

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO 16/2014 OF 6TH MAY, 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. Hussein Were | - In the Chair |
| 2. Nelson Orgut | - Member |
| 3. Peter Bitu Ondieki | - Member |
| 4. Gilda Odera | - Member |
| 5. Weche Okubo | - Member |

IN ATTENDANCE

1. Philip Okumu - Secretariat
2. Judith Maina - Secretariat

PRESENT BY INVITATION

Applicant - Suzan General Trading JLT

1. Ngaca D. Gacugia - Advocate
2. Mercy Chebet - Advocate
3. Nzuki Musyoki - Wachira & Co. Advocate
4. Abdul Dawood - Wachira & Co. Advocate

Procuring Entity -Kenya Airports Authority (KAA)

1. George Kamau - Legal Officer
2. Hobadiah Orora - Ag. GM, P& L
3. Margaret Murage - Manager, Procurement
4. Benard Bosire - PA
5. Anthony Kulei - M.O-WR
6. Riungu Kevin -Intern, KAA

Interested Party -Hoggers Limited

1. George Mbugua - Advocate
2. Azam Samanani - Managing Director

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 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.

Out of 15 bid documents purchased only 4 firms submitted their bids at the closing date, as follows:-

Bidder No.	Bidder	Bidder Contact Details	Contact Person	Concession Rate in % p.a.
1.	Suzan General Trading Limited	P.O. Box 14401 Dubai UAE Tel: +97144474669 Email: Arif.hafiz@suzangen.ae samtradeint@hotmail.com	Arif Yusuf Hafiz	7.5%
2.	Kuku Foods Kenya Limited	P. O. Box 14885 00100 Nairobi Kenya Tel: 0722512405 Email: gavin.j.bell@kfk.co.ke	Gavin Bell	6.5%
3.	Yog Holdings Limited	Hinxhill, Ashford, Kent TN25 5NP UK Tel: +4440123612820 Email: info@yogyogurt.co.uk	Ersen Salih	10%
4.	Hoggers Limited	P. O. Box 49842, 00100 Nairobi Kenya Tel: +254733262272 Email: azam@samanani.com	Azam Samanani	8%

TENDER EVALUATION

The Evaluation Committee of the Procuring Entity (P.E) evaluated the bids for compliance with mandatory requirements. It then subjected the responsive bids to technical and financial evaluation.

a) Preliminary Evaluation

The committee subjected all the tenders to the mandatory requirements test and the score was as follows:

	MANDATORY REQUIREMENTS	BIDDER NUMBER			
		1	2	3	4
1.	Background of Tenderer	√	√	√	√
	• Bidder's detailed company profile	√	√	√	√
	• Statement on senior management capability of success managing the branded fast food outlet	√	√	√	√
2.	Legality	√	√	√	√
	• Demonstrate legal capacity to undertake contract	√	√	√	√
	• Submit a tender security	√	√	√	√
	• Submit a duly completed and signed Form of Tender	√	√	√	√
	• Submit a duly filled Litigation History Form (both court and arbitration cases)	√	√	√	√
	• Submit a duly filled Declaration Form confirming whether the firm has been debarred.	√	√	√	√
	• Written Power of Attorney or Signed Authorization Form	√	√	√	√
	• In case of a franchise , a letter from the franchise owner to be attached submitted	√	√	√	√
	• One (1) original and one (1) copy of completed tender documents	√	√	√	√
3.	Financial capability	√	√	√	√
	• Demonstrate ability to access at least US \$250,000 , by way of Bankers Letter or Line of Credit	√	√	√	√
4.	Relevant Experience	√	√	X	√
	Demonstrate an understanding of the Travel Retail business.	√	√	X	√
	• Documentary proof indicating firms operations as an International Branded Fast Food Outlet in an up-market environment	√	√	X	√
	• A list of at least ten (10) outlets where the international brand is currently operating	√	√	√	√

Based on the above evaluation for mandatory requirements bidder No. 3, Yog Holdings Limited was considered non-responsive.

Three (3) firms out of the four fulfilled all the mandatory requirements and proceeded to the next level of the evaluation, which is technical evaluation.

b) 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	10	10	10
2.	The Proposal: Brands and Product lines 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	25	25	25

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	10	10	10
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	5	5	5
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; ○ Acceptance of credit cards and foreign currencies Provide details of your method of auditing these procedures.	5	5	5	5
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	5	5	5
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	10	10	10
	Total	70	70	70	70

All the three bids attained the maximum score of 70 at technical evaluation and proceeded to financial evaluation.

c) Financial Evaluation

The PE's evaluation committee subjected the three bids to financial evaluation and was 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 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>Max of 20 points to be scored on pro-rata basis</i>	7.5%	6.5%	8%
	Points		18.75	16.25	20
PART C	Cash Flow As part of their financial proposal, bidders shall be required to submit a 5year cash flow cash statement to support the proposed concession.	<i>Max 10 points</i>	5years concession fee Kshs. 132,303,752/- (USD 1,530,214X86.444)	5years concession fee Kshs. 29,426,686/- (6.5% of 452,718,249 total sales for 5 years)	5years concession fee Kshs. 133,339,170/-
	Points		10	10	10
	Sum total		28.75	26.25	30.00

d) 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>	70	70	70
2.	Financial evaluation	<i>Max 30 points</i>	28.75	26.25	30.00
	Sum total		98.75	96.25	100.00
	Ranking		2	3	1

e) Evaluation Committee Recommendation

The Procuring Entity's Tender Evaluation Committee, acting in accordance with Instructions to Bidders Clause 2.25, recommended that the tender for the Development and Management of an International Branded Fast Food Outlet at Jomo Kenyatta International Airport terminal 4, **Tender No. KAA/197/2013-2014** is awarded to **Ms Hoggers Limited** for having achieved the highest final score and substantially meeting all conditions for award. **Ms. Hoggers Limited** is to pay the Procuring Entity (Kenya Airports Authority) 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 sq. ft. per annum**.

TENDER COMMITTEE DECISION

The Tender Committee of the Procuring Entity met on 23rd April, 2014 for its 310th meeting 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 letter dated 29th April, 2014. At the same time, the other bidders were also notified of unsuccessful bids.

THE REVIEW

The Request for Review was lodged by Suzan General Trading JLT, of Postal Address 14401 Dubai, UAE and of physical address 2508, One Lake Plaza, Jumeirah Towers Dubai, Tel No. +97144474669 and Email: suzan1@suzangen.ae (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 was represented by Mr. Ngaca D. Gacugia, Advocate while the Procuring Entity was represented by Mr. Geoge Kamau, Legal Officer. The Interested Party, M/s Hoggers Limited was represented by Mr. George N. Mbugua, Advocate.

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

1. ***THAT this request for review be allowed;***
2. ***THAT the decision of the Kenya Airports Authority notifying the Applicant through its letter of 29th April, 2014 that it had not been successful in Tender No. KAA/197/2013-2014, be annulled;***
3. ***THAT the award of Tender No. KAA/197/2013-2014 to Hoggers Limited as the successful tenderer with the lowest evaluated price under Section 66 of the Act, be annulled;***

4. **THAT** for sufficient cause provided by the Applicant, 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;***
5. **THAT** The Review Board issues 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.
6. **THAT** Costs of and/or incidental to these proceedings, in any event, be borne by the Procuring Entity.

The Applicant raised five grounds of review as follows:

1. Violation of the statutory requirements of Sections 2 and 66 of the Public Procurement & Disposal Act, 2005 (hereinafter referred to as "the Act") through erroneous assessment of concession fee of Applicant.
2. Breach of Sections 2, 31 and 66 of the Act, as well as Clause 2.21 of the Instructions to Tenderers in the tender document through use of wrong conversion rate of US dollars of Applicant's bid.
3. Violation of Sections 31, 66 and 86 of the Act by failing to properly and objectively give sufficient weighting to Applicant's bid.

4. Breach of Sections 31 and 66 of the Act by accepting and evaluating a profit and loss statement provided by the Interested Party rather than a valid cash flow as required under Clause 2.20 of The Tender document.
5. Breach of the Act and failure to comply with Clause 2.11 of the Instructions to Tenderers with regard to misrepresentation of facts by the Interested Party to pass off as an internationally reputed firm.

Ground 1

The Applicant submitted in ground one of Request for Review that the Procuring Entity's financial evaluation of the Applicant's bid, using the 5 year Cash Flow Statement given to support its proposed concession rate of 7.5%, was done erroneously resulting in an assessed 5 year concession fee of US \$ 1,530,214 rather than the correct sum of US \$ 1,654,901, which was greater than the sum proposed by Hoggers Limited, the Successful Bidder (Interested Party).

It argued that the Procuring Entity failed to correctly apply the criteria for financial evaluation by using the wrong concession fee, resulting in wrong results.

Ground 2

The Applicant submitted in ground two of the Request for Review that the Procuring Entity's financial evaluation of the Applicant's proposed 5 year concession fees was done erroneously through the use of a conversion rate of US\$ 1 = KShs. 86.444 (mean rate) instead of US\$ 1 =

KShs.-86.5222 (selling rate). It also submitted that the Procuring Entity violated its own Instructions to Tenderers by using the Central Bank of Kenya (CBK) mean rate instead of the selling rate to convert the currency used by the Applicant for the concession fee. The Applicant, further submitted that, on face value, its bid would have been the highest on the concession fee had the correct exchange rate been applied.

The Applicant averred that, based on the 5 year cash flow statement in its bid, the Applicant's proposed 7.5% concession rate would earn the Procuring Entity a higher amount than the Interested Party's 8% of the Interested Party's 5 year total cash flow. It argued that it was scored less and yet it offered a higher concession value than the Interested Party.

Ground 3

The Applicant submitted in ground three of the Request for Review that the Procuring Entity, in its technical evaluation, failed to properly and objectively give sufficient weighting to the Applicant's professional, technical and economic capability as an international brand, rendering the evaluation upon which the award was based, fundamentally flawed and contrary to Sections 31, 66 and 86 of the Act. It added that the action of the Procuring Entity giving the same weighting to all bidders for evaluation purposes irrespective of their strengths amounted to breach of objectivity in the tender evaluation process contrary to the provisions of Sections 2 and 66 (3) of the Act.

The Applicant further submitted that the weighting given under the "Brands and Product Lines" of the technical evaluation ought to have been done objectively so as to give an international brand operating in

more continents higher marks than one that is not. It argued that the concession fee was to be compared and allocated a graduating score where a maximum of 20 points ought to have been awarded on pro-rata basis. The Applicant stated that it was not prudent to compare and award marks based on concession rate percentage at the expense of the concession fee, which is where the Procuring Entity assesses how much revenue it can generate. The application of a pro-rata scoring would then ensure that the bidder with the highest concession bid gets the highest marks and the bidder with the lowest concession bid gets the lowest marks. By failing to do so, the Procuring Entity did not properly weight the Applicant's professional, technical and economic capability as an international brand.

The Applicant further stated that had the concession fee scoring been done on a pro-rata basis, using the Applicant's correct concession fee, the Procuring Entity should have awarded 20 points to the Applicant, 4.11 points to Kuku Foods and 18.62 points to Hoggers Ltd.

Ground 4

The Applicant submitted in this ground of Request for Review that the Procuring Entity breached Sections 31 and 66 of the Act by accepting and evaluating a document that had not been a requirement as per the criteria set out in the tender document. The Applicant alleged that the Interested Party submitted a Profit and Loss Statement instead of a Cash Flow statement, therefore failing to comply with Clause 2.20 of the Tender Document. The Applicant stated that the Cash flow statement

was required for the concession fees to be scrutinized appropriately and further stated that the Interested Party's response did not explain how the Interested Party arrived at the concession fee without sales computation.

Ground 5

The Applicant submitted in ground number five of Request for Review that the successful bidder, M/s Hoggers Limited fundamentally misrepresented facts on its locations of operations with a view of passing itself off as an internationally reputable firm with great experience in running travel retail business, contrary Clause 2.11 of the tender document. It argued that the Successful Bidder had misrepresented facts that they have presence in four continents and yet, going by the information in the Successful Bidder's document, all the restaurants listed by the Successful Bidder were on the African continent. Finally, the Applicant averred that, unlike the Successful Bidder, it has a higher international ranking and referred the Board to page 369, page 9-11, page 427 of Volume I and Volume II of the Request for Review.

RESPONSE OF THE PROCURING ENTITY

In response to the above issues raised on grounds 1, 2 and 3 of the request for review the Procuring Entity submitted that its decision was guided by the statutory requirements of Sections and 66 of the Act, Regulation 48, 49 and 50 as well as the procedure for evaluation in the

Tender Document Clause 2.20 to 2.25 and the Appendix thereto. The Procuring Entity referred the Board to the scores awarded in the evaluation process and stated that there was no prejudice whatsoever to the Applicant in the scoring, given that the Applicant was awarded the full maximum points in all the sections of the technical evaluation, like all other qualified bidders. The Procuring Entity further submitted that the Applicant, like all other bidders, had been informed of an earlier clarification and amendment to the tender document and referred the Board to a letter addressed to all bidders dated 5th February, 2014 titled Clarification No.1. The Procuring Entity stated that the Applicant should have sought clarification on how the financial evaluation was to be done if they had not understood.

The Procuring Entity further submitted that the tender documents clearly stipulated how the concession rate was to be scored and that it had no bearing on the concession fee, saying that it was the percentage of the concession rate that they were evaluating. The Procuring Entity submitted to the Board that indeed it used the tender document criteria of evaluation Clause 2.22 of Instructions to Tenderers for evaluation. The Procuring Entity referred the Board to the evaluation report stating that the Applicant had not pointed out even one element of technical requirements where they suffered prejudice due to the Procuring Entity's lack of objectivity.

The Procuring Entity argued that the issue raised by the Applicant of the mean rate being used instead of the selling rate had no bearing on the outcome of the scoring since the Applicant was awarded the entire full

marks for the concession fee like all the other bidders and was not disadvantaged whatsoever by the use of the mean rate as claimed. It added that only the concession percentage rate was the determining factor and not the concession fee. The Procuring Entity averred that the two scorings for the Cash flow statement was not for the financial evaluation stage and referred the board to the case of **Hagar Construction Co. Ltd Vs. Tender Committee of Wajir South District (Application No.469 of 2009-PPLR Vol. 1 2008-2010 Page 385)** at page 389 where it was held by the Board that a Procuring Entity can only use the criterion set out in the tender document as stipulated in Section 66 (2) of the Act.

Finally the Procuring Entity avers that the Applicant's technical proposal was objectively, properly evaluated and given sufficient weighting as per requirements of Sections 31, 66 and 86 of the Act. The Applicant attained the maximum score of 70 Marks and proceeded to financial evaluation

On grounds 4 and 5, the Procuring Entity submitted that the Interested Party provided a Cash Flow Statement and guided the Board through the Procuring Entity's Response to the Request for Review where the document was filed.

The Procuring Entity also referred the Board to several decisions in support of its arguments and concluded its submissions with a prayer that the Board should find that the evaluation criteria were applied uniformly, that the Procuring Entity observed the spirit of Section 2 of

the Act and that the evaluation was properly done. The Procuring Entity therefore urged the Board to refuse to grant the Request for Review, 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, M/s Hoggers Limited, submitted that it provided a cash flow statement at page 156 of its bid document contrary to the Applicant's claim in its Request for Review at ground number four that it supplied a profit and loss statement and not a cash flow statement. The Interested Party also denied the Applicant's submissions that it had misrepresented itself as an internationally reputable firm and stated that it submitted its bid in a joint venture with Goodison Two Hundred Five Limited. It submitted that Hoggers Limited on the one hand is the franchisee of Famous Brand which owns Steers, while Goodison is the franchisee of Papparoti. It stated that Papparoti has its presence in many continents whereas Famous Brand has its presence in 10 locations spread across 4 continents. It stated that it has its presence outside Africa and specifically, Malaysia, Singapore, Thailand, China, Vietnam, Korea, Japan, Abu Dhabi, Kuwait, Saudi Arabia, Dubai, India, Indonesia, Bangladesh, U.K and Australia. It took great exception to the Applicant's disregard of considering South Africa or other African countries as international. The Interested Party questioned the Applicant's complaint that they are not an international brand yet the Applicant itself does not have international presence using their own specific brand but operate through their joint venture partners, just like the Interested Party. It

stated that the Applicant had wrongly claimed that the Interested Party has a Steers outlet on Tom Mboya Street to belittle them yet it is a fact that the only two Steers outlets they run in Nairobi are on Wabera Street and Muindi Mbingu Street.

The Interested Party submitted that it provided its margins at 50% of gross profit which was clearly shown in the cash flow statement at page 156 of its bid document and that what remains after computation of the margins is the cost of sales.

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 entire Request for Review was lacking in merit, frivolous, vexatious and solely intended to delay the procurement proceedings for which reason it urged the Board to dismiss with costs.

REPLY BY THE APPLICANT

In reply the Applicant argued that it had emerged from submissions at the hearing that what was to be served in the tender over and above getting an international brand was the kind of money that it would generate. It stated that it already demonstrated how its concession fee was wrongly used and that it offered the best value for money. On points of law, the Applicant stated that the Procuring Entity had said that the financial

evaluation complied with Section 66(3) of the Act and that everything that was done was objective and wondered how the Procuring Entity can say it is objective when the party that provides the highest concession with the highest technical score gets a lower scoring than the one with a less concession fee. On the issue of Section 66(2) of the Act the Applicant submitted that the Procuring Entity basically tried to put it that it is the concession rate that provided an objective result and that there was no prejudice but the Applicant maintained that it was not objective. The Applicant stated finally, that the Procuring Entity made a number of concessions which ideally as a worst case scenario would require a fresh financial evaluation of the tenders.

THE BOARD'S FINDINGS

The Board having carefully considered 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 violated Sections 2 and 66 of the Act through erroneous assessment of concession fee of the Applicant.
- (ii) 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 a wrong conversion rate of US dollars in Applicant's bid.
- (iii) 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.

- (iv) 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.
- (v) Whether the Interested Party misrepresented facts to pass off as an internationally reputed firm thereby breaching Clause 2.11 of the Instructions to Tenderers.

The Board will now determine the above issues as follows:-

1. **As to whether the Procuring Entity violated Sections 2 and 66 of the Act through erroneous assessment of concession fee of the Applicant:**

The Board notes that the Appendix to Instructions to Tenderers, under Clause 2.22 provides as follows:-

"As part of their financial proposal, bidders shall be required to submit a 5 year cash flow statement to support the proposed concession"

The Board further notes that the Applicant submitted a 5 year cash flow statement and was awarded the maximum 10 points under this criterion.

The Board also notes the following provision of the Act pertaining to evaluation:

Section 66:- *Evaluation of Tenders.*.....

“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.”

