

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 57/2012

BETWEEN

FURNITURE ELEGANCE LTD.....APPLICANT

AND

KENYA SCHOOL OF MONETARY

STUDIES.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya School of Monetary Studies dated 19th October, 2012 in the matter of Tender No. KSMS/PROC/23/11-12 of April, 2012 for Supply & Assembly of Furniture for the Academic Wing and Library at the Kenya School of Monetary Studies, Ruaraka Campus.

BOARD MEMBERS PRESENT

Mr. Joshua W. Wambua	- Member (In the Chair)
Eng Christine Ogut	- Member
Amb.Charles Amira	- Member
Natasha Mutai	- Member

IN ATTENDANCE

Nathan Soita	-Secretariat
Judy Maina	-Secretariat

PRESENT BY INVITATION

Applicant- Elegance Furniture Ltd

Mr. Alex S.Masika - Advocate, Masika & Koross Advocates
Mr. Firoze Bachu - Director
Mr. George Och - Manager

Procuring Entity -Kenya School of Monetary Studies (KSMS)

Mr. George N. Mbugua - Ngatia & Associates Advocates
Mr. K. Sunji - Assistant Director
Mr. S. Mungeria - Compliance Manager
Mr. J. Kariuki - Manager
Mr. J. Moenga - Manager

Interested Party -Fursys (K) Limited

Mr. Mungai Kalande - Mungai Kalande & Co. Advocates
Mr. L.D. Sung - Director
Noelle Mutai - Designer

BOARD'S DECISION

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

BACKGROUND

Invitation to tender

The Procuring Entity advertised the Tender No. KSMS/PROC/23/11-12 for Supply, delivery and Assembly of furniture for the new academic wing and Library at the Kenya School of Monetary Studies in the

Standard and Daily Nation newspapers of 27th and 30th April, 2012 respectively.

Closing/Opening:

The tender closed and opened on 23rd May, 2012 with the following seven firms responding:

1. Furniture Elