

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 34 OF 2014

BETWEEN

FLEMINGO INTERNATIONAL (BVI) LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY (KAA).....PROCURING ENTITY

AND

DUFRY INTERNATIONAL AG.....1ST INTERESTED PARTY

ATU TURIZIM ISLETMECILIGI2ND INTERESTED PARTY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 14th August, 2014 in the Matter of Tender No. KAA/193/2013-2014 Development and Management of a Duty Free Retail Master Concessionaire at Jomo Kenyatta International Airport (JKIA), Nairobi.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Paul Ngotho | - Member |
| 3. Josephine Mong'are | - Member |
| 4. Hussein Were | - Member |
| 5. Nelson Orgut | - Member |

6. Rosemary Gituma - Member
7. Peter Ondieki - Member
8. Gilda Odera - Member

IN ATTENDANCE

1. Philemon Kiprop - Secretariat
2. Evalyne Wambui - Secretariat

PRESENT BY INVITATION

Applicant - Flemingo International (BVL) Ltd

1. G.M. Nyaanga - Advocate (Achach & Co Advocates)
2. Verah Kemunto - Lawyer (Achach & Co advocates)

Procuring Entity -Kenya Airports Authority (KAA)

1. Kennedy Ogeto - Advocate
2. Rosebella Nyonje - Advocate
3. George Kamau - Legal Officer
4. Margaret Muraya - Manager, Projects
5. Benard Bosire - PA
6. Martin Kamau - Accountant
7. Katherine N. Kisia - Corporate secretary
8. Augustine Moenga - Lawyer

1st Interested Party Dufry International AG

1. Mwaniki Gachuba - Advocate
2. Victor Mosweta - Advocate
3. Dewos Hourigan - Representative

2nd Interested Party Atu Turizim Isletmeciligi

1. Peter Wena - Advocate
2. Uger Atosey - Representative
3. Ismet Ersaw Arion - Representative

BACKGROUND OF AWARD

The Board conducted a consolidated hearing for Requests for Review No. 34 and 35 of 2014 because they had arisen from the same tender but on condition that a separate decision would be given in each Request for Review.

The decision of the Board with respect to the Applicant's Request for Review No. 34 of 2014 relates to the Procuring Entity's Tender No. KAA/193/2013-2014 for the Development and Management of a Duty Free Retail Master Concessionaire at the Jomo Kenyatta International Airport (JKIA) in Nairobi.

The stated objectives of the tender were to create a new shopping experience for shoppers, make JKIA a competitive shopping destination,

and enhance the Procuring Entity's non-aeronautical revenue and to boost the national economy.

The Tender No.KAA/193/2013-2014 was advertised in the local dailies on Wednesday 26th March 2014 in the Daily Nation and on Friday 28th March 2014 in the Standard Newspaper. The tender was scheduled to close on the 18th April 2014 however through an addendum 1, the closing date was extended to 25th April 2014. In addition addendum 2 and 3 further extended the closing date to 23rd May 2014. A pre-bid/Site visit was conducted on the 11th April 2014 and minutes released to all bidders on the 24th April, 2014. Due to numerous requests for clarifications the Procuring Entity through addendum 4, 5, 6, 7 and 8 further extended the closing date to 8th July 2014 and issued a revised Tender Document which was circulated to bidders on the 18th June 2014 through the KAA website.

Addendum 9 changed the tender name to: ***“THE DEVELOPMENT AND OPERATION OF DUTY FREE SHOPS UNDER A SINGLE MASTER LICENSE AT THE NEW JOMO KENYATTA INTERNATIONAL AIRPORT TERMINAL UNI 4 – KAA/193/2013-2014 (REVISION NO. 1) – VOLUME 1 –TECHNICAL PROPOSAL AND VOLUME 2 - FINANCIAL PROPOSAL”.***

Clarification 1, 2 and 3 were issued to the bidders.

The Tender Documents were bought by 28 (Twenty Eight) bidders. However, 5 (Five) bidders returned the bids which were submitted and opened on the closing date. Paragon Holdings failed in the Preliminary

Evaluation stage and so its bid did not proceed for Technical Evaluation. The four bidders who qualified and their scores out of 90 in the Technical Evaluation are as follow:-

Dufry International Ag: Bidder No. 1..... 83.61

Atu Turizim-Isletmeciligi: Bidder No. 2 78.20

AerRianta International: Bidder No. 3..... 87.20

Flemingo International (BVI) Limited: Bidder No. 4..... 79.03

Financial Evaluation

Following the opening of the financial bids on 12th August 2014, the four bidders were subjected to financial evaluation as per the financial evaluation criteria. The financial bids scoring and the final combined ranking for the tender are tabulated below:-

Bidder's Name	Tech nical Score	Financial Proposal (US \$)	Maximum Financial Proposal (US \$)	Financial Score (pro-rata)	Final Score	Ranking
M/s.Dufry International Ag	83.61	3,500,000	4,126,000	8.482792	92.093	1
M/s. Atu Turizim	78.20	4,126,000	4,126,000	10	88.200	3
Isletmeciligi						

M/s Aer Rianta International	87.20	2,000,000	4,126,000	4.84731	92.047	2
M/s. Flemingo International (BVI) Limited	79.03	3,765,420	4,126,000	9.126079	88.156	4

Recommendation

The evaluation committee recommended the award of the tender to M/s Dufry International AG which was ranked number 1, as shown above. In addition M/s Dufry International AG will pay the Authority a minimum annual guarantee fee of **US\$ 3.5 million per annum** exclusive of taxes subject to an annual license fee at the rate of **20%** on annual gross sales.

TENDER COMMITTEE DECISION

The Kenya Airports Authority's 334th Tender Committee Meeting adopted the recommendations of the Evaluation Committee and approved the award of the tender to **M/s Dufry International AG**.

THE REQUEST FOR REVIEW

This Request for Review was lodged by M/s Flemingo International (BVI) Ltd (the Applicant), against the decision of The Kenya Airports Authority (Procuring Entity) to award Tender No. KAA/193/2013-2014 for the Development and Management of a Duty Free Retail Master

Concessionaire at Jomo Kenyatta International Airport (JKIA), Nairobi to the 1st Interested Party M/s Dufry International AG.

The Applicant seeks for the following orders:

- a) *The Respondent's decision awarding Tender No. KAA/193/2013-2014 to the alleged successful bidder be and is hereby set aside and nullified.*
- b) *The Respondent's decision notifying the Applicant that it had not been successful in Tender No. KAA/193/2013-2014 purportedly by the letter dated 15th August 2014 (which was received on 18th August 2014) be set aside and nullified.*
- c) *Further, the Review Board do direct the Respondent to undertake fresh evaluation of all bids received in strict adherence to the Tender, the Act and the Regulations and award Tender No. KAA/193/2013-2014 to the highest competitive bidder.*
- d) *The Board be pleased to review all records of the procurement process (including the evaluation thereof) relating to Tender No. KAA/193/2013-2014 and do substitute the decision of the Review Board for the decision of the Respondent.*
- e) *Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender, afresh.*
- f) *The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and*

g) Such other or further relief or reliefs as this board shall deem just and expedient.

During the hearing of this Request for Review, the Applicant was represented by Mr. G M. Nyaanga while the Procuring Entity was represented by Mr. Kennedy Ogeto. Two Interested Parties namely M/s Dufry International AG and M/s Atu Turizim Isletmeciligi appeared before the Board and were allowed to participate in the proceedings pursuant to the Provisions of Section 96 of the Public Procurement and Disposal Act. The two Interested Parties who the Board will in this decision henceforth refer to as the 1st and the 2nd Interested Party respectively were the Successful Bidder and the third ranked evaluated bidder respectively. They were represented by Mr. Mwaniki Gachuba, Advocate and Mr. Peter Wena, Advocate respectively. The 2nd highest bidder **M/s Aer Rianta International** did not appear and was not represented at the hearing of this Request for Review.

The Applicant which was ranked fourth in the evaluation process was dissatisfied with the decision of the Procuring Entity contained in the Procuring Entity's letter dated 15th August, 2014 awarding Tender NO. KAA/193/2013-2014 for the development and operation of duty free shops under a single master license at the new Jomo Kenyatta International Airport Terminal unit 4 to the 1st Interested Party.

The Applicant consequently filed a Request for Review dated 20th August 2014 with the Board on 21st August, 2014. The Request for Review runs

into a total of 121 pages. On 4th September, 2014 the Applicant additionally filed an affidavit/statement signed by one **THANJAVUR MUTHUMAKUMARSWAMY RAMALINGAM**.

On 27th August, 2014, the Procuring Entity filed a written reply to the Applicant's Request for Review and additionally filed a 158 page written submissions. The Procuring Entity further forwarded the original tender and other documents to the Board for the purposes of the hearing of the Request for Review pursuant to a request by the Board under the Provisions of Section 44 (2) (c) of the Public Procurement and Disposal Act (2005) and Regulation 74 (3) of The Public Procurement and Disposal Regulations (2006).

The 1st Interested Party filed a response to the Applicant's Request for Review on 5th September, 2014. On 8th September, 2014 the 1st Interested party in addition to the Memorandum of Response also filed a notice of Preliminary Objection dated 5th September, 2014 and written submissions dated 10th September, 2014 which were filed with the Board on 11th September, 2014.

The 2nd Interested Party did not file any document either in support or in opposition to the Applicant's Request for Review. The Board however informed Counsel for the 2nd Interested Party that he was entitled in law to address the Board should he consider it necessary to do so based on the submissions made by any of the parties to the Proceedings. The Board however observes that at the conclusion of the submissions by the Advocates representing the other parties Counsel for the 2nd Interested

Party opted not to tender any submissions in this Review as it had filed its own Request for Review, namely Request for Review number 35 of 2014 also challenging the award of the same tender to the 1st Interested Party.

Before proceeding to consider and give its determination on the grounds and the issues raised in this Request for Review, the Board finds it necessary to set out the background giving rise to this Request for Review which is as follows:-

It was common ground in this Request for Review as evidenced by this Board's decision dated 20th December, 2013 which was produced at pages 9-65 of the Applicant's Request for Review and which was also produced as annexure "K1" by the Procuring Entity's in its bundle of documents that the tender the subject matter of this Request for Review was first advertised in the media on 4th and 7th October, 2013 with a closing date of 25th October, 2013 and attracted a number of 36 bidders out of who only one bidder namely **M/s Nuance Group AG** proceeded to the last stage of evaluation and was declared the successful bidder pursuant to the decision of the Tender Committee dated 21st November, 2013.

Several bidders who participated in the tender as first advertised on 4th and 7th October, 2013 were dissatisfied with the Procuring Entity's decision awarding the tender to **M/s Nuance Group AG** and filed several Requests for Review namely Request for Review No. 46 of 2013 filed on 28th November, 2013, Request for Review No. 47 of 2013 filed on 2nd December, 2013, Request for Review No. 48 of 2013 filed on 5th December, 2013 and Request for Review No. 50 of 2013 filed on 6th December, 2013. The Board

consolidated, heard and delivered a decision on the four Requests for Review and gave the following orders on 20th December, 2013.

- a) That the tender by Kenya Airports Authority to develop and manage duty free Retail Concessionaire at Jomo Kenyatta International Airport (Tender number KAA/193/2013-2014 awarded to M/s Nuance Group AG is hereby annulled.*
- b) The Kenya Airports Authority being the Procuring Entity in this matter is directed to re-tender a fresh the tender and ensure in doing so (a) make use of the Standard Tender document as prepared by the PPOA and (b) enlarge specifications to make them more inclusive.*
- c) That the Board makes no orders as to costs.*

It was common ground by all the parties to this Request for Review that pursuant to the Board's decision dated 20th December, 2013, the subject tender was re-advertised in the print media, namely in the Standard Newspaper of 29th March, 2014. As already stated in the background to this decision the fresh tender attracted a total of 28 bidders who purchased the tender documents but only the following five bidders returned their tenders.

1. Dufry International AG.
2. Atu Turizim Isletmeciligi.
3. Aer Rianta International.
4. Paragon Holdings.
5. Flemingo International (BVI) Ltd.

It is apparent from the Request for Review, the responses thereto and the oral and the written submissions made by the parties that the tenders submitted by the five bidders were subjected to a preliminary, technical and financial evaluation with the result that the 1st Interested Party was awarded the subject tender and notified of the award of the tender by a letter dated 15th August, 2014.

When this Request for Review was filed, the Secretary in consultation with the Chairman of the Board constituted the full panel of the Board to sit and hear the dispute between the parties to this Request for Review under the Provisions of Regulation 69 of the Regulations.

At the commencement of the hearing of the Request, Counsel for the 1st Interested Party sought to have his Preliminary Objection as set out in the notice or Preliminary Objection dated 5th September, 2014 heard first but the Board directed that the grounds raised in the Preliminary Objection be incorporated and be argued within the main hearing of the Request for Review since, in the Board's view, the Preliminary Objection was not based on agreed but on contested issues of law and fact which could only be argued and determined after a full hearing. The grounds of Preliminary Objection were therefore incorporated and canvassed during the full hearing of the Request for Review.

The Board has looked at the Request for Review, all the documents submitted to it by the parties who opted to participate in the proceedings. The Board has also considered the written submissions filed by the Procuring Entity and the 1st Interested Party and the oral submissions

made by all the advocates for the parties who participated in the proceedings. Upon consideration of all the above factors, the Board has determined that this Request for Review raises the following issues for determination.

- (i) Whether the Applicant's Request for Review was filed out of time in contravention of the Provisions of Section 93 (1) of the Public Procurement and Disposal Act (2005) as read together with Regulation No. 73 (2) (c) (i) of the Public Procurement and Disposal Regulations (2006) and Regulation 20(a) of the Public Procurement and Disposal (Amendment) Regulations 2013.*
- (ii) Whether the Applicant's Request for Review contravenes the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations (2006) in that it was not accompanied by the mandatory statement under that Regulation and what are the consequences of the lack of such a statement.*
- (iii) Whether the Applicant's Request for Review is incompetent and defective on the ground that the Applicant's Board of Directors did not authorize the filling of the Request for Review.*
- (iv) Whether the Procuring Entity breached the Provisions of Section 2, 39, 62 and 66 of the Public Procurement and Disposal Act (2005) and Regulations 50(1), (2) and (3) of the Public Procurement and Disposal Regulation (2006).*
- (v) Whether the Procuring Entity breached the Provisions of Section 67 (2) of the Act by failing to notify the Applicant of the outcome in the tendering process in the manner required.*

- (vi) *Whether or not the Procuring Entity breached the Provisions of Article 227 of the Constitution.*
- (vii) *What order should the Board make on costs.*

The Board will therefore now proceed to consider the submissions by the parties and render it's decision on each of the above issues:-

ISSUE NO. 1

Whether the Applicant's Request for Review was filed out to time in contravention of the Provisions of Section 93 (1) of the Public Procurement and Disposal Act 2005 as read together with Regulation No. 73 (2) (c) (i) of the Public Procurement and Disposal Regulations (2006) and Regulation 20(a) of the Public Procurement and Disposal (Amendment) Regulations 2013.

The issue of whether the Applicant's Request for Review was filed out of time contrary to the Provisions of Section 93 (1) of the Act as read together with Regulation 73 (2) (c) (i) of the Regulations as amended by the Provisions of Regulation 20 (a) of the Public Procurement and Disposal (Amendment) Regulations, 2013 is an issue of jurisdiction. This issue was raised in ground 2 of the 1st Interested Party's notice of Preliminary Objection dated 5th September, 2014 which was lodged with the Board on 8th September, 2014. This being a jurisdictional issue therefore it must be determined first for without jurisdiction this Board cannot proceed to consider and determine the other issues raised in the Request for Review.

Mr. Mwaniki Gachuba Counsel for the 1st Interested Party argued that from a reading of the Request for Review and upon hearing the submissions made by Counsel for the Applicant, it was apparent from that the Applicant's grievances were based on the Procuring Entity's decision as contained in the letter dated 18th July, 2014 in which the Procuring Entity informed the Applicant that it's technical proposal as was non-responsive since it did not meet two mandatory requirements namely that:-

(i) The Applicant did not provide audited accounts for Flemingo International (BVI) Ltd for all the three years as required and that it had only submitted audited accounts for the financial years 2012 and 2013 against the requirement of three financial years (2010, 2011 and 2012).

(ii) And that Flemingo duty free shop Mumbai Private Ltd, being one of the subsidiaries, presented in this tender did not provide audited accounts for three financial years as required under clarification No. 2.

Counsel for the 1st Interested Party submitted that the Applicant's main grievance was based on complaints surrounding the Procuring Entity's decision to declare it's tender as non-responsive at the Preliminary and technical evaluation stage for the reasons contained in the letter dated 18th July, 2014. The 1st Interested Party therefore argued that the Applicant ought to have therefore filed a Request for Review against that decision within a period of Seven (7) days from the date when the grounds for that complaint arose. In the 1st Interested Party's view, the Applicant was

therefore precluded from raising that complaint in the present Request for Review which was filed on 21st August, 2014 way outside the period of 7 days as the events complained of occurred on 18th July, 2014.

The 1st Interested Party relied on the Provisions Section 93 (1) of the Act and the decision of the High Court in the case of **Republic of Kenya -vs- The Public Procurement Review Board & Another, Exparte Nelson Korir & 3 Others (2013) eKLR** and also to the decision of this Board in the case of **Transcend Media Group Limited -vs- The Kenya Airports Authority (Application No. 6 of the 2014)** in support of its argument on this issue.

Mr. Nyaanga for the Applicant in a brief response submitted that the Applicant's Request for Review was not time barred on the ground that the Applicant had been notified of the Procuring Entity's decision vide the letter dated 15th August, 2014 which was received on 18th August, 2014 and that the Request for Review which was filed on 21st August, 2014 was therefore filed within time.

The Applicant further argued that Article 159 of the Constitution now enjoins any court, tribunal or body exercising judicial or quasi judicial authority to dispense such authority in order to do justice to all parties without undue regard to technicalities.

Counsel for the Procuring Entity did not tender any submissions on this aspect of the Preliminary Objection in his oral or written submissions but confined his submissions to the substantive issues raised in the Request for Review.

The Board has read through and considered the Applicant's Request for Review and the submissions made by the parties for and against the issue of whether the Applicant's Request for Review was filed out-of-time.

The Board notes that the Applicant has raised a total of 14 grounds which raise distinct complaints.

Grounds 3 to 7 are complaints relating to the events arising from the Procuring Entity's letter dated 18th July, 2014 while grounds 8, 9 and 10 relate to complaints touching on technical and financial evaluation while grounds 11 (a) to (p) and 12 (a) - (d) raise issues touching on alleged breaches of the Act and the Regulations. Ground 13 raises issues touching on the alleged breaches of Article 227 of the Constitution while ground 14 raises the issue of the alleged breach of Section 67 (2) of the Act by the Procuring Entity and are based on the allegation that the Procuring Entity did not serve notification of the outcome of the tender process on the Applicant.

The Board further finds that in its prayers numbers (a) & (b), the Applicant is challenging the Procuring Entity's decision awarding the subject tender to the 1st Interested Party as notified in the letter dated 15th August, 2014 which the Applicant states it received on 18th August, 2014.

These two prayers which appear at the printed page 6 of the Request for Review read as follows:-

a) The Respondents decision awarding tender NO. KAA/193/2013-2014 to the alleged successful bidder be and hereby set aside and nullified.

b) The Respondent's decision notifying the Applicant that it had not been successful in Tender NO. KAA/193/2014 purportedly by the letter dated 15th August, 2014 which was received on 18th August, 2014 be set aside and annulled.

The Board therefore finds, based on the above analysis that the Applicant's grounds of Review are not only based on the events triggered by the letter dated 18th July, 2014 but also that it raises a number of other additional grounds and prayers which are directed at the award made as contained in the letter dated 15th August, 2014 on among other grounds that the notification of the final outcome of the process was not effected in accordance with the Provisions of Section 67(2) of the Act among other alleged breaches of the law.

The Board therefore finds that due to the mixed nature of the grounds set out by the Applicant in the Request for Review, the issue of whether any ground or grounds of review is time barred should be determined while dealing with the specific ground or grounds of review.

For the above reasons, the 1st Interested Party's Preliminary Objection that the Applicant's request for review was filed out of time therefore fails but subject to what the Board has stated in the last paragraph of this decision.

ISSUE NO. 2

Whether the Applicant's Request for Review contravenes the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations 2006 in that it was not accompanied by the mandatory statement under

that Regulation and what are the consequences of the lack of such a statement.

On the second issue framed for determination, the 1st Interested Party submitted that the Applicant's Request for Review was incompetent since it was not accompanied by the mandatory statement which an applicant in a Request for Review ought to file under the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations (2006). The 1st Interested Party therefore urged the Board to find that the Applicant's Request for Review was incompetent and defective and does not lie in law because it had failed to comply with the Provisions of Regulation 73 (2) (b) of the Regulations which the Board has already set out above.

The 1st Interested Party relied on the decision in the case of **Republic -vs- Senate Examination Disciplinary Committee & Another, Exparte Shadrack Muchemi Mbau (2006) eKLR** and in particular at page 5 of the said decision for the proposition that the Applicant ought to have filed a statement and a Verifying Affidavit setting out the grounds and the facts in support of its Request for Review.

The 1st Interested Party therefore urged the Board to strike out the Applicant's Request for Review.

Mr. Nyaanga, learned Counsel for the Applicant in response to this aspect of the Preliminary Objection argued that the Provisions of Regulation 73(2) (b) were permissive and left the discretion on whether or not file a statement on the Applicant.

Counsel for the Applicant further submitted that where a Request for Review was based on a pure point of law an applicant was entitled to lodge the Request for Review without the need to file a statement. He urged the Board to find that most of the documents the Applicant was relying on were also contained in the Procuring Entity's bundle of documents and or were admitted in the Procuring Entity's response. He gave the example of the letter dated 18th July, 2014 and the allegation that the Applicant had initially been declared non-responsive and had later been re-admitted into the tender process as one of the issues which was not in dispute.

On the decision in the case of **Republic -vs- Senate Examination Disciplinary Committee & Another, Exparte Shadrack Muchemi Mbau (2006) eKLR**, Counsel for the Applicant argued that the decision was distinguishable and was not applicable to the Request for Review because the court in the decision cited by the 1st Interested Party was not dealing with the interpretation of the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations but with an application for judicial Review under the Provisions of Order 53 of the Civil Procedure Rules and the Law Reform Act which provide for the Procedure and the law governing the manner in which an application for judicial Review ought to be filed.

Counsel for the Applicant finally urged the Board to take into account the fact that the Applicant had filed an affidavit/statement in support of certain facts it sought to rely upon on 4th September, 2014 which were relevant to the grounds set out in the Request for Review.

Counsel for the Procuring Entity and the 2nd Interested Party did not make any submissions in support or opposition to the second issue framed for determination in this Request for Review.

The Board has considered the rival submissions made by the 1st Interested Party and the Applicant in support and in opposition to the second issue framed for determination and holds as follows:-

This Board has previously held that though the provisions of Regulation 73(2) (b) are permissive, a party who files a Request for Review which is based on factual issues should file a statement and where the necessary an affidavit to establish the existence of such facts or factual situation. This is reflected in several decisions of this Board such as the case of **Kocks Krannes GMBH (Germany) -vs- The Kenya Airports Authority (PPRB APPLI. NO. 33 of 2013)** and the case of **China Wuyi Co. Ltd -vs- Kenya Pipeline Company Ltd & Others (PPRB 24 OF 2014)**.

The Board finds that in the present Request for Review, the Applicant did not file a statement at the time it filed the Request for Review but filed an 8 paragraph affidavit/statement on 4th September, 2014. The 1st Interested Party did not take any objection to the said affidavit/statement. The Applicant therefore relied on the affidavit/statement at the hearing of the Request for Review without any objection by any party to this Request for Review.

~~This Affidavit which was sworn by Mr. THANJAVAR MUTHUKU MARASWAMY RAMALINGAM~~ makes this case distinguishable from the two decisions the Board has set out above.

The Board further finds that a certain set of facts in support of the grounds for review were not disputed by the Procuring Entity. The Procuring Entity did not for example dispute the Applicant's allegation that the Applicant was declared non-responsive at the preliminary and technical evaluation stage by a letter dated 18th July, 2014 but was later allowed to proceed to financial evaluation or that it awarded the tender to the 1st Interested Party on 15th August, 2014 and the Applicant's bid declared unsuccessful on the same day.

The Board has read the case of **Republic -vs- Senate Examination Disciplinary Committee & Another Exparte Shadrack Muchemi Mbau (2006) eKLR** and finds that this decision related to a judicial review application governed by the Provisions of the Civil Procedure Rules and the Law Reform Act. These two laws set out the mandatory procedure for the institution of an application for Judicial Review, such as that an application must by operation of law be accompanied by a statement and a verifying affidavit. The court was not therefore dealing with provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations (2006).

Based on all the above findings, the 1st Interested Party's Preliminary Objection on the competence of the Applicant's Request for Review pursuant to the Provisions of Regulation 73 (2) (b) of the Public Procurement Regulations (2006) as framed in issue no. 2 fails and is hereby dismissed.

ISSUE NO. 3

Whether the Applicant's Request for Review is incompetent and defective on the ground that the Applicant's Board of Directors did not authorize the filling of the Request for Review.

This point of Preliminary Objection is contained ground 3 of the 1st Interested Party's notice of Preliminary Objection.

~~Counsel for the 1st Interested Party argued that the Applicant in this Request for Review was a limited liability Company and that in view of this fact, the Applicant ought to have filed a Board resolution together with the Request for Review authorizing the filling of the Request for Review and also appointing the firm of M/s Achach & Company Advocates to act for it for all the purposes related to the filling and the prosecution of the Request for Review.~~

~~Counsel for the Applicant relied on the case of **Kenya Commercial Bank Ltd -vs- Stage Coach Management Limited (2014) eKLR** in support of the proposition that where a suit is instituted for and on behalf of a Company there should be a company resolution to that effect.~~

In conclusion the 1st Interested Party argued that the Board was bound by the decision of the High Court and urged the Board to find that the Application before it was incompetent since it was not accompanied by a resolution either authorizing the filling of the Application or appointing the firm of Advocates who had filed the application to act on its behalf.

In response to that submission, Mr. Nyaanga for the Applicant argued that the issue of whether the Applicant had authorized the filing of the application or appointed an advocate to act for and on its behalf in the present Request for Review required evidence to establish which evidence the 1st Interested Party had failed to produce. The Applicant therefore urged the Board to find that the allegation had not been substantiated.

Counsel for the Procuring Entity and the 2nd Interested Party did not tender any submission on this point of Preliminary Objection.

The Board has considered the arguments made in support and in opposition to this ground of Preliminary Objection which is also contained in paragraph 9 of the 1st Interested Party's Memorandum of Response dated 5th September, 2014. Both the notice of Preliminary Objection and the Memorandum of Response are not under oath and were signed by the firm of advocates acting on behalf of the 1st Interested Party. The two documents are therefore of no evidential value. The Board agrees with the Applicant's submissions that the issue of the existence or non-existence of a Board Resolution is an issue of fact which needs evidence to prove.

The Board has looked at the Affidavit/Statement sworn by Mr. **THANJAVUR MUTHUKU MARASWAMY RAMALINGAM** on 4th September, 2014 where he has averred as follows in paragraph 1 of the affidavit/statement:-

"That I am a male adult individual of sound mind and disposition and a Senior General Manager of Flemingo International (BVI) Limited (hereinafter referred to as the Applicant). I have been

authorized by the Board of Directors of the Applicant to make this statement"

This statement in the Affidavit/Statement which stood unchallenged by any other evidence is in the Board's view a sufficient answer to the 1st Interested Party's third point of the Preliminary Objection.

The Board has also read the High Court's decision in the case of *Kenya Commercial Bank Limited -vs- Stage Coach Management Ltd (2014)* eKLR and notes that the case related to the institution of a suit under the provisions of the Civil Procedure Act and the Rules made thereunder.

Both the former Order III Rule 2(c) of the former Civil Procedure Rules and the current Order 9 Rule 2(c) Procedure Rules required and still requires that where a suit is filed for or against a corporation then the corporation can only act through an officer of the corporation duly authorized under the corporate seal of the corporation to act as its agent for the purposes of the suit.

There is no such a corresponding requirement in the Public Procurement and Disposal Act (2005) or the Regulations made thereunder. The institution of a Request for Review before the Board is governed by the Provisions of Section 93(1) of the Act and Regulation 73 of the Regulations which provide for the form and the other requirements to be observed in instituting a Request for Review. Both the Act and the Regulations do not provide for the filing of any resolution at the time of filing a Request for Review.

Finally Regulation 86 of the Public Procurement and Disposal Regulations stipulates that while hearing a matter before it the Board shall not be bound to observe the rules of evidence in the hearing of a request under these regulations.

The 1st Interested Party's third ground of Preliminary Objection therefore fails and is therefore dismissed.

The determination of the above Preliminary issues raised by the 1st interested Party now paves the way for the Board to consider the merits of the Applicant's Request for Review as set out in issues number 4, 5 and 6.

ISSUE NO. 4

Whether the Procuring Entity breached the Provisions of Section 2, 39, 62 and 66 of the Public Procurement and Disposal Act (2005) and Regulations 50(1), (2) and (3) of the Public Procurement and Disposal Regulations 2006.

Grounds 4, 5, 7, 8, 9, 10, 11, 12 and 13 of the Request for Review have been consolidated as they revolve around the evaluation process and the award of the subject tender to the 1st Interested Party.

At the beginning of his submissions, Mr. Nyaanga for the Applicant indicated that he wished to argue the above grounds as a block. Counsel for the Applicant submitted that grounds 1-10 of the Applicant's Request for Review were explanatory and in general terms and that the grounds were a recap of what transpired before the final act of awarding the tender to the 1st Interested Party. The Applicant further submitted that the

specific breaches which formed the basis of the reliefs sought in the Request for Review were set out in grounds 11(a) – (p) 12 (a) to (d) and in ground 13 of the Request for Review.

Counsel for the Applicant took the Board through a brief background upon which its Request for Review was premised and which are contained in paragraphs 3 to 10. Counsel for the Applicant started off his submissions by stating that the Applicant started “smelling a rat” when it received a letter dated 18th July, 2014 which appears at page 108 of Applicant’s Request for Review informing the Applicant that it did not provide the audited accounts for Flemingo International (BVI) Limited and Flemingo duty free shop Mumbai Private Limited. The Applicant contended that although the letter did not say so, the Procuring Entity intimated in paragraph 2 of the letter that it would return the Applicant’s letter of surety and the unopened financial proposal upon completion of the evaluation. The Applicant submitted that based on the above set of facts and although the Procuring Entity did not specifically say so in its letter dated 18th July, 2014 the Applicant was of the view that it was being disqualified.

The Applicant further submitted that it was aggrieved by the Procuring entity’s action and wrote a letter dated 21st July, 2014 and which was delivered to the Procuring Entity on 22nd July, 2014 and which it produced at pages 109 to 112 of its Request for Review. The Applicant stated that it later received a letter dated 8th August, 2014 from the Procuring Entity informing the Applicant that it’s technical proposal had been reviewed and the outcome was successful. The Applicant was therefore invited for the

opening of the financial proposal which was to take place on 12th August, 2014 at 10.00 am at the General Manager's office (Procurement and Logistics). This letter appears at page 113 of the Applicant's Request for Review.

The Applicant stated that it was uncomfortable with the Procuring Entity's action of being disqualified and later being re-admitted into the process. This was in the Applicant's view one evidence that the Procurement process lacked integrity and demonstrated a casual handling of the evaluation. During the course of his submissions Counsel for the Applicant conceded that the Applicant had received another letter dated 28th July, 2014 which though not produced in the Applicant's Request for Review was produced at page 72 of the Procuring Entity's bundle of documents. The letter reads as follows in so far as it's contents are relevant to the proceedings now before the Board.

"Reference is made to your letter of 21st July, 2014 contesting the decision of the authority concerning the above mentioned matter. We have noted your concerns. The technical submissions are being reviewed and we shall notify you of the outcome in due course".

The Applicant further submitted on the basis of ground no. 8 of the Request for Review that notwithstanding it's grievance it attended the opening of the financial proposals on 12th August, 2014 pursuant to the Procuring Entity's letter dated 8th August, 2014 inviting it to do so.

The Applicant submitted that two days after the financial opening of the bids, namely on 14th August, 2014, the Applicant voiced it's discomfort and

concerns with the evaluation process and complained to the Procuring Entity that it's evaluation committee was neither independent nor fair nor did it promote any confidence in the so-called re-evaluation of the technical proposal which accounted for 90% of the score.

It was the Applicant's case that the Applicant had by then recognized that if the technical evaluation was not done properly, the financial bid which accounted for a mere 10% would not account for much.

While relying on the technical and the financial results which we set out by the Procuring Entity at paragraphs 32 and 34 at page 11 of its submissions, the Applicant contended that the design of this tender was not in compliance with the provisions of Section 2 of the Act.

Counsel for the Applicant in conclusion stated that the Applicant had raised these specific issues in its letter dated 14th August, 2014 which appears at pages 114 to 117 in the Request for Review and additionally submitted that the Applicant had also raised concern at the marginal scores which it was being awarded. The Applicant gave an example of the combined technical and financial score for the Successful Bidder and the bidder who was declared the second best evaluated bidder who scored 92.09% and 92.04% respectively and which therefore represented a difference in their scores that only translated to a difference of 3 decimal points/marks as an example of that.

Based on the above submissions the Applicant urged the Board to find that the conduct of the Procuring Entity was not in any manner fair and could not be said to have promoted integrity and that the Procuring Entity had

acted in breach of the Provisions of Sections 2, 39, 62 and 66 of the Act and Regulations 50 (1) (2) and (3) of the Public Procurement and Disposal Regulations (2006).

In reply to the Applicant's submissions on this issue, Mr. Ogeto on behalf of the Procuring Entity relied on its response dated 27th August, 2014 and on its written submissions dated 10th August, 2014 which he highlighted.

Mr. Ogeto started off his submissions by stating that the Applicant's Request for Review raised two main substantive issues namely:-

- (i) The propriety or otherwise of the Applicant's alleged disqualification and its readmission in the evaluation process.*
- (ii) Whether or not the Applicant was notified of the results of the Procurement process as required by Section 67(2) of the Act.*

On the first issue identified by Counsel for the Procuring Entity for determination, Counsel for the Procuring Entity argued on the basis of paragraphs 10-17 of his submissions appearing at the printed pages 3 to 5 of the Procuring Entity's submissions that upon carrying out Preliminary and Technical evaluation, two bidders namely the 1st Interested party and the 2nd Interested Party were notified by a letter dated 18th July, 2014 of their success in the Preliminary and technical evaluation and were invited to attend the financial opening of their proposals on 21st July, 2014 and that in letters dated the same date, the Procuring Entity notified the three remaining bidders namely; **Aer Rianta International** , **Paragon Holdings** and the Applicant that they had been unsuccessful and did not make it to the financial proposal evaluation stage. The Procuring Entity produced the

said letters all of which are dated 18th July, 2014 and which were all marked as bundle "K3". They run from the hand written pages 59 to 63 of the Procuring Entity's bundle of documents.

Counsel for the Procuring Entity admitted both in his oral submissions and in paragraphs 11 and 12 of its written submissions that the letter of notification to the Applicant and which is dated 18th July, 2014 was written by the Procuring Entity.

The Procuring Entity submitted that upon the notifications being sent out the bidder **M/s Aer Rianta International** objected to the contents of the letter and wrote a letter dated the same day and which was produced by the Procuring Entity as annexure "K4" contesting the Procuring Entity's decision and requested for a Review of its bids. The said bidder also requested that the opening of the financial bids be put on hold until such time as their bid would be reviewed.

The Procuring Entity submitted that pursuant to the complaint by the above bidder the Procuring Entity wrote to the 1st and the 2nd Interested Parties informing them that the scheduled financial opening date had been postponed and produced the two letters as documents "K5" which appear at pages 65 and 66 of its bundle of documents.

Counsel for the Procuring Entity submitted that the date for the opening of the financial proposals namely 21st July, 2014 was therefore postponed to a later date.

The Procuring Entity stated in paragraph 14 of its written submissions that in a letter dated 21st July, 2014, the Applicant also requested that the issue of its audited accounts be revisited for the reasons set out in the Applicant's said letter dated 21st July, 2014.

The Procuring Entity submitted that based on the concerns raised by the two bidders and upon the direction of the Tender Committee, the Procuring Entity's evaluation committee re-evaluated the Applicant's audited accounts. The Procuring entity submitted that in giving the said directions, the Tender Committee was acting pursuant to the provisions of Regulation 10 (2) (a) of the Public Procurement Regulations (2006) as amended in 2013. In the Procuring Entity's view, this Regulation gives the tender committee the power to among other things review verify and ascertain that any Procurement and disposal has been undertaken in accordance with the Provisions of the Act, the Regulations made thereunder and the terms set out in the Tender Document.

The Tender Committee also directed the Procuring Entity's evaluation committee to relook at the complaints raised by **M/s Aer Rianta International**.

The Procuring Entity produced the minutes of the 332nd Tender Committee Meeting of the Procuring Entity where the issue of the concerns raised by the two bidders was considered. The minutes which are marked as annexure "K11" run from pages 138 to 151 of the Procuring Entity's bundle of documents.

The Procuring Entity submitted that the its evaluation committee reviewed the technical proposals of the two bidders and informed them that upon re-evaluation of their technical proposals, the two bidders' technical proposals were successful and they were accordingly invited for the opening of the financial proposals scheduled to take place on 12th August, 2014 which the Applicant duly attended. The Procuring Entity produced the letters dated 8th August, 2014 informing the two bidders that they had been successful after the re-evaluation similar letters were addressed to the Applicant, the 1st and the 2nd Interested Parties and the bidder **Aer Rianta International**.

Counsel for the Procuring Entity argued that the decision to re-look at the Applicant's tender was done in compliance with the Provisions of the Act and the Regulations and that the Tender Committee was acting in the spirit of the principles set out in Section 2 of the Act and in exercise of the powers conferred upon it by Regulation 10 (2) (a) of the Regulations.

Counsel therefore urged the Board to find that the evaluation process was properly conducted and that the Applicant had not demonstrated what prejudice it had suffered.

In answer to the Applicant's submissions that the Tender Document was skewed by virtue of the Procuring Entity assigning 90 marks to the Technical aspect and 10 marks to the financial aspect of the evaluation the Procuring Entity submitted that upon this tender being advertised, the Applicant had accepted to participate in it and was therefore bound by the criteria set out in the Tender Document. The Procuring Entity argued that the Applicant did not complain about the criteria in the Tender Document

which was part of the Tender Document from the beginning and that the Applicant ought to have raised any complain from the word go but not after it had lost.

Mr. Gachuba on behalf of the 1st Interested Party associated himself with the submissions made by the Procuring Entity. He submitted that under the Provisions of Regulation 10 (2) (a) the Procuring Entity's Tender Committee had an obligation to review and ensure that the evaluation of the subject tender was in accordance with the law and the Tender Document.

Mr. Gachuba further submitted that a glance at paragraphs 3 to 10 of the Applicant's Request for Review indicated that the facts giving rise to this ground were triggered by the letter dated 18th July, 2014 and that if the Applicant had any complaint based on the said letter, it ought to have filed a Request for Review within Seven (7) days of that date and submitted that in so far as the criteria set out in the tender document was concerned the Applicant ought to have raised any complaint relating to the criteria from the beginning and not after the Applicant's bid had been declared unsuccessful on 15th August, 2014

Counsel for the 1st Interested Party relied on the High Court decision in the case of **Republic -vs- The Public Procurement Administrative Review Board & Another Exparte Nelson Korir & 3 Others (2013) eKLR** and this Board's decision in the case of **Transcend Media Group Limited -vs- Kenya Airports Authority (PPRB) application no. 6 of 2014** for the proposition that an applicant who was alleging a breach of Regulation 73

ought to file a Request for Review within a period of Seven (7) days upon receipt of a notification giving rise to the breach and for the further Proposition that Regulation 73 (2) (c) (i) and section 93 of the Act allows a party to come before the Board even when the tender process is still ongoing.

Mr. Nyaanga in a brief response reiterated his submissions which the Board has already set out above. He pointed out and reiterated that the letter dated 18th July, 2014 did not amount to a disqualification and in order for it to be so, the letter ought to have specifically stated that the Applicant was being disqualified from the process.

Counsel for the 2nd Interested Party did not tender any submissions in support or in opposition to the submissions made by the other parties to this Request for Review.

The Board has considered the Request for Review, the affidavit/statement filed by the Applicant on 4th September, 2014, the response filed by the Procuring Entity on 27th August, 2014 and that filed by the 1st Interested Party. The Board has also perused the original Tender Documents submitted by the bidders together with the other original documents supplied by the Procuring Entity to the Board pursuant to the Provisions of Section 44(2) (c) of the Act and Regulation 74(3) of the Public Procurement and Disposal Regulations (2006) as amended in 2013. The Board has also considered the oral submissions made by the parties and the written submissions filed by the Procuring Entity and the 1st Interested Party together with all the authorities referred to by the parties.

The Board finds that the Procuring Entity had written to the Applicant a letter on 18th July, 2014 indicating to the Applicant that upon the evaluation of the Applicant's Preliminary and technical proposal, it had been found not to be responsive and the Procuring Entity therefore stated that it would return the Applicant's security and financial proposal unopened at the conclusion of the process.

The Board further finds that, upon receiving the said letter, the Applicant wrote a letter dated 21st July, 2014 appearing at page 9 of the Applicant's Request for Review addressing the concerns raised in the Applicant's letter dated 18th July, 2014 and responded to the two issues that had been raised by the Procuring Entity's in the said letter.

The Board has read the two letters and it is clear from the letters and particularly the letter of response dated 21st July, 2014 that the Applicant had supplied to the Procuring Entity audited accounts for several entities namely Flemingo International Limited, Flemingo International (BVI) Limited , Flemingo duty free shop Mumbai Private Limited and DFS India private Limited. It is further evident from the said letter that the Applicant was explaining to the Procuring Entity the legal connection between all these companies with Flemingo International (BVI) Limited which was the lead bidder and the Applicant in this Application.

The Applicant in explanations 1, 2 and 3 stated that it had provided consolidated audited accounts for Flemingo International Limited for the year 2010 audited financial accounts for Flemingo International Limited and Flemingo duty free shop Private Limited for the year 2011 because

Flemingo International (BVI) Limited did not exist as the holding company during those two years.

On the issue of the audited accounts for Flemingo Duty Shop Free Shop Mumbai Private Limited, the Applicant explained that the above Entity was incorporated with the sole purpose of acting as an investment vehicle to hold 30% shares in a Company known as DFS India and explained that it had provided the financial accounts of Flemingo Duty Free shop Limited which highlighted the above mentioned ownership structure of DFS India Private Limited. The Applicant further stated that Flemingo Duty Free Shop Mumbai Private Limited was merely an investment Company and a special purpose vehicle.

The Applicant concluded its letter by stating that it had fully complied to the preliminary and technical criteria and was ready to offer best in class services to the Authority should it be adjudged as the winning bidder.

Pursuant to the Applicant's letter dated 21st July, 2014, the Procuring Entity wrote to the Applicant on 28th July, 2014 informing it that it had noted its concerns which it would address.

Pursuant to the Applicant's concerns, the Procuring Entity's tender committee at its 332nd Tender Committee meeting held on 31st July, 2014 reviewed the evaluation committee's decision on the Applicant's technical evaluation and directed a re-evaluation of the Applicant's technical bid which was done and the Applicant was later informed that its tender was successful in the technical evaluation and a decision to that effect was communicated to the Applicant on 8th August, 2014. The Applicant was

invited for and thereafter attended the financial proposal opening meeting of 12th August, 2014.

Based on the above set of facts, the Board finds that the Procuring Entity acted within its mandate under the provisions of Regulation 10(2) (a) of the Regulations which empowers the tender committee *to review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the provisions of the Act, these Regulations and the terms of the Tender Documents.*

The Board has established from the original tender evaluation committee minutes of 18/7/2014, 5/8/2014 and those 14/8/2014 that the following members of the tender evaluation committee conducted the evaluation of the tenders from the start to the end: Mr. Anthony Kulei, Mr. Ronald Muriuki, Mr. Wilfred Ndegwa, Mrs. Margaret Muraya and Mr. Martin Kamau.

The Board has perused the Procuring Entity's letter dated 18th July, 2014 and the Applicant's response dated 21st July, 2014 and is unable to establish any bad faith on the part of the Procuring Entity. The state of affairs that led to the letter dated 18th July, 2014 appears to have been occasioned by the fact that the Applicant submitted accounts from several companies in its bid and hence the need to clarify their legal connection with the lead bidder. The Board has perused volume 1 of the original proposal Appendix F which contains the accounts by Flemingo International (BVI) Ltd and those other companies. These accounts are contained in the Applicant's

original bid document and the Applicant did not suggest anywhere in its letter of 21st July, 2014 that the said accounts had been removed.

The Board also finds that upon re-admission to the process, the Applicant participated in the process and attended the financial proposals opening meeting held on 12th August, 2014 without any protest. The Applicant did not therefore suffer any prejudice since it was allowed back into the process and continued participating in it and its financial proposal opened and evaluated.

On the contention that the criteria in the Tender Document was skewed by reason of the Procuring Entity assigning a threshold of 90% to technical and 10% to the financial proposals, the Board holds on the basis of the letter dated 18th June, 2014 signed by the Director General of the Public Procurement oversight Authority which appears at pages 156 to 158 of the Procuring Entity's bundle of documents that the Authority took into account the Applicant's Tender Document before allowing the process of re-tender to proceed and made it only subject to Procuring Entity providing for financial evaluation criteria which it did.

The criteria for technical and financial evaluation was therefore part of the Tender Document from the word go and the Applicant who opted to participate in this tender did not raise any objection to any aspect of the criteria but instead bought completed and returned the document to the Procuring Entity for evaluation.

In the case of **Republic -vs- The Public procurement Administrative review Board & Another, Ex-parte GIBB Africa Limited & Another (2012)**

EKLR the court held that a party who went ahead to submit its bid in a procurement process which was founded on a flawed document could not upon failing to attain the minimum technical marks raise the issue of such irregularities at the end of the process.