The Board observes that the award for the scores for the Cash Flow Statement was to be a “maximum 10 points”. By using the word ‘maximum’, there was a supposition that the points would be graduated based on a criteria which was not however defined in the Tender Document. Despite the bidders submitting different amounts for the 5 year projected cash flow, the Board is at a loss as to why the Procuring Entity awarded the same marks and yet the Procuring Entity was seeking the bidder offering the highest value. Although the Procuring Entity argued that the Cash Flow was of no significance to the Concession rate, the Board finds that the criteria used by the Procuring Entity was not objective in ensuring that it secures the best for itself. Just like price alone cannot be a determining factor in a tender evaluation process, the percentage of the Concession Rate on its own cannot be the determining factor to evaluate the worthiness of a tender proposal in the financial evaluation. Furthermore, the bidders were indeed using their Cash Flow projections to determine the highest concession rate they could offer to the Procuring Entity. bidders. The Projected 5 year Cash Flow statement cannot and should not be taken as inconsequential as has been done by the Procuring Entity.

The Board recognizes that the Procuring Entity awarded the maximum score to all bidders for the Cash Flow and further finds that the Procuring Entity's arguments that the Applicant did not suffer prejudice has no basis. The Board has established as a fact that the conversion rate applied in calculating the concession fee was Kshs 86.444 per USD instead of the rate of Kshs 86.522 per USD. The conversion rate of Kshs 86.522 to the USD was not taken into account by the Procuring Entity when calculating the concession fee, thus making the Applicant's concession fee less than that of the successful bidder. The Procuring Entity could not downplay the importance of the total 5 year Projected Cash Flow Statement as it is the fundamental determinant of the value of the concession rate and the income that would accrue to the Procuring Entity and the public.

The Board therefore finds that the criteria applied by the Procuring Entity in the financial evaluation process was not objective. The Procuring Entity set for itself an evaluation criteria designed not to give it the best value out of the procurement process. For that reason the public stands to lose money out of improperly evaluated tenders. This ground for review therefore succeeds.

2. **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 of US dollars of Applicant's bid:**

The Board observes that the Tender Document, under Clause 2.21 provides as follows:-

"2.21 Conversion to Single Currency

Where other currencies are used, the Procuring Entity will convert those currencies to Kenya Shillings using the selling exchange rate on the date of tender closing provided by the Central Bank of Kenya."

In its Evaluation Report, the Procuring Entity used the exchange rate of USD 1 = Kshs. 86.444 to convert the Applicant's 5-year proposed concession fee instead of the selling rate of Kshs 86.522 to the USD. The Board finds that the use of the mean rate of exchange went against the evaluation criteria which provided for a selling rate of exchange. The Applicant suffered prejudice as a result of having its concession fee coming lower than its actual amount. The Procuring Entity would also get less concession fee than it should have if the Applicant was to be awarded the tender. Accordingly, this ground for review succeeds.

3. 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 Board notes that the technical scores were assigned a maximum achievable total of 70 marks while the financial scores were assigned a maximum of 30 marks. The technical scores were further subdivided

into sub-scores that were assigned to each criteria set for the technical evaluation.

The Board further notes that the requirements on the technical criteria were based on whether a bidder submitted the required information or not. The bidder would then be awarded the maximum marks under those criteria if they submitted the information. There is no provision for comparing or grading or weighting the various bids based on the content of the information asked for in the technical criteria. This might not have provided a proper basis for competition amongst bidders. The Board's apprehension is well founded given that all the three bidders who qualified to the technical evaluation stage were awarded the maximum 70 marks under those criteria.

Sections 31(1), (3) & (4) of the Act state that as follows:-

"31(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria-

(a) The person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;

(b).....

(2) the procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the

request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

- (4) *The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3)"*

Section 66(3) of the Act states as follows:-

"66(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) -

(a) the criteria must to the extent possible, be objective and quantifiable; and

(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation."

The Board further notes that Section 86 of the Act, under "International Competition" states that:-

"86 If there will not be effective competition unless foreign persons participate, the following shall apply -

(a).....

(b).....

(c) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade."

The Board notes that the Procuring Entity set out to procure a tender for the Development and Management of an **International** Brand Fast Food Outlet at JKIA. The Board is inclined to agree with the Applicant that weighting given under the "Brands & Product Lines" in the tender document ought to have been done in a manner that reflects the international nature of the desired bidder.

