

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO 13/2014 OF 17<sup>TH</sup> APRIL, 2014**

**BETWEEN**

**LIBERTY EAGLE KENYA LTD .....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY ..... PROCURING ENTITY**

Review against the decision of Kenya Airports Authority in the Matter of Tender No KAA/195/2013-2014 for Development and Management of a Catering Outlet, Pizza and Subs at Jomo Kenyatta International Airport (JKIA), Nairobi.

**BOARD MEMBERS PRESENT**

- |                        |                         |
|------------------------|-------------------------|
| 1. Hussein Were        | - Member (in the Chair) |
| 2. Peter Bitia Ondieki | - Member                |
| 3. Gilda Odera         | - Member                |
| 4. Weche Okubo         | - Member                |
| 5. Paul Ngotho         | - Member                |

**IN ATTENDANCE**

1. Philip Okumu - Sitting in for Secretary
2. Maureen Namadi - Secretariat

**PRESENT BY INVITATION**

**Applicant -Liberty Eagle Kenya Ltd t/a Subway International**

1. Andrew M. Musangi Advocate
2. Christopher Bak Director
3. George Maina Gichuru Pupil

**Procuring Entity -Kenya Airports Authority**

1. George Kamau Legal Officer
2. Hobadiah Orora Ag. GM, Procurement & Logistics
3. Margaret Murage Manager, Procurement
4. Benard Bosire Procurement Assistant

**Interested Parties -**

1. George Nganga Advocate, Barintown
2. Ritesh Doshi Director, Naked Pizza
3. A.Samanani M.D., Hoggers Ltd
4. Caleb Mukuna Assistant Director, Ruhama
5. Florence Kamau Project Manager, Ruhama
6. Francis Amina Juma Director, Ruhama

## BOARD'S DECISION

Upon hearing the representations of the parties and 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 a Catering Outlet, Pizza and Subs at Jomo Kenyatta International Airport (JKIA), Nairobi, Kenya in the *Standard* newspaper on 17<sup>th</sup> January, 2014 and in the *Daily Nation* newspaper on 20<sup>th</sup> January, 2014. The tender was closed on 11<sup>th</sup> February 2014.

Out of 24 bid documents purchased only 7 firms submitted their bids at closing date as follows:-

No.	Bidder	Concession Rate in % p.a.	Tender Security Provided
1	Naked Pizza (K) Ltd	10%	Banker's Cheque (BOA) 100,000/=
2	Pulcinella Ltd	7.5%	KCB 100,000/=
3	China New World Development Co. Ltd	10%	Banker's Cheque (DTB) 100,000/=
4	Liberty Eagle (K) Ltd	10%	Banker's Cheque (BBK) 100,000/=
5	Hoggers Limited	8%	Banker's Cheque (GIRO)
6	Barintown Ltd	8%	Banker's Cheque (MEB) 100,000/=
7	Ruhama Catering Ltd	12.5%	Occidental Insurance 100,000/=

The bids were subjected to preliminary, technical and financial evaluation as applicable.

The preliminary evaluation was based on the following mandatory requirements:

BIDDER NO.	1	2	3	4	5	6	7
BIDDER NAME	Naked Pizza	Pulcinella Ltd	China New World	Liberty Eagle (K) Ltd	Hoggers Limited	Barintown Ltd	Ruhama Catering Ltd
MANDATORY REQUIREMENTS							
1	Certificate of Incorporation	Yes	Yes	Yes	Yes	Yes	Yes
2	Current KRA Tax Compliance Certificate	Yes	Yes	No	Yes	Yes	Yes
3	Tender Surety Kshs. 100,000/= valid up to 11 <sup>th</sup> June, 2014	Yes	Yes	Yes	Yes	Yes	Yes
4	Form of Tender	Yes	Yes	Yes	Yes	Yes	Yes
5	Confidential Business Questionnaire	Yes	Yes	Yes	Yes	Yes	Yes
6	Litigation History	Yes	Yes	Yes	Yes	Yes	Yes
7	Declaration Form	Yes	Yes	Yes	Yes	Yes	Yes
8	Financial ability to access Kshs. 1 million	Yes	Yes	Yes	No	Yes	Yes
9	Proof of firm's operation/ relevant experience (2 sites operating pizza and subs for at least 2 years) in an up-market location	Yes	No	No	No	Yes	Yes

Four bidders did not proceed to the technical evaluation stage for the reasons given below.

Bidder No.	Name	Reasons the Bid Did Not Proceed To Technical/Financial Evaluation
2	Pulcinella	1. Provided only one outlet
3	China New World Development Co. Ltd	1. Provided expired Tax Compliance Certificate (expired 15 <sup>th</sup> December, 2013) 2. Provided only one outlet with a fully signed lease, the other outlet's lease agreement was not signed by the tenant
4	Liberty Eagle (K) Ltd	1. The bank account statement provided did not bear the account holder's name 2. No proof of financial ability
7	Ruhama Catering Ltd	1. No proof of financial ability - Statements provided for only 2 months instead of six as required 2. Lease agreement with KAA does not portray experience of Pizzas and Subs

Three bidders considered compliant with the mandatory requirements at the preliminary stage were subjected to technical evaluation as follows:

BIDDER TO PROVIDE		Maximum Attainable Score	Naked Pizza	Hoggers Limited	Barintown Ltd
1. Design Concept & Fit-Out (10 Marks)	1. Perspectives, materials and colours	3.3	3.3	3.3	3.3
	2. Construction details(layout plans & location of various product lines)	3.3	2.2	3.3	3.3
	3. Indicative fit-out timeframe	3.3	3.3	3.3	3.3
2. The Proposal Brands & Product Lines (25 Marks)	1. Business Plan outlining total investments	10	10	10	10
	2. Five (5) year cash flow statement	5	5	5	5
	3. Product lines provided	10	5	10	10
3. Marketing Plan (10 Marks)	1. Proposed branding of shops	2.5	2.5	2.5	2.5
	2. Target market & market research	2.5	2.5	2.5	2.5
	3. Merchandising plan	2.5	2.5	2.5	2.5
	4. Discounts & marketing incentives	2.5	1.25	2.5	2.5
4. Pricing Policy (5 Marks)	1. Provide details of proposed pricing policy and ensure that prices will be competitive	5	2.5	2.5	5
5. Customer Standards And Quality Control (10 Marks)	1. Customer Service Policy	2.5	2.5	2.5	2.5
	2. Complaints Handling procedure	2.5	2.5	2.5	2.5
	3. Return/Exchange policy	2.5	2.5	0	0
	4. Acceptance of credit cards and foreign currencies	2.5	2.5	2.5	2.5
6. Personnel Details Of Staff Selection & Training Procedure. (5 Marks)	1. Staff Training, recruitment and retention programs	2.5	2.5	2.5	2.5
	2. Total no. of staff to be employed on the premises.	2.5	2.5	2.5	2.5
7. Financial Performance, Epos & Recording System. (10 Marks)	1. Provide details of proposed EPOS with ability to link to KAA POS system	5	5	5	5
	2. Description of methods of recording transactions daily/weekly/monthly/annual turnovers including sales analysis of product groups and sub groups	5	5	5	5
<b>MARKS</b>	<b>Out of 75</b>	<b>75.00</b>	<b>65.05</b>	<b>69.90</b>	<b>72.4</b>

The three bidders were then subjected to financial evaluation as follows:

BIDDER TO PROVIDE	Naked Pizza (K) Ltd.	Hoggers Limited	Barintown Ltd
BIDDER NO.	1	5	6
Minimum Annual Guarantee Of Kshs 500,000/=	YES	YES	YES
Concession Rate (20 Points)	10% = 20	8% = 16	8% = 16
Cash Flow (10 Points)	29,708,310 = 10 pts	28,071,403.92 = 9.45 pts	29,424,640.00 = 9.90 pts
Score/30	30	25.45	25.90
<b>TOTAL EVALUATION SCORE</b>	<b>95.50</b>	<b>95.35</b>	<b>98.30</b>

The Tender Evaluation Committee, in a report signed on 20<sup>th</sup> February 2014, recommended that the tender be awarded to M/s Barintown Ltd of P.O. Box 34877-00100, Nairobi being the bidder with the highest combined score of 98.30 points.

