective evaluation criteria as well as scoring criteria used, in breach of the mandatory requirements of Section 44 as read together with Section 45(2)(e) of the Act and the decision of the Review Board in P.P.A.R.B. Application No. 16 of 6th May 2014 Suzan General Trading Limited Vs. Kenya Airports Authority.~~

The Board takes cognizance of the provision of the following Regulations:

Regulation 74(1): *"The Secretary shall immediately after the filing of the request under regulation 73, serve a copy thereof on the Procuring Entity or Director General as the case may be"*.

Regulation 74(2): *The copy to the Procuring Entity under paragraph (1) shall also contain a notification of the pending Review and the suspension of the procurement proceedings of such procuring entity.*

Regulation 74(3): *Upon being served with a notification of a Request, the Procuring Entity or the Director General shall within seven days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.*

The Board notes the following sequence of events:

- i) The Board made orders in Application 16/2014 on 3rd June, 2014
- ii) The Procuring Entity carried out a re-evaluation of the Tender on or about 9th June, 2014.
- iii) The Procuring Entity's Special Tender Committee meeting held on 10th June, 2014 adjudicated the Tender under Review and approved the award to M/s Hoggers Limited, the Successful Bidder herein. The notification letters to successful and the unsuccessful bidders were dated 10th June, 2014.
- iv) The Applicant requested the Procuring Entity to furnish it with documents and/or information on 12th June, 2014.

- v) That the Procuring Entity in response to the Applicant's request in (iv) above sent a summary of the evaluation report to the Applicant vide a cover letter dated 13th June, 2014.
- vi) The instant Request for Review was filed on 19th June, 2014
- vii) ~~The Procuring Entity was notified by the Board of the instant Request for Review by a letter dated 19th June, 2014 and received by it on 20th June, 2014.~~
- viii) The Applicant wrote to the Board requesting for *ex-parte* direction on 20th June, 2014.

The Board notes that under the Act, once a Request for Review has been filed, it acts as a stay against anything the Procuring Entity is supposed to do. ~~On receipt of the Notification of the Request for Review from the Board, The Procuring Entity was under obligation to supply to the Board all the documents that were used in the tender process. For the Board to make an *ex-parte order* as sought for by the Applicant for it to be supplied with further details or information after the Board had already requested for all the documents used in the tendering process would have caused difficulties to the Procuring Entity as it could not possibly have been capable of carrying out the order at that particular time. The Board also operates under very strict timelines given that it has only a 30 days window within which all parties must be brought on board and the matter determined. If *ex-parte* orders were to be issued, it would end up delaying the process and the strict timelines would not be met. The Board could not therefore issue *ex-parte* orders sought by the Applicant.~~

The 3rd preliminary issue concerns the filing of Supplementary Grounds of Review by the Applicant. The Board notes that the grounds being referred to as Supplementary Grounds were filed on 3rd July 2014. Under Regulation 73 as amended by Regulation 20 (a) of legal notice 106 of 2013, a Request for Review must be filed before the Board within seven days from the date of Notification under by Sections 67 and 83 of the Act. The documents were brought 13 days after that period had lapsed. Supplementary grounds that are introducing new issues to the Request for Review should have been brought within the period of filing a Request for Review. The Board's decision on the Supplementary Grounds is that the same must be struck out from the record as they have been brought in contravention of the Act and the Regulations. The said Supplementary Grounds of Review shall therefore not be relied on by any party. The Review shall proceed with the original Request for Review as filed on 19th June, 2014.

THE APPLICANT'S CASE

All the three grounds have been consolidated as they revolve around compliance with the orders of the Board and the evaluation of bids in accordance with the evaluation criteria.

The Applicant submitted that the Procuring Entity not only act in contravention and in contempt of the directions given by the Board in Review No. 16/2014 of 6th May, 2014 but also breached the requirements of Sections 2, 31 and 66 of the Act as read together with the regulations made thereunder. It submitted that, cumulatively, the Procuring Entity contravened the directions given by the Review Board under Section

98(b) of the Act as well as the requirements of integrity, fairness, transparency, objectivity and accountability secured by Sections 2, 31 and 66 of the Act, resulting in an unjustifiable denial of the Applicant's right to be declared the winning bidder with not only the highest combined technical and financial score, but also offering the best value for money.

The Applicant argued that the Procuring Entity, in respect of the DESIGN CONCEPT & FIT OUT criterion, did not apply any objective criteria in its technical re-evaluation and scoring and, as a result, the Applicant was denied the full 10 marks or, in the very least, a score equal to that of the successful bidder, without any rational basis. It argued further that the Procuring Entity awarded the tender on the basis of a joint bid which was materially different from the strict requirements of the tender under the BRAND AND PRODUCT LINE criteria.

It was the submission of the applicant that what was to be evaluated under the criteria in the tender document was the concession fee adding that the orders of review Board did not alter that criteria and that it was the method the Procuring Entity used to allocate the pro-rata scores that failed the objectivity test. The Applicant argued that the Procuring Entity re-evaluated the concession rate that was not supposed to be evaluated and that this was the same thing that had failed the objectivity test in the previous decision of the Board. According to the Applicant there were only three things to be evaluated -the Minimum Annual Guarantee, the concession fee and the cash flow. The concession fee was

directly related to the Minimum Annual Guarantee. It was on the basis of this concession fee that the evaluation of the cash flows was to be done. It was the Applicant's case that what parties were proposing in their supporting Cash flow was the minimum they were actually guaranteeing for the 5 year period regardless of the percentage quoted. In this regard, the Applicant submitted that its concession fee of USD. 1,613,965(Kshs. 139,643 802) was higher than that of the successful bidder at Kshs. 133,339,170). It argued further that had the Procuring Entity not disregarded the re-evaluation of both the concession fee and the cash flow, the Applicant would have been shown to have offered the best value. The applicant submitted that in terms of the financial evaluation it should have been awarded the full Marks for this category. For this reason the Applicant contended that the evaluation by the Procuring Entity was fundamentally flawed and unjustified.

The Applicant further alleges that the Procuring Entity unjustifiably awarded the Interested Party marks for the Cash flow statements and yet the Interested Party did not factually, legally and objectively support its proposed concession fees. It further alleges that The Procuring Entity awarded the tender on the basis of a joint bid which did not comply with the mandatory requirements and specifications of the tender and its requirements and by failing to observe the requirements of Section 2, 31(1), (4) & (5), 34(1) & (2) and 59(3). Finally it submitted that the evaluation was not objective as it further denied it 25 marks and in the opposite awarded the winning bidder a much higher score than it deserved.

RESPONSE OF THE PROCURING ENTITY

In response to the above issues raised in grounds 1, 2 and 3 of the Request for Review, the Procuring Entity submitted that the tenders were re-evaluated afresh in respect to the three bidders and the exercise was undertaken in compliance with the ruling of the Board and adherence to the provisions of the Act, the Regulations and as per the criteria set out in the tender document.

The Procuring Entity submitted that it applied a pro-rated formula based on the Review Board's direction that the Procuring Entity takes into account the significance of the Cash Flow projections. It was ~~therefore the submission of the Procuring Entity that it did not~~ contravene the directions given by the Review Board or the ~~requirements of integrity, fairness, transparency and objectivity.~~ It added that the technical and financial re-evaluation was done in strict compliance with the directions given by the Review Board as well as the requirements of integrity, fairness, transparency, objectivity and accountability.

The Procuring Entity further submitted that the three bids were subjected to a preliminary, technical and financial evaluation as applicable whereby the Procuring Entity awarded the tender to Hoggers Limited. It also submitted that the Applicant's contentions are without basis and its attempt to conduct its own self serving evaluation is subjective and without any factual and legal basis. According to the Procuring Entity there were six different items: design concept and fit

outs, brands product line, marketing plans, pricing policy, customer standard and quality control, finance. The Procuring Entity averred that it carefully looked at the various bid documents and allocated marks as per these items and that the applicant actually scored highest in some of these items including the item brands and product line where the Applicant got 21 marks and Interested Party got 20.3 marks; item on pricing policy the applicant got the highest marks followed by the Interested Party. The Procuring Entity argued that the evaluation was properly done, it was objective, transparent and the criteria followed. The Procuring Entity also stated that the Procuring Entity observed the spirit of Section 2 of the Act and that the evaluation was properly done.

In conclusion, the Procuring Entity submitted that the Application substantially contains general statements which are not supported by any evidence hence no relief for the prayers sought. It urged the Board to decline the Applicant's request, allow the continuation of the procurement process and condemn the Applicant to pay the costs of the proceedings.

THE INTERESTED PARTY'S RESPONSE

The Interested Party submitted that the re-evaluation of the tenders as submitted by the Procuring Entity in its response and the award of tender to the Interested Party was done in accordance with the criteria set out in the tender documents and in compliance with the orders of the Review Board made on 3rd June 2014. It submitted further that the Interested Party's cash flow statement was the subject of review in

Review No. 16/2014 of 6th May 2014 and that the Review Board ruled that the cash flow statement provided by the Interested Party was admissible. On the type of bid submitted, the Interested Party averred that the tender permitted a bid to be submitted by a Tenderer in joint venture with another party and so long as it attached a joint venture agreement.

Finally, the Interested Party submitted that the entire Application for Review was instituted in contravention of the provisions of section 44 as read together with Section 27(4) of the Act in that evaluation of the Applicant's financial bid was confidential.

In conclusion the Interested Party submitted that the Applicant had failed to demonstrate that the Procuring Entity in its re-evaluation breached any duty imposed on it by the Act or the Regulations or in any way failed to adhere to the criteria and procedure set out in the tender documents to warrant review of the Procuring Entity's decision to award the tender to the Interested Party for which reason it urged the Board to dismiss the application with costs and allow the procurement process to continue.

REPLY BY THE APPLICANT

In reply the Applicant reiterated that the Interested Party had failed to demonstrate how it would raise sales revenue and hence was not able to justify its cash flow statement. It went further to reiterate that had the Board's direction in Review No. 16 of 2014 been followed by the Procuring

Entity, it would have emerged the highest evaluated bidder and urged the Board to award the tender to it directly.

THE BOARD'S FINDINGS

The Board having carefully considered the oral and written submissions of the parties and examined all the documents that were submitted to it has identified the issues for determination in this Request for Review as follows: -

- (i) Whether the Procuring Entity failed to comply with the orders of the Board as directed in Review Case No. 16/2014 of 6th May, 2014 contrary to Section 100 of the Act.
- (ii) Whether the Procuring Entity failed to carry out tender re-evaluation in accordance with the evaluation criteria set out in the tender document contrary to section 66 (2) of the Act.

1. **As to whether the Procuring Entity failed to comply with the orders of the Board as directed in Review Case No. 16/2014 of 6th May, 2014 contrary to Section 100 of the Act:**

In determining these issue, the Board makes reference to its decision in Review Case No. 16/2014 of 6th May, 2014 which was delivered on 3rd June, 2014 and the re-evaluation report submitted before it, and notes as follows:-

- a) That the Board made a determination on the following issues, among, others:

- i. *As to whether the Procuring Entity violated Sections 2 and 66 of the Act through erroneous assessment of concession fee of the Applicant (the ground succeeded)*
- ii. *As to whether the Procuring Entity breached the provisions of Sections 2, 31 and 66 of the Act, as well as Clause 2.21 of the Instructions to Tenderers by use of wrong conversion rate in the Applicant's bid (the ground succeeded)*
- iii. *As to whether the Procuring Entity failed to properly and objectively give sufficient weighting to the Applicant's bid thereby violating Sections 31, 66 and 86 of the Act (the ground succeeded)*
- iv. *As to whether the Procuring Entity failed to carry out tender evaluation in accordance with the evaluation criteria set out in the tender document contrary to section 66(2) of the Act (the ground failed)*
- v. *As to whether the interested party misrepresented facts to pass as internationally reputed firm thereby breaching Clause 2.11 of the Instructions to Tenderers (the ground failed).*

b) In the said review the Board made the following orders material to the instant Request for Review:

- i. *The award of the tender to the successful bidder, Messrs Hoggers Limited was annulled.*

ii. The Procuring Entity was directed to re-evaluate the tenders of the three most responsive bidders for both technical and financial evaluation in accordance with the criteria set out in the tender documents and the findings of this Board.

iii. The Procuring Entity was directed to complete the entire process, including award within seven (7) days from the date of this decision.

c) The Procuring Entity carried out re-evaluation on or about 9th June, 2014.

d) The Procuring Entity's Special Tender Committee meeting held on 10th June, 2014 adjudicated the Tender under Review and approved the award to M/s Hoggers Limited, the Successful Bidder herein. The notification letters to successful and the unsuccessful bidders were dated 10th June, 2014.

e) The Applicant requested the Procuring Entity to furnish it with documents and/or information on 12th June, 2014.

f) That the Procuring Entity in response to the Applicant's request in (iv) above sent a summary of the evaluation report to the Applicant vide a cover letter dated 13th June, 2014.

g) The instant Request for Review was filed on 19th June, 2014.

h) The Procuring Entity was notified by the Board of the instant Request for Review by a letter dated 19th June, 2014 and received by it on 20th June, 2014.

i) The Applicant wrote to the Board requesting for ex-parte direction on 20th June, 2014.

In determining this issue the Board makes reference to Section 100 of the Act which provides as follows: -

Section 100 (1): A decision made by the Review Board shall, be final and binding on the parties unless Judicial Review thereof commences within fourteen days from the date of the Review Board's decision.

