

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 35 OF 2014

BETWEEN

ATU TURIZIM ISLETMECILIGIAPPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

AND

DUFY INTERNATIONAL AG.....1ST INTERESTED PARTY

FLEMINGO INTERNATIONAL (BVI) LTD..... 2ND 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 | - Holding brief for Secretary |
| 2. Evalyne Wambui | - Secretariat |

PRESENT BY INVITATION

Applicant - Atu Turizim Isletmeciligi

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

Procuring Entity - Kenya Airports Authority (KAA)

- | | |
|-----------------------|-------------------------|
| 1. Kennedy Ogeto | - Advocate |
| 2. Rosebella Nyonje | - Advocate |
| 3. George Kamau | - Legal Officer |
| 4. Margaret Muraya | - Manager Project |
| 5. Benard Bosire | - Procurement Assistant |
| 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 - Fleming International (BVI) Ltd

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

BACKGROUND

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 directed that it would give separate decisions on each of the application. This decision of the Board is with respect to the Applicant's Request for Review No. 35 of 2014 related 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 No. 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 release to all

bidders on the 24th April 2014. Due to the 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 / submitted bids which were opened on the closing date. **Paragon Holdings** which failed was one of the bidders at the Preliminary Evaluation stage and so its bid did not proceed for Technical Evaluation. The 4 bidders who qualified for Technical Evaluation are as listed below:

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 ranking for the tender are tabulated below:-

Bidder's Name	Techn ical 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 Isletmeciligi	78.20	4,126,000	4,126,000	10	88.200	3
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 would 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 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 Atu Turizim Isletmeciligi (the Applicant), against the decision of the Kenya Airports Authority (Procuring Entity dated 15th August, 2014 awarding tender number KAA/193/2013-2014 for the Development and Management of a Duty Free Retail Master Concessionaire at the Jomo Kenyatta International Airport (JKIA), Nairobi to the 1st Interested Party herein.

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

- 1. The Decision not to award the Appellant the Tender Number KAA/193/2013 - 2014 to the Appellant be annulled and/or revoked.*
- 2. The Appellant ATU TURIZIM ISLETMECILIGI be declared the successful winner of Tender No. KAA/193/2013 - 2014*
- 3. The Respondent be and is hereby ordered to provide all the minutes and the proceedings of the Tender process.*
- 4. That No entity be allowed to develop and manage a Duty free Retail Master Concessionaire at Jomo Kenyatta International Airport until such time as the Review herein has been resolved.*
- 5. Tender contracts should not be written, signed or given out until the Review herein is determined.*

During the hearing of this Request for Review, the Applicant was represented by Mr. Peter Wena while the Procuring Entity was represented by Mr. Kennedy Ogeto. The two Interested Parties namely M/s Dufry International AG and M/s Flemingo International (BVI) Limited 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 describe as the 1st and the 2nd Interested Party respectively were the successful and the fourth ranked evaluated bidder respectively. They were represented by Mr. Mwaniki Gachuba and Mr. G. M. Nyaanga respectively. The 2nd highest evaluated 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 third in the evaluation process was dissatisfied with the decision of the Procuring Entity as 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 being so aggrieved filed this Request for Review on 22nd August 2014. The Applicant raised a total of six grounds in support of its Request for Review. The Applicant's Request for Review was accompanied by a statutory statement dated 22nd August, 2014 which

was signed by one Arsan Arcan who described himself as the Applicant's General Manager.

The Procuring Entity filed a written reply to the Applicant's Request for Review on 28th August 2014 and additionally filed a 142 page written submissions containing documents which the Procuring Entity relied upon at the hearing of the application and in addition forwarded to the Board the original tender and other documents pursuant to a request from the Board under the Provisions of Section 44 (2) 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 written response to the Request for Review and a Preliminary Objection dated on 5th September, 2014 and which was filed on 8th September, 2014. The Interested Party also filed 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 at liberty to address the Board should he consider it necessary based on the submissions made by any of the parties to the Proceedings.

Counsel for the 2nd Interested Party fully participated in the hearing of the Request for Review and made submissions which the Board will set

out while considering the arguments set forth by the parties in this Request for Review.

Although the Board has already set out the background giving rise to the present Request for Review in its decision in Request for Review No. 34 of 2014, the Board considers it necessary to repeat this background for the purposes of completeness and on account of the fact that each of these two Requests for Review was heard separately and attracted separate decision.

It was common ground in this Request for Review 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 total 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 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 the Request for Review No. 50 of 2013 which was filed on 6th December, 2013. The Board consolidated, heard and

delivered a decision on the four Requests for Review and gave the following orders in a decision dated 10th 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 us 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 not in dispute in 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 the Standard Newspaper of 29th March, 2014. The fresh tender attracted a total of 28 bidders who purchased the Tender Documents but only the following five bidders submitted 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 before the Board 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 was notified of that award by a letter dated 15th August, 2014.

At the commencement of the hearing of this Request for Review, Counsel for the 1st Interested Party sought to have his Preliminary Objection as set out in the notice dated 5th September, 2014 heard first but the Board directed that the 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 facts or points of law but on contested facts and points of law which could only be tested and resolved after a full hearing of the application.

The Board has looked at the Request for Review, all the responses filed, the 1st Interested Party's notice of Preliminary Objection and all the documents submitted to it by the parties to the Request for Review. The Board has also considered the written submissions filed by the Procuring Entity and the 1st Interested Party and the oral submissions made by the advocates for the parties who participated in this Request for Review. Upon consideration of all the above factors the Board has determined that this Request for Review raised the following issues for determination.

- (i) *Whether or not the applicant's Request for Review is fatally incompetent and contravened the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations (2006) and*

whether the statement filed with the Request for Review is defective for having not been verified by an affidavit.

- (ii) Whether or not the Applicant's Request for Review and the statement accompanying the Request for Review are both fatally incompetent and defective having not been authorized by the Applicant's Board of Directors.*
- (iii) Whether or not the Procuring Entity breached the Provisions of Section 2, 31 (1-5) of the Act.*
- (iv) Whether or not the Procuring Entity breached the Provisions of clause 2.12.4 and 2.12.5.1 by failing to declare the 2nd Interested Party's and the tender submitted by M/s Aer Rianta International as being non responsive by failing to provided a tender security in the prescribed form.*
- (v) Whether or not the Applicant suffered loss, damage and prejudice as a result of the Procuring Entity's alleged breaches of the Provisions of the Act the Regulations and the criteria set out in the tender document.*
- (vi) Who should pay the costs of this Request for Review?*

The Board will now proceed to consider the arguments made by the parties for and against each issue.

ISSUE NO. 1 & 2

- (i) Whether or not the applicant's Request for Review is fatally incompetent and contravened the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal and whether the statement filed with the Request for Review is defective for having not been verified by an affidavit.*

- (ii) *Whether or not the Applicants Request for Review and the statement accompanying the Request for Review were both fatally incompetent and defective having not been authorized by the Applicant's Board of Directors.*

These two issues have been consolidated since they both challenge the competence of the Applicant's Request for Review and the statement accompanying the said application Counsel for the 1st Interested Party argued that under the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations 2006 it is mandatory for an Applicant to file a statement in support of the Request for Review which ought to contain only the name and the description of the applicant, the relief sought and the grounds upon which the relief is sought and must be accompanied by an affidavit verifying the facts of the application. Mr. Gachuba while acknowledging that the Applicant to this Request for Review had filed a statement dated 22nd August, 2014 accompanying the Request for Review nonetheless argued that the Request for Review was incompetent since it was not verified by an affidavit.

Counsel for the 1st Interested Party relied on the High Court decision in the case of Republic -vs- The Senate Examination Disciplinary Committee and Another Exparte Shadrack Muchemi Mbau (2006) eKLR in support of the submission that a statement should contain nothing more than the name and the description of the Applicant, the relief sought and the grounds on which it is sought and that it was not correct to file a statement of all the facts. He further relied on the above

decision for the proposition that such a statement must be verified by an affidavit containing such facts as would sufficiently and reasonably set out the facts in support of the Applicant's case before court.

The second ground of the 1st Interested Party's attack on the Request for Review was that the person who signed the statement dated 22nd August was not authorized by the Applicant to sign the statement and that the Application was fatally incompetent as it's filing was not authorized by the Applicant's Board of Directors.