#### TENDER COMMITTEE

The Tender Committee in its meeting of 27<sup>th</sup> February, 2014 referred the matter back to the Evaluation Committee for re-evaluation noting that bidder No. 4 - M/s Liberty Eagle Kenya Limited had been disqualified from the Technical Evaluation yet he had a bank statement which provided an account number.

The Evaluation Committee submitted the same report, signed on 19<sup>th</sup> March, 2014, in which it still recommended M/s Barintown Limited for the award of the tender.

The Tender Committee meeting of 27<sup>th</sup> March, 2014 approved the recommendation of the Evaluation Committee to award the tender to M/s Barintown Limited at a concession rate of 8% per annum.

## THE REVIEW

The Request for Review was lodged by M/s Liberty Eagle Kenya Ltd trading as Subway International (Applicant) on 17<sup>th</sup> April, 2014 against the decision of Kenya Airports Authority (Procuring Entity) in the matter of Tender No KAA/195/2013-2014 for Development and Management of a Catering Outlet, Pizza and Subs at Jomo Kenyatta International Airport (JKIA), Nairobi.

The Applicant requested the Public Procurement Administrative Review Board (hereafter referred to as the Board) to review the whole decision of the Procuring Entity and sought the following orders:

- **That the Board nullifies the tender decision of the Procuring Entity and orders the re-evaluation of the bids against the tender evaluation criteria to properly identify an internationally reputable firm to manage a Subs and Pizza outlet at JKIA Terminal 4.**

The Applicant raised five grounds of review as follows:

1. Breach of Article 227 (1) of the Constitution of Kenya, 2010 and Regulation 29 of the Public Procurement & Disposal Regulations, 2006 (hereinafter referred to as "the Regulations");
2. Breach of Regulation 66(2) of the Regulations;
3. Breach of Regulation 46 of the Regulations;
4. Breach of Section 34(1) of the Public Procurement & Disposal Act, 2005, (hereafter referred to as "the Act") with regard to lack of clarity on specific requirements;
5. Breach of the Evaluation Criteria of the Tender Document.

At the hearing, the Applicant consolidated the grounds for review into the following three main grounds to be argued: -

1. That the Procuring Entity acted in breach of Regulation 66(2) of the Regulations by delaying to release the letter of notification to the Applicant
2. That the Procuring Entity disregarded its own clear objective thereby going against the provisions of Section 34 (1) of the Act.
3. That the Procuring Entity failed to conduct evaluation in accordance with the Evaluation Criteria set thereby failing to promote competition and ensure that competitors are treated fairly in accordance with Section 2 (b) of the Act.

The Applicant submitted in ground number one that the Procuring Entity acted in breach of Regulation 66(2) of the Regulations by delaying to release the letter of notification to the Applicant when it sent an email to the Applicant on 16<sup>th</sup> April, 2014 containing a scanned copy of the notification dated 9<sup>th</sup> April 2014. It argued that the delay can only be seen as an attempt by the Procuring Entity to prevent the Applicant from filing a Request for Review within the seven days window provided in Regulation 73 (2)(c) of the Regulations, an action that is indicative of a system that is not fair, equitable, transparent, competitive and fair, contrary to Article 227 (1) of the Constitution of Kenya 2010.



The Applicant submitted in ground number two that the Procuring Entity had stated in Section V of the Schedule of Particulars of Tender No. KAA/195/2013-2014 the objective of the tender as follows:

*“Through this tender the Authority wishes to engage an internationally reputable firm to manage a food outlet, PIZZA and SUBS at its new terminal unit 4”*

The Applicant argued that it provided a bid with a 10% concession rate and represented the SUBWAY brand which has more than 41,000 outlets in 104 countries thereby meeting the key requirement of the tender for a bidder with an international presence. It argued further that of all the bidders who submitted valid tenders at the tender opening on 11<sup>th</sup> February 2014, only three of them have an international presence that may satisfy the stated objective of the Procuring Entity and these are Liberty Eagle Kenya Limited (the Applicant), Naked Pizza Limited and Hoggers Limited. The Applicant contended that, by not awarding the tender to any of the firms that could be described as having international experience, the Procuring Entity disregarded its own clear objective and went against the provisions of Section 34 (1) of the Act which provides as follows:-

*“The procuring entity shall prepare specific requirements relating to the goods, works, or services to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings”.*

The Applicant submitted in ground number three that it was notified by the Procuring Entity that the Applicant's tender was unsuccessful because the Applicant allegedly did not provide proof of financial ability since the

bank account statement provided by the Applicant did not indicate who it belonged to making it impossible to link the statement details provided to the Applicant. The Applicant argued that it had submitted system-generated statements from Barclays Bank of Kenya showing that it easily exceeded the Procuring Entity's requirement of the ability to access Kshs. 1,000,000.00 for the business. It argued further that it had demonstrated on multiple occasions that it is the representative of the largest restaurant company in the world, a system whose global sales exceeded US dollars 18 billion in the year 2013. It contented that it had provided the Procuring Entity with a list of the 165 airports that currently had SUBWAY restaurants as well as the street addresses and phone numbers for the more than 40,000 SUBWAY restaurants around the world and that one of its restaurants in East Africa generated revenues in excess of Kshs 1 million in a week. The PE's disqualification of its bid on the ground of financial capability was preposterous, the Applicant argued.

The Applicant averred that there is absolutely no place in the whole tender document where a particular format of the bank statement was required or the requirement for the statement to be certified. The Applicant provided system generated bank statements going back to the year 2013 in its bid to the PE. The statements disclose the account number, branch and premier life centre. The Applicant stated that the reason its bid was disqualified was because the statement does not have a company name on it. It argued that when statements are posted to you they have your name and postal address but when you download them online, they do not show those details. It argued further that the Procuring Entity was out to reassure itself that every Applicant had

capacity to raise 1 Million shillings. It averred that the two sets of statements, one in US dollars and the other in Kenya shillings, each showed specific account numbers. The account numbers read against the Confidential Business Questionnaire filled by the Applicant and which showed its bank name and bank branch matching what was shown on the statement when read together confirmed that the statement belonged to the Applicant. The Applicant further submitted that the Procuring Entity should have sought clarification under Section 62 (1) of the Act if it was faced with difficulty of determining to whom the bank statements actually belonged. Section 62 of the Act provides as follows:

*62 (1) "The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders".*

*(2) A clarification may not change the substance of the tender".*

The Applicant also submitted the following previous decisions of the Board as authorities:-

- 1- Tricon Works Kenya Ltd and Kenya Forestry Research Institute  
(ARB Review No. 51 of 2013)
- 2- Unifree Duty Free, Suzan Trading General JLT, Flemingo International (BVI) Ltd, Dufry International (AG) and Kenya Airports Authority (ARB Review No. 46, 47, 48 & 50 of 2013)
- 3- Samo Security Limited and Masinde Muliro University of Science & Technology (ARB Review No. 40 of 2013)
- 4- Motivator Enterprises Ltd and Ministry of Foreign Affairs (ARB Review No. 45 of 2013)

The Applicant stated that, as a result of the actions of the Procuring Entity, it stood to suffer financial and reputational harm and prayed that the Board grants the orders sought.

In response, the Procuring Entity opposed the Request for Review terming it frivolous, vexatious and made solely for the purpose of delaying the procurement process.

On the issue of timelines, the Procuring Entity stated that it had furnished the Board with all the evaluation documents for perusal and scrutiny with regard to the process. It further stated that it had nothing to hide hence the reason it had not attempted to oppose the Request for Review for being filed out of time. The Procuring Entity added that the Applicant has not provided any proof of prejudice as a result of the notification process.

The Procuring Entity submitted on ground number two that it applied the evaluation criteria as outlined in the Tender Documents and in accordance with the Act and the Regulations.