The Board finds that by giving the same weighting to all parties for evaluation purposes regardless of the extent of the international scope of operation of the bidders renders the evaluation process in breach of the objectivity under Sections 2 and 66(3) of the Act. This ground for review therefore succeeds.

4. 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 Applicant argued that the Interested Party submitted a Profit & Loss Statement instead of a Cash Flow statement, therefore failing to comply with Clause 2.20 of the Tender document and therefore ought not to have been awarded the tender.

The Board finds that the Interested Party submitted a Cash Flow Statement although in a different format. The Board holds that the difference in the format of the cash flow statement provided by the Interested Party does not stop it from being admissible.

The Board takes cognizance of Section 64(2) of the Act which states as follows: -

"64 (2) The following do not affect whether a tender is responsive-
(a) Minor deviations that do not materially depart from the requirements set out in the tender documents."

This ground of review therefore fails as the Board did not find the Procuring Entity in any breach of the law by admitting the Interested Party's Cash Flow statement in a different format from that of the other bidders.

5. As to whether the Interested Party misrepresented facts to pass off as an internationally reputed firm thereby breaching Clause 2.11 of the Instructions to Tenderers:

On this ground the Applicant alleged that the Interested Party was guilty of misrepresentation of its location of operations with a view of passing itself off as an internationally reputable firm with great

experience in running travel retail business, contrary to the Act and Clause 2.11 of the tender document.

The Board observes that the Procuring Entity had indicated at page 15 of the Tender Document that as part of the mandatory requirements:-

"Bidders shall prove that they have the financial ability to undertake contract by demonstrating ability to access funds necessary for the Branded Fast Food Outlet, at least US\$ 250,000. This shall be by way of Banker's Letter or Line of Credit.

Bidders shall be expected to demonstrate an understanding of the Travel retail Business.

- Bidders shall provide documentary proof indicating firms operations as an International Fast Food Outlet in an upmarket environment which will include shopping malls, airports, train stations, up town streets etc*
- Bidders to provide a list of at least ten (10) outlets where the international brand is currently operating."*

The Board observes that the Interested Party submitted a Banker's Letter from the Diamond Trust Bank indicating the bank's undertaking to extend any financial accommodation to the Interested Party to the extent of US\$ 250,000/= should the tender be awarded to the Interested Party.

The Interested Party also submitted a list of ten outlets where their brand was operating which included outlets in Africa, Europe and Asia.

The Board also notes that the Interested Party's partner in its joint venture in the subject tender, submitted a list of 19 locations worldwide in which it operates under the brand "Papparoti" and which included locations in Asia, the United Kingdom, Australia and Canada.

The Board does not find any evidence of misrepresentation of facts by the Interested Party. Accordingly, this ground for review fails.

GENERAL REMARKS OF THE BOARD

The Board wishes to state the following regarding this tender process:

That the Procuring Entity's evaluation criteria does not provide for a thorough evaluation process as should be the case. Giving blanket scoring in the evaluation process is an abuse of the entire procurement process. The Procuring Entity must ensure that for all its future tender processes, it sets out an objective evaluation criteria for both technical and financial evaluation. It is absurd that all bidders would score the same marks in all technical and financial evaluation areas even when the bidders have demonstrably varying capabilities. This does not leave much room for an objective evaluation. Where the score sheet states that a score is based on a maximum scoring method, the Procuring Entity should always ensure that the criteria enables the Procuring Entity to award graduating marks based on a comparison of the information provided.

DECISION OF THE BOARD

Accordingly and for all the above reasons either singularly or cumulatively and in exercise of the powers conferred upon it by Section 98 of the Act the Board makes the following orders: -

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 take into account the findings of this Board.
3. The Procuring Entity is directed to complete the entire process, including the making of an award within seven (7) days from the date of this decision.
4. The Board makes no order as to costs.

Dated at Nairobi on this 3rd Day of June, 2014

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Chairman, PPARB

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Secretary, PPARB