The Board has finally looked at the letter dated 14th August, 2014 written by the Applicant and addressed to **Mr. Hobadia Orora** who is described as the Procuring Entity General Manager Procurement and Logistics. This letter was written before the conclusion of the procurement process.

Clause 2.4.1 of the Tender Document and Section 38 (1) of the Public Procurement and Disposal Act prohibits any person who has submitted a tender, proposal or quotation from making any unsolicited communications to the Procuring Entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations after the deadline for the submission of tenders, proposals or quotations. That is exactly what the applicant sought to do by its letter of 14th August, 2014 in which the Applicant even went on to suggest that the Procuring Entity disbands and reconstitutes a fresh tender evaluation committee to re-evaluate its tender.

The Board therefore finds and holds in view of all the reasons given above that all the grounds of review set out under issue no. 4 fail and are hereby dismissed.

ISSUE NO. 5

Whether or not the Procuring Entity the provisions of Section 67 (2) of the Act by failing to notify the Applicant of the outcome of the tendering process in the manner required.

Though the Applicant raised the issue of lack of notification under the provisions 67 (2) of the Act by alleging that the Procuring Entity failed to notify it of the outcome of the tendering process as required by law, the Board notes that Counsel for the Applicant either through inadvertence or for whatever other cause did not make any oral submissions on this issue.

The Procuring Entity on the other hand singled out this as one of the issues for determination and submitted that the Procuring Entity had sent out letters of notification to all bidders on the final outcome of their bids which it produced as bundle "K9" at pages 77 -92 of its bundle of documents. Counsel for the Procuring Entity drew the Board's attention to the contents of paragraph 10 of the Applicant's Request for Review where the Applicant expressly admitted service.

The Board wishes to point out at the onset that the Procurement method used in this particular tender was a Request for Proposals which is governed by the Provisions of Sections 76 to 87 of the Act. The requirement for notification of the outcome of the tender process is set out in Section 83 of the Act but not under Section 67 (2) of the Act which relates to open tendering under Part V of the Act. The Applicant's contention that the Procuring Entity breached the provisions of Section 67 (2) of the Act

cannot therefore lie since it is not the applicable Section of the Law on notification as far as Request for Proposals are concerned.

But even assuming that the Board is wrong in the above finding the Applicant expressly admitted in paragraph 10 of its Request for Review that it received the notification. The Applicant stated as follows in the said paragraph 10 of the statement:-

“On 18th August, 2014 at 2122 hours, the Applicant received an email attaching the letter dated 15th August, 2014 advising the Applicant that its tender was not successful and that the Applicant was ranked 4th with a combined score of 88.15%”.

The Board has also looked at the prayers set out at pages 6 and 7 of the Request for Review and particularly prayer (b) of the reliefs sought. The said prayer reads as follows:-

(b) The Respondent's decision notifying the Applicant that it had not been successful in tender NO. KAA/193/2013-2014 purportedly by the letter dated 15th August, 2014 which was received on 18th August, 2014 be set aside and nullified.

These two admissions by the Applicant without more are sufficient proof that the Applicant was duly notified of the results of the tendering process.

This ground of the Applicant's Request for Review therefore fails and is dismissed.

ISSUE NO. 6

Whether or not the Procuring Entity beached the Provisions of Article 227 of the Constitution.

The Applicant submitted that as a result of the alleged breaches of the Provisions of the Act, the Regulations and the evaluation which were set out in its application, then the Procuring Entity had therefore acted in contravention of the Provisions of Article 227 of the Constitution of Kenya 2010.

This argument can only be sustained upon the proof of such alleged breaches which the Applicant has failed to do. There cannot be any breach of the provisions of Article 227 of the Constitution in the absence of a basis for such a finding.

The Applicant also failed to precisely set out the nature of the infringement and demonstrate how the Article in question was breached.

In the case of Samuel Ndungu Gitau -vs- The Senior Resident Magistrate, Chief Magistrate Court at Kiambu and 3 Others Petition No. 238 of 2011 stated:-

"37 I must observe, in closing that parties coming before the court alleging violation of their constitutional rights must also remember

that the Constitution imposes rights and obligations: that one has rights, but also, that one has a duty to respect the rule of law and the rights of others. The Constitution is not a one-way street in which the right of others and other provisions of the law are discarded. It is supposed to safeguard the rights of citizens while upholding other legal processes”.

This ground of review therefore fails and is also dismissed.

ISSUE NO. 7

What order should the Board make on costs?

Before delving into the issue of costs, the Board’s policy in the past and generally at the moment has been to order each party to bear its own costs. This policy has generally been based on the Board’s desire not to discourage a party with a meritorious claim from accessing justice.

The Board however wishes to observe that just like any other body exercising judicial or quasi judicial authority; it is bound by the general principles of law regarding the award of costs. The wording of Section 98 (d) expressly confers the Board with jurisdiction to award costs.

The general principles governing the award of costs have been set out variously and they are that:-

- (i) Costs are in the discretion of the judicial or quasi judicial authority.
- (ii) The costs should follow the event, except when it appears to the authority that in the circumstances of the case some other order should be made.
- (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations which fail but where that has caused a significant increase in length or costs of the proceedings he may be deprived of the whole or part of the costs.
- (iv) Where a successful party raises issues or makes allegations improperly or unreasonably, the judicial authority may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs.

In the case of ~~Fish Processors Ltd vs- Aggrey Dimo Ogola Kisumu Civil Appeal No. 122 of 2008~~ the court while considering the issue costs highlighted the following factors which must be considered while dealing with the issue of costs:-

- (i) The discretion on the award of costs should be exercised judiciously with a reason.
- (ii) It should not be exercised capriciously.
- (iii) It should be exercised with the sole aim of doing justice to both sides.

The Board has taken into consideration the above legal principles, the issues raised in this request for review and orders that each party bears its own costs of the review. This decision is grounded upon the fact that each

of the parties to this review was partly successful on the issues that were framed for determination.

FINAL ORDERS

In view of all the foregoing matters and determinations on the issues raised by the parties to this Request for Review and in exercise of the powers conferred upon it by the provisions of Section 98 of the Public Procurement and Disposal Act (2005) the Board makes the following orders:-

- a) That the Preliminary Objection filed by the interested party and which is dated 5th September, 2014 and filed with the Board on 8th September, 2014 be and is hereby dismissed.

- b) As a consequence of the Boards findings under issue no. 4 to 6 above, the Applicant's Request for Review dated 20th August, 2014 and filed with the Board on 21st August, 2014 be and is hereby dismissed.

- c) Each party will bear its own costs of this Request for Review in view of the reasons set out in issue No. 7 above.

Dated this 17th day of September, 2014.

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CHAIRMAN

PPARB

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SECRETARY

PPARB