The Procuring Entity submitted on ground number three that the Applicant did not provide information to show that they have the financial capability by demonstrating ability to access one million shillings as required under preliminary examination of the tender documents through: -

(1) Bankers Letters,

(2) Line of Credit, or

(3) Bank Statement for the last six months

The Procuring Entity argued that the Applicant provided a printout labelled "end of day balance" running from 1<sup>st</sup> August 2013 to 1<sup>st</sup> February 2014 and written "computer generated summary" at the bottom. It argued that there was no indication that the document belonged to the Applicant. It further argued that the tender documents placed the burden of proof that the bidder can access one million shillings on the Applicant and that in this case the bank statements have to be the bank statements of the Applicant.

The Procuring Entity averred that other mandatory documents provided by the Applicant such as the Tax Compliance Certificate, the Certificate of Incorporation and Confidential Business Questionnaire are explicitly stated to belong to Liberty Eagle Kenya Ltd trading as Subway International whose bankers are Barclays Bank, Village Market branch. It further averred that without providing more information as to whether this bank statements belong to Liberty Eagle Kenya Ltd, it is a very weak link to say that the fact that the Confidential Business Questionnaire indicates the bankers to be Barclays Bank at Village Market and the system-generated paper summary is from Barclays Bank Village Market, then the evaluators can conclusively be comfortable that the Applicant has demonstrated the mandatory requirements under this tender.

The Procuring Entity submitted that Regulation 47 of the Regulations, on preliminary evaluation of open tenders, outlines the requirements a tenderer must submit and provides that *"the Evaluation Committee shall first conduct a preliminary evaluation to determine whether all documents and information have been submitted."* It submitted that it is therefore mandatory for the Procuring Entity to allow only the bidder that has provided all documents and all the required information to proceed to the next stage of evaluation and reject tenders which do not satisfy the requirements set out. It added that this was a mandatory requirement and the Procuring Entity could not evaluate further if it was not met.

The Procuring Entity submitted that Regulation 47 of the Regulations has to be read together with Section 64 of the Act, hence the Procuring Entity cannot be said to have violated any right. It further submitted that it did not breach the provisions of Section 2 of the Act or Article 227 of the Constitution of Kenya, 2010.

The Procuring Entity urged the Board to dismiss this application and allow the procurement process to continue so that the Procuring Entity can have this important facility by the time they are opening the terminal. It also requested the Board to award it costs if it finds that there was no merit whatsoever in the application.

In its submission, the first Interested Party, M/s Barintown Limited (~~herein referred to as the "Successful Bidder"~~) associated itself entirely with the submissions of the Procuring Entity and urged the Board to dismiss the application for lack of merit. It submitted on ground number one that the letter notifying it of the award was dated the same day, 9<sup>th</sup>

April 2014, as the one sent to the Applicant, M/s Liberty Eagle Kenya Ltd. The Interested Party was however unable to explain the date and mode in which the letter of notification was transmitted to them by the Procuring Entity.

The first Interested Party argued that the Tender Document's appendix to instructions to tenderers, at page 15, clause 2.1.1, is clear that eligibility is to all tenderers running a pizza and subs outlet and that whereas the Applicant made reference to the objective of the tender, the mandatory requirement at clause 2.1.1 is sufficient for purposes of establishing who are eligible to bid. It further argued that the Tender Documents state that wherever there is a conflict between the provisions of the instructions to tenderers and the provision of the appendix, the provisions of the appendix shall prevail over those of the instructions to tenderers.

The first Interested Party submitted on ground number three that it is not incumbent upon the Procuring Entity to seek for a clarification under Section 62(1) in every situation. It argued that the Procuring Entity may request for a clarification of a tender to assist in the evaluation and comparisons meaning that the request is discretionary. It further argued that the Tender Document was clear that the bank statement was for purposes of assessment of financial capability so that the bidder submitting must, on the face of it, own the document hence there was no need for clarification.

The second Interested Party, M/s Naked Pizza, in its submission stated that they received the letter of notification dated 9<sup>th</sup> April 2014 from the Procuring Entity sent by email on 16<sup>th</sup> April, 2014. The second Interested

Party further submitted that on the day it received notification, it requested the Procuring Entity for further information on the criteria it had not met and the name of the successful bidder to which the Procuring Entity had not responded at the time of the review. It further submitted that as a tax payer it was entitled to a procurement process that is fair and transparent.

In reply the Applicant argued that it had emerged from submissions at the hearing that the Tender Committee actually remitted the matter back to the Evaluation Committee and asked them to have a fresh look at the issue and that there is no record of the Evaluation Committee even acknowledging receipt of the request to review the issue, reassessed, re-evaluated and arrived at the same finding. It further argued that the Evaluation Committee was already of a fixed mind and simply resubmitted the same evaluation report to the Tender Committee.

The Applicant submitted in its closing remarks that at the very least, it was entitled to proceed to technical evaluation and be scored. It argued that Section 62 of the Act is discretionary but it is not there as a superfluous provision of the law but a provision of the law to enable justice to be achieved in tendering.

From the foregoing submissions of the parties, the Board has identified the following issues for determination:

- (i) Whether the Procuring Entity acted in breach of Regulation 66(2) of the Regulations by delaying to release the letter of notification to the Applicant.



- (ii) Whether the Procuring Entity disregarded its own clear objective thereby going against the provisions of Section 34 (1) of the Act.
- (iii) Whether the Procuring Entity, by its conduct failed to promote competition and ensure that competitors are treated fairly in accordance with Section 2 (b) of the Act.

### PRELIMINARY ISSUES

In determining this Request for Review the Board first considered the issue of jurisdiction. Although not directly raised by the Procuring Entity, the Applicant referred to the issue of Jurisdiction in its submissions. The Board is therefore inclined to put this matter to rest first.

The Board observes that the Tender Committee of the Procuring Entity approved the award of the tender to the successful bidder on 27<sup>th</sup> March, 2014. The Procuring Entity communicated its decision to the Applicant in a letter dated 9<sup>th</sup> April, 2014 which was however emailed to the Applicant on 16<sup>th</sup> April, 2014. Regulation 66(2) of the Regulations provides as follows:

*"A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful".*

In view of the above, the Board finds that the action of the Procuring Entity in terms of notifying the Applicant did not meet the requirements

of the Regulations as regards notification of award. The Board however notes that the delay to notify the Applicant as aforementioned did not in any way prejudice the Applicant's right to file a Request for Review under Regulation 73 (2)(c) of the Regulations. The countdown for filing the review ordinarily begins after the bidder is notified of the outcome of the tender or from the time the bidder is made aware of the occurrence of the breach complained of. From the records before the Board, the Applicant was made aware of the outcome of its tender on 16<sup>th</sup> April, 2014. The seven day window for filing a Request for Review ended on 23<sup>rd</sup> April, 2014. The application for review was filed by the Applicant on 17<sup>th</sup> April, 2014. The Board therefore finds that the application for review was filed within the seven days window period for filing a request for review in accordance with Regulation 73 (2)(c) of the Regulations. The request for review is therefore properly before the Board for determination on merit.

The Board has carefully considered the submissions of the parties and examined all the documents that were submitted to it and finds as follows as regards the issues placed before it for determination:

1. **As to whether the Procuring Entity acted in breach of Regulation 66(2) of the Regulations by delaying to release the letter of notification to the Applicant**

The Board has already dealt with this issue in its determination of the Preliminary Issues above and additionally observes that the Tender Committee of the Procuring Entity approved the award of the tender to

the successful bidder on 27<sup>th</sup> March, 2014. The Procuring Entity communicated its decision to the bidders in a letter dated 9<sup>th</sup> April, 2014 which was however emailed to the bidders on 16<sup>th</sup> April, 2014. Regulation 66(2) of the Regulations provides that *"A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful"*.

The Board therefore finds that the action of the Procuring Entity did not meet the requirements of the Regulations as regards notification of award. Accordingly, this ground for review succeeds.

2. As to whether the Procuring Entity disregarded its own clear objective thereby going against the provisions of Section 34 (1) of the Act

The Board notes that the stated objective of Tender No. KAA/195/2013-2014 is *"to engage an internationally reputable firm to manage a food outlet, PIZZA and SUBS at its new terminal unit 4"*

The Board note that Section 34 (1) of the Act provides as follows:

*"The procuring entity shall prepare specific requirements relating to the goods, works, or services to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings"*.