The 1st Interested Party relied on the case of **Kenya Commercial Bank Limited-vs- Stage Coach Management Ltd (2014) eKLR** in support of his submission that in the absence of a Board of Directors resolution authorizing one Ersan Arcan to sign the statement or a resolution authorizing it's advocate to file the application on it's behalf, then both the application and the statement were incurably defective and ought to have been struck out.

Mr. Wena on behalf of the Applicant opposed both limbs of the Preliminary Objection and started off his submissions by stating that the Applicant had infact complied with the Provision of Regulations 73(2) (b) of the Public Procurement and Disposal Regulations (2006) by filing a statement dated 22nd August, 2014. Counsel for the Applicant said from his reading of Regulation 73 (2) (b) of the Regulations, the requirement of that Regulation left the discretion on whether to file a statement or not on an applicant and that the Regulation did not prescribe what form and contents that should be included by an applicant in such a statement.

On the issue of verification of the statement by a verifying affidavit Counsel for the Applicant submitted that there was no such requirement in the Regulations.

On the issue of the alleged lack of a Board resolution, Counsel for the Applicant submitted that such an allegation could not be raised by way of a Preliminary Objection since such an allegation required proof either through affidavit evidence or any acceptable means of proving a disputed fact. On the two authorities relied upon by the Applicant in support of his submissions on the issue of the competence of the Request for Review and the statement, Counsel for the Applicant submitted that the two decisions were clearly distinguishable since none of them was dealing with the Interpretation of Regulation 73 (2) (b) of the Regulations but the court was dealing with an application for judicial Review in the first decision while the court in the second decision was dealing with a civil suit instituted pursuant to the Provisions of the Civil Procedure Act and the Rules made thereunder.

Counsel for the Applicant finally submitted that under the provisions of Article 159 of the Constitution, the Board was enjoined to administer Justice to all without regard to technicalities.

Mr. G. M. Nyaanga for the 2nd Interested Party opposed the 1st Interested Party's Preliminary Objection and associated himself with Mr. Wena's submissions on the two issues set out above and urged the Board to dismiss them.

Mr. Ogeto did not make any submissions in support or in opposition to the 1st Interested Party's Preliminary Objection. His submissions were focused on addressing the merits of the Request for Review.

The Board has considered the submissions made by the rival parties in support and in opposition to the 1st Interested Party's two Preliminary Objections and makes the following findings on the issues raised.

Regulation 73 of the Public Procurement and Disposal Regulations (2006) as amended in 2013 provides as follows:-

"73 (1) A Request for Review under the Act shall be made in the form RBI set out in the fourth schedule of the Regulations.

(2) The Request referred to in paragraph 1 shall:-

- a) state the reasons for the complaint including any alleged breach of the Act or these Regulations.*
- b) be accompanied by such statements as the Applicant considers necessary in support of its Request.*
- c) be made within seven days of:-*
 - (i) The occurrence of the breach complained of where the Request is made before the making of an award or*
 - (ii) The notification under Sections 67 or 83 of the Act.*

The wording of Regulation 73 set out above is plain and the requirement is that a Request for Review shall be accompanied by such a statement as the Applicant considers necessary in support of its Request.

Regulation 73 does not stipulate what should be contained in the statement or that the statement should be accompanied by a verifying affidavit. The Board therefore finds that the Applicant filed the statement required by Regulation 73 (2) (b) on 22nd August, 2014 when it filed its Request for Review and that there being no requirement for verification of the statement by the Regulations, the statement dated 22nd August 2014 was procedural and is properly before the Board. The 1st limb of the Applicant's Preliminary Objection as set out in the first issue therefore fails.

On the requirement for a Board resolution authorizing Mr. Ersan Arcan to sign the statement and for the advocate for the Applicant to file this application, the Board wishes to observe that this is a factual issue that cannot be argued as a Preliminary Objection. The 1st Interested Party ought to have laid an evidential basis for challenging the lack of such a resolution even if that basis was in the form of a general denial in an affidavit but more importantly, the Public Procurement and Disposal Act is a special legislation which does not provide for the filing of such a resolution at the time a party institutes a Request for Review. This is unlike the procedure set out in the former Order III Rule 2(c) of the Civil Procedure Rules and the current Order 9 R 2(c) of the Civil Procedure Rules.

The Board has read the decision in the case of **Kenya Commercial Bank Ltd -vs- Stage Coach Management Ltd (2014) eKLR** and agrees with Mr. Wena's submissions that the suit in question was instituted under the Provisions of the Civil Procedure Act and the Rules made

thereunder but not under Regulation 73 of the Public Procurement and Disposal Regulations 2006 as amended. The decision is therefore distinguishable from the present application.

It is notable that when this application came up for hearing on 11th August 2014 two representatives of the Applicant namely Mr. Ismet Arsan Arcan who signed the statement dated 22nd July, 2014 and who stated that he was one of the Applicant's Directors and one Mr. Uger Atosey confirmed to the Board that the Applicant had instructed Counsel for the Applicant to file the present application and that Mr. Arsan Arcan had the Applicant's authority to sign the statement dated 22nd August, 2014.

The Board further notes that the Procuring Entity which was the Respondent against which the Request for Review had been filed did not raise objection on the competence of the Request for Review or the statement accompanying it while the 2nd Interested Party against whom several adverse allegations had been made in the application did not also challenge the competence of the Request for Review and the statement filed in support thereof but instead opposed the Preliminary Objection.

For all the above reasons and taking into account the Provisions of Article 159 which enjoins the Board to administer Justice to all without undue regard to technicalities, the 1st Interested Party's second ground

of Preliminary Objection also fails and the Board will now proceed to determine the Applicant's Request for Review on merits.

ISSUE NO. 3

Whether or not the Procuring Entity breached the Provisions of Section 2, 31 (1-5) of the Act.

This issue and the grounds relate to the tendering process and the qualifications to be awarded a tender.

The Applicant submitted that the Procuring Entity's Decision to award the tender the subject matter of its Request for Review to the 1st Interested Party violates the spirit of the Act as espoused in Section 2 of the Act as it contravenes the Provisions of Section 31 of the Act and that the Decision to award the tender to the 1st Interested Party was marked by irregularities, malpractices, lack of transparency and was manipulated by the Procuring Entity in favour of one Party and to the disadvantage of the Applicant.

The Applicant argued based on the contents of its statement that it offered the highest financial minimum guarantee to the Procuring Entity yet it was given the lowest technical score which in its submissions was a clear demonstration of compromise in the integrity of the process. The Applicant in its statement in support of the Request for Review and more particularly paragraph 24 therefore further argued that in the initial tender document the Technical proposal accounted for 80% which was subsequently increased to 90% and the financial element reduced

from 20% to 10%. This, according to the Applicant, amounted to manipulation and favouritism.

Counsel for the Applicant wondered how the Applicant which had attained the highest financial score could obtain the lowest technical score. The Applicant stated that this was compounded by the Procuring Entity's refusal and neglect to furnish it with copies of the evaluation report.

The Applicant finally submitted that all the four bidders whose Preliminary, technical and financial bids were evaluated were reputable International companies and that one would have expected their technical scores not to be so divergent. The Applicant urged the Board to find that such a big disparity was evidence that the technical scoring was not done properly which resulted in an award that was not necessarily the best award.

Mr. Ogeto for the Procuring Entity opposed the Applicant's submissions on this issue and submitted that the bids by all the bidders were subjected to a Preliminary, technical and a financial evaluation to determine the bidder's compliance with the tender requirements.

Counsel for the Procuring Entity submitted that all the tenderers were evaluated based on the same criteria. The Procuring Entity submitted that the evaluation process was undertaken in adherence to the Provisions of the Act and the Regulations and the criteria set out in the Tender Document and therefore it argued that the process was fair,

objective, quantifiable and transparent. The Procuring Entity further submitted that the scores awarded to the Applicant and the other bidders were the scores that were due and no scores were awarded to any bidders that were not due to it.

The Procuring Entity further submitted that the method of procurement used in this tender was the Request for proposals and the tender was therefore a two envelope process and the financial proposals were opened after the technical proposals had been evaluated and that the financial opening was carried out in the presence of all the representatives of the bidders including the applicant's representatives, during which the technical scores were read out.

The Procuring Entity in further opposition to the Applicant's submissions stated that the grounds raised by the Applicant were general and all that the applicant did was to merely cite the Provisions of the Act, namely, Section 2, 31, 44 and several other Provisions without giving the particulars of how these Sections of the law had been violated. Counsel also reminded the Board that the burden of proof of any violation of the law lies with the Applicant and that an applicant cannot simply cite Sections of the Law and the Articles of the Constitution and leave it to the Board to speculate and guess what possibly could have gone wrong.

On the complaint that the Procuring Entity did not provide the Applicant with the evaluation report, the Procuring Entity submitted that the Applicant did not request for any documents and did not

exhibit any request for such documents and that there can be no breach when there is no request for documents.

In reply to the argument that the Procuring Entity had adjusted the technical evaluation threshold from 80% to 90% and reduced the financial threshold from 20% to 10%, Counsel for the Procuring Entity stated that there was nothing wrong with that. He submitted that under the law as it currently stands, the Procuring Entity was mandated by law to set out the evaluation criteria and that the Procuring Entity had in exercise of that power prepared and issued a Tender document setting out the procedures and the criteria to be used in the evaluation and comparison of tenders.

The Procuring Entity's final submission on this issue was that the Applicant which had voluntarily participated in this tender did not raise any complaint about the criteria adopted at any time before the close of the tender.

The Procuring Entity therefore urged the Board to dismiss the above grounds of review.

Counsel for the 1st Interested Party in his oral and written submissions and the Memorandum of response dated and filed on 5th September, 2014 urged the Board to dismiss the consolidated grounds of review and argued that the Applicant had not demonstrated how the Procuring Entity's decision to award the tender herein to the 1st Interested Party violated the spirit of Section 2 of the Act. Counsel for the Interested

Party urged the Board to find that his client which had been in operation since the year 1865 had engaged in the business of operating and managing duty free facilities at leading Airports all over the World and it therefore has the necessary qualifications, capability, experience and the resources required by the Procuring Entity. He urged the Board to look at the entire Request for Review and the submissions made by the Applicant and the admission by Counsel for the Applicant where he specifically stated that the Applicant was not casting any aspersions on the successful bidder.

The Board has heard and considered the submissions made by the parties and has perused all the documents before it and which are relevant to the above issue and finds that in grounds 1 and 2 of the grounds as set out in the Request for Review the Applicant merely cited the Provisions of breach of Section 2 and 31 (1) (5) of the Public Procurement and Disposal Act. In ground 3 of the Request for Review, the Applicant also set out the general statement that the Procuring Entity's decision amounted to an unfair practice and secrecy and deliberate manipulation and collusion which the Applicant stated was against the Provisions of the Public Procurement and Disposal Act 2005.

The Applicant did not give the particulars of the unfair practices, secrecy, manipulation and collusion in its Request for review or the statement in support thereof which for the purposes of this Request formed the foundation of the applicant's case.

Allegations of unfair practices, secrecy, manipulation and collusion are serious allegations and some of them border on or are criminal in nature. Such allegations require more than a general statement to prove.

The Applicant gave the following instances of what it considered as evidence of the unfair practices, secrecy, manipulation and collusion:-

- (i) That the applicant offered the highest financial bid yet the Procuring Entity gave it the lowest technical score.
- (ii) The Procuring Entity changed the initial technical and financial threshold from 80% to 90% from 20% to 10% respectively which amounted to manipulation and favoritism.
- (iii) That the Procuring Entity did not provide or neglected to provide it with the evaluation report which was prove of secrecy.
- (iv) That the four bidders were bidders of International repute and that the disparity between their technical scores demonstrated that the technical scoring was not done properly and resulted in an award that was not necessarily the best award.

The Board has considered the above arguments and finds that under the provisions of Section 82 (5) of the Act, the successful candidate in a Request for Proposals is the tenderer with the highest combined Technical and Financial score. That Section does not state that such a tenderer shall be the tenderer with the lowest evaluated tender price unlike in an open tender under part V of the Act.

It was held in the cases of **Landor Associates -vs- Kenya Power and Lighting Company Ltd** (PRB Application No. 42 of 2009) and in the

case of Runji & Partners Consulting Engineers Limited -vs- Kenya Rural Roads Authority (PRB Application No. 35 of 2010) that where the Procurement was undertaken under a Request for Proposal, the Procurement was entirely to be governed by the provisions of Sections 76 to 87 of the Act and that the Provisions of Section 66 of the Act were not applicable to it.

The Board further held that a recommendation of the award of a tender to a successful bidder could only be made in favour of the bidder that scored the highest aggregate combined Technical and financial score in accordance with Section 82 (5) of the Act.

The Board therefore finds that merely because a tenderer was ranked the highest on the financial score does not necessary mean that it should be ranked first in the technical evaluation.

The Applicant in this case did not give details and evidence to show that the Procuring Entity breached the law and the Regulations while evaluating its bid and the particulars of such breaches.

On the second complaint that the Procuring Entity changed the initial technical and financial threshold from 80% to 90% and reduced the financial threshold from 20% to 10% and which according to the Applicant amounted to manipulation, the Board finds that the Provisions of Section 52 of the Act requires the Procuring Entity to prepare a Tender Document setting out the criteria for evaluation.

The Board has perused the documents supplied to it by the Procuring Entity and particularly the letter dated 18th June, 2014 signed by the Director General of the Public Procurement Authority. The authority upon consideration of the Tender Document submitted to it for approval by the Procuring Entity pursuant to the Board's Order dated 20th December, 2013 gave the Procuring Entity the authority to proceed with the process of re-tender subject to the Procuring Entity providing for a financial evaluation criteria.

The Board has perused the Tender Document and finds that the threshold for the financial score was provided for in the tender document pursuant to the authority's direction. Both the Technical and the financial criteria were therefore contained in the tender document from the beginning and if the applicant had any grievance with the criteria then it ought to have objected to it or not tendered for the project at all.

In arriving at this decision the Board wishes to rely on the High Court's decision in the case of **Republic -vs- The Public Procurement Administrative Review Board & Another Exparte Gibb Africa Ltd & Another (2012) eKLR** where the High Court held as follows:-

"The Applicants have admitted that the Procurement documents had two different scores for the technical evaluation parameters. They nevertheless went ahead to submit their bid in a Procurement process, which in their view, was founded on a flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started

complaining.... Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought".

On the complaint that the Procuring Entity did not provide it with the evaluation report, the Board finds that under the Provisions of Section 44 of the Act the Applicant was not entitled to be provided with an evaluation report.

Section 44 of the Act prohibits a Procuring Entity or any of its employees or agent of a Procuring Entity or a member of the Board or committee from disclosing any information set out in Section 44 (1). Section 44(4) of the Act criminalizes the production of such information. Section 44(2) and (3) of the Act however set out several exceptions to this requirement one of which is that the Provisions of subsection (2) of the do not apply where the disclosure is for the purposes of a review under part VII of the Act or an investigation under part VIII for the purposes of carrying out an investigation under Section 105 of the Act.

Section 44 (3) also permits a bidder such as the Applicant to be provided with a summary of the evaluation report and comparison of the tender proposals or quotation including the evaluation criteria.

Such summary can only be provided upon the Applicant making a written request to be provided with the same. The Board finds that had the Applicant taken this route, it would have probably been able to have

obtained information that would have perhaps been helpful to it in setting out a more focused Request for Review.

On the last complaint that there was disparity between the technical scores of the four bidders who were bidders of International- repute the Board finds that this ground was not set out in the body of the Request for Review. The ground was not therefore pleaded. The Applicant did not also provide any evidence to support the allegation that the Companies should have been ranked closely in the technical score. The Board further finds that even if it was be assumed for the purposes of this application that all the four companies are companies of International repute, it does not necessarily follow that they all have the same technical capacity so as to be awarded the same or a close technical score.

This is in the Board's view the province of the evaluation committee which must weigh the technical strength of each bidder on the contents of it's Tender Document as submitted.

Before giving its final decision on this issue, the Board notes that at no time did the Applicant fault the 1st Interested Party. Counsel for the Applicant stated in his submissions before the Board that the Applicant in this Request for Review was not casting aspersions on faulting the successful bidder but it's grievance was mainly directed against the Procuring Entity, the 2nd Interested Party and the 2nd best evaluated bidder **AER RIANITA INTERNATIONAL** which was not joined as a

Respondent in this Request for Review inspite of serious allegations having been made against it.

The sum total of all the above findings is that grounds 1, 2 and 3 of the Applicant's Request for Review as captured in issue no. 3 above therefore fail and are dismissed.

ISSUE NO. 4

Whether or not the Procuring Entity breached the Provisions of clause 2.12.4 and 2.12.5.1 by failing to declare the 2nd Interested Party's and the tender submitted by M/s Aer Rianta International non responsive by failing to provided a tender security in the prescribed form.

Counsel for the Applicant submitted on the basis of ground 4 of the Request for Review and paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of it's statement in support of the Request for Review that the Procuring Entity's decision smirked of unfair practice as some parties were allowed to participate in the tender process yet they had already failed at the Preliminary evaluation stages and did not meet some mandatory requirement for participation.

The Applicant focused it's submissions on the Provisions of clause No. 2.12.4 on tender security and clauses 2.12.5, 2.12.1 and 2.12.3.

The Applicant submitted that the provisions of clause 2.12.4 in relation to tender security clearly and expressly provided that the Tender

security shall be denominated in Kenya Shillings or in any other freely convertible currency and shall be in the form of:-

- a) Cash
- b) A bank guarantee.
- c) Such Insurance guarantee approved by the authority.
- d) A letter of credit.

Counsel for the applicant further submitted that clause 2.12.5 of the tender document, clearly stipulated that any tender not secured in accordance with paragraph 2.12.1 and 2.12.3 will be rejected by the Procuring Entity as non responsive.

The Applicant argued that contrary to the above requirement in the tender document the 2nd Interested Party and M/s Aer Rianta International provided tender security in the form of Bankers cheques which instrument was not recognized by clause 2.12.4 of the Tender document and the tenders by the two companies ought to have been immediately rejected as being non responsive in accordance with clause 2.12.5.

The Applicant submitted that had the tenders by the two bidders been disqualified then the technical scores for the remaining tenderers and more particularly the Applicant's score would have increased with the result that the Applicant would have obtained the highest score and won the tender.

The Applicant in addition also contended that the Procuring Entity had by its letter of 18th July, 2014 declared the 2nd Interested party (Flemingo International (BVI) Ltd and M/s Aer Rianta International Unsuccessful in the Preliminary evaluation and that the two ought not to have been allowed to participate in the tender process. The Applicant consequently submitted that the above actions by the Procuring Entity greatly compromised the Integrity of the tender process to the detriment of the Applicant and the people of the Republic of Kenya.

Both Counsel for the Procuring Entity, the 1st Interested Party and the 2nd Interested Party opposed the Applicant's submissions on the issue of tender security. They argued that the cheques referred to by the Applicant were Bankers cheques and were unanimous that cash and a Bankers Cheque were one and the same thing and what cash does a bankers Cheque could also do.

Counsel for the Procuring Entity alternatively submitted that even if the Board were to find that there was deviation from the tender requirement regarding the issue of tender security, the Board should treat the issue as a minor deviation under the Provisions of Section 64 (2) of the Act. He further relied on the Provisions of Article 159 of the Constitution which enjoined the Board to exercise its authority to do Justice without undue regard to technicalities.

On the issue of the alleged disqualification and the later re-admission of the two bidders referred to above, Counsel for the Procuring Entity relied on his submission in Request for review no. 34 of 2014 and urged

the Board to look at pages 128 - 139 of his submissions, filed this Request for Review. He however clarified that it was not correct for the applicant to state that no explanation was given for the re-admission and that the Procuring Entity had given a detailed explanation in its written submissions and the annexed documents.

The Board has heard and considered the rival submissions made by the parties on this issue together with all the documents submitted to it for consideration.

The Board finds at the outset and this was not disputed by any of the parties to this request for review that under the Provisions of clause 2.12.4 a bidder was required to provide a tender security in any of the following forms:-

- a) Cash.
- b) A bank guarantee.
- c) Such insurance guarantee approved by the authority.
- d) A letter of credit.

The only dispute before the Board was as to whether a Bankers Cheque was equivalent to cash and if not whether the provision of a Bankers cheque instead of cash was a minor deviation.

The Board has looked at the Provisions of Sections 3, 10 and 73 of the Bills of Exchange Act (chapter 27) of the Laws of Kenya and other several decided cases on this issue.

Section 73 of the said Act defines what a Banker's Cheque is and it states as follows:-

PART III CHEQUES ON A BANKER

73. Cheque defined

(1) A cheque is a bill of exchange drawn on a banker payable on demand.

(2) Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

Section 10 of the same Act defines what a bill payable on demand is the said provision of the law states as follows:-

10. Bill payable on demand.

1. A bill is payable on demand

- a) Which is expressed to be payable on demand or at sight or on presentation; or*
- b) In which no time for payment is expressed.*

The Court in the case of *Njoka Tanners Limited & Another -vs- Paul kigia* (Meru HCA No. 60 of 2009) held on the strength of the decision of the court of Appeal of England in the case of *ESSO Petroleum Co. Ltd -vs- Milton* and on the House of Lords decision in the case of *Nova (Jersey) Knit Ltd -vs- Kammgran Spinneri GMBH* (1977) IWLIR 273 that a Bankers cheque is regarded as cash.

In view of the above provisions of the Act and the above authorities, the Board accepts the position taken by the Procuring Entity, the 1st and the 2nd Interested Party that a banker's cheque is regarded as cash for all intents and purposes. The Procuring Entity did not therefore breach the provisions of clause 2.12.4 of the Tender Document.

The Applicant did not also demonstrate what prejudice it suffered as a result of the two bidders providing Bankers Cheques. Its bid was evaluated to the last stage and it is upon its tender being declared unsuccessful that it now sought to raise the issue.

On the issue of admission and readmission, the Board has considered and decided that issue in the Request for Review number 34 of 2014 to which the Applicant was a party under Section 96 of the Act and adopts its said decision and the reasons for arriving at its decision and reasons thereof.

These reasons which the Board adopts are in a nutshell that:-

- (i) The Procuring Entity's tender committee was empowered to direct for a re-evaluation.**
- (ii) The Board did not find any evidence or proof of any breach of the law or bad faith on the part of the evaluation committee.**
- (iii) The 2nd Interested Party did not suffer any prejudice as its financial proposal was evaluated and that it freely proceeded with the process to the end after its tender was**

declared successful at the technical evaluation stage after the re-evaluation.

- (iv) The process of evaluation and re-evaluation was conducted by the same members of the evaluation committee and the criteria for evaluation was spelt out from the beginning since it was contained in the tender document.

Arising from all the foregoing findings ground 4 of the Applicant's grounds for Review as captured in issue No. 5 above therefore fails and is dismissed.

ISSUE NO. 5

Whether or not the Applicant suffered loss, damage and prejudice as a result of the Procuring Entity's alleged breaches of the Provisions of the Act, the Regulations and the criteria set out in the tender document.

The Applicant submitted in grounds 5 and 6 of its Request for Review that it had suffered loss and damage as a result of the Procuring Entity's actions arising from the alleged breaches of the Act and the criteria set out by the Procuring Entity in the Tender Document. The Applicant however failed to demonstrate such breaches and in the absence of such proof this ground of review cannot succeed.

This ground of review therefore also fails.

FINAL ORDERS

In view of the above findings and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:-

- a) That the Preliminary Objection dated 5th September, 2014 and filed by the Interested Party on 8th September, 2014 is hereby dismissed.
- b) Pursuant to the Board's findings on issues No.3, 4 and 5 above the Applicant's Request for Review dated 22nd August, 2014 and filed with the Board on the same day is hereby dismissed.
- c) The Procuring Entity is therefore at Liberty to proceed with the Procurement process in respect of the tender the subject matter of this Request for Review.
- d) In view of the fact that each of the parties to this Request for Review was partly successful in the issues framed for determination, each party will bear it's own costs of this Request for Review.

Dated this 17th day of September, 2014

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CHAIRMAN, PPARB

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SECRETARY, PPARB