(2)

Section 100 (3): A party to the review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void

The Board observes that the time the Procuring Entity took to give effect to the orders lapsed on 10th June, 2014. The Procuring Entity awarded the tender on 10th June, 2014 at the seating of its Tender Committee and went on to notify bidders through letters dated 10th June, 2014 although received by the Advocate for the Applicant on 18th June 2014. As to whether the Procuring Entity complied with the period set by the Board to carry out the Board's orders, the Board is satisfied that this indeed

took place as the important date for compliance was the date of the Award Notification which was 10th June 2014. The three bidders were also notified according to the law. The Board is therefore satisfied that its direction to reevaluate and award the tender within Seven days was complied with fully.

2. As to whether the Procuring Entity failed to carry out tender evaluation in accordance with the evaluation criteria set out in the tender document contrary to section 66 (2) of the Act:

~~The Board makes reference to the following Section of the Act, Regulation and The Board's decision in Review No. 16/2014 of 6th May, 2014.~~

Section 66 (2):

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used".

Board orders:

"The Procuring Entity is directed to re-evaluate the tenders of the three most responsive bidders for both technical and financial evaluation in accordance with the criteria set out in the tender document and takes into account the findings of the Board."

In the previous evaluation undertaken by the Procuring Entity in Review No. 16 of 2014 all the three bidders had been awarded the full

marks of 70% at the Technical Evaluation. However the Procuring Entity could not at the hearing explain how this score had been arrived at. The Board notes that the re-evaluation that was carried out on or about 9th June, 2014 in compliance with the Board's Order and a different evaluation committee was set up to conduct the process. The Procuring Entity, in an effort to comply with the directive of the Board, graduated the bidders' proposals against the maximum scores and different scores for all the bidders arrived at. Although it is not clear how this criteria was developed by the new evaluation team, the Board observes from the evaluation report that the results of technical evaluation indicate that scores were apportioned to each parameter under the criteria in contrast to the first evaluation where all bidders were given the same maximum points. ~~The Board having been availed with the summary of each individual score sheets as requested for during the hearing, it is satisfied that indeed an attempt to comply with the Board's directive was made by the Procuring Entity.~~

On the financial re-evaluation, the Board observes that the applicable exchange rate to be used for the tender was Kshs. 86.52 to the US dollar. The Board in Review No. 16/2014 of 6th May, 2014 made a finding on the importance of the 5 years cash flow statements that *"it is fundamental determinant on the value of the concession rate and the income that would accrue to the Procuring Entity and the public."*

The Board notes that the Procuring Entity carried out financial re-evaluation with the concession fees being pro-rated. The Applicant's rate

of 7.5% got 18.75 points, Kuku Foods rate of 6.5% got 16.25 points and Hoggers Limited rate of 8% got the maximum 20 points. The formula was applied on the cash flow carrying 10 marks and was prorated on the sales/turnover. However the Applicant's bid documents had three sets of data on cash flow with each showing different concession fee, viz:

Business plan for five years (charges as operating expenses)

Concession fee (7.5 %) (Note 8) USD 1,654,901

Projected cash flow for five years

Concession fee (7.5 %) (Note 8) USD 1,530,214

Revenue for KAA

Concession fee (7.5 %) (Note 8) USD 1,654,901

Note: 8

Concession fee is payable quarterly in arrears

The Board observed/notes that calculation of this category of the Applicant's concession fee using the USD 1,654,901 (Kshs. 143,185,675 at exchange rate of Kshs. 86.522 per USD) as its concession fee, the Applicant will attain the maximum score of 10 points while reducing the Successful Bidders score to 9.3123 points translating the Applicant's financial score to 28.75 and combined technical and financial score of 87.85 points. In the same vein the Successful Bidder's concession fee of Kshs. 133,339,170 would give a revised combined score is 89.8123 points. The Board notes that although the Applicant offered the best concession fee to the Procuring Entity at Kshs. 143,185,675 against the Successful

Bidder's concession fee of Kshs. 133, 339,170 on the cash flow projections, it still did not emerge the highest evaluated bidder when the technical and financial scores were put together. All factors held constant, the score of the Applicant's bid is lower than the Successful Bidder's score by 1.9623 points even with the revision.


The Board holds that Compliance with the minimum annual guarantee of Kshs. 500,000 and the Bidders proposed concession rate are key in the subsequent execution of the contract.

Accordingly, this ground for review fails.

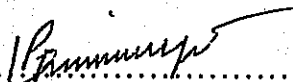
DECISION OF THE BOARD

Taking into consideration all the above matters, the Request for Review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act that the procurement process may proceed to its logical conclusion. The Board makes no order as to costs.

Dated this 16th day of July, 2014


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CHAIRMAN, PPARB


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SECRETARY, PPARB