The Board further notes that the Procuring Entity prepared tender documents and received bids for Tender No KAA/195/2013-2014 from local and international firms. The Procuring Entity proceeded to evaluate and award the tender. The stated objective of the tender is to engage an internationally reputable firm to manage the food outlet, PIZZA and SUBS at the new terminal. It is the view of the Board that a firm can be of an international repute without having an international presence and the converse is also true. The two phrases are not synonymous. The Board therefore finds that, by the Procuring Entity awarding the tender to a firm that does not have an international presence, which the Board is not suggesting of the successful bidder, the Procuring Entity did not disregard its own objective and hence the Board finds that there was no breach of Section 34 (1) of the Act. This ground of review therefore fails.

3. **As to whether the Procuring Entity failed to conduct evaluation in accordance with the Evaluation Criteria thereby failing to promote competition and ensure that competitors are treated fairly in accordance with Section 2 (b) of the Act.**

The Board notes that it was a mandatory requirement of the tender documents for a bidder to demonstrate ability to access one million shillings. Only bidders who met all the mandatory requirements were to be cleared at the preliminary evaluation stage to proceed to technical and financial evaluation.

The Board further notes that the Applicant submitted in its bid two sets of on-line computer-generated statements, one in US Dollars and the other in

Kenya Shillings. The statements showed the name of the issuing bank as Barclays Bank of Kenya, the account number and the branch but did not bear the name of the account holder. The amounts on the statements easily exceeded the Procuring Entity's requirement of the ability for the bidder to access Kshs.1,000,000.00. The Board took note of a letter from the Barclays Bank Ltd dated 16<sup>th</sup> April, 2014 and the explanation by the Applicant that system-generated bank's statements do not show details of account holder's name and postal address. The Board also notes that the bank name and bank branch details in the Applicant's Confidential Business Questionnaire submitted in its bid match those on the system-generated bank statements hence confirming that the statements indeed belong to the Applicant.

The Board takes the view that the Procuring Entity's Evaluation Committee adopted a narrow interpretation of the requirement for the bidders to submit bank statements as proof of financial capability. The Evaluation Committee, governed by the doubts it harboured on the ownership of the statements, rejected the Applicant's bid at the preliminary evaluation stage. The Procuring Entity's Tender Committee presented the Evaluation Committee with a second opportunity to clear its doubts by referring the report back to the Evaluation Committee but the latter failed to seize the chance and instead returned the same evaluation report without comment to the Tender Committee. The Board holds the view that the Procuring Entity's Evaluation Committee could have cleared the doubts if it had applied itself to the provisions of Section 62 of the Act on Clarification which provides as follows: -

62 (1) *“the Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.*

*(2) A clarification may not change the substance of the tender”.*

The Evaluation Committee did not attempt to seek clarification on this issue in the manner provided for under Section 62 of the Act and Clause 2.19 of the Instructions to Tenderers in the tender document thereby locking out the Applicant’s bid from being evaluated beyond the preliminary stage. The action of the Procuring Entity’s Evaluation Committee failed the test of promoting competition and ensuring that competitors are treated fairly in accordance with Section 2 (b) of the Act. Accordingly, this ground for review succeeds.

The Board under powers conferred on it by Section 98 of the Act directs as follows:

1. The award of the tender to the successful bidder, Messrs Barintown Limited, is hereby annulled.
2. The Procuring Entity is directed to consider the bank statement submitted by the Applicant and re-evaluate all tenders afresh in respect of all the bidders and complete the entire process within fifteen (15) days from today’s date.

3. The Procuring Entity is ordered to take necessary steps to extend the validity period of the tenders to allow for the award to be made within the tender validity period.

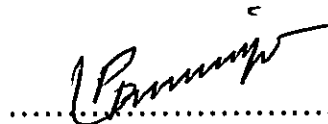
4. The Board makes no order as to costs.

Dated this 14<sup>th</sup> May, 2014

  
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Chairman,

PPARB

  
.....

Secretary,

PPARB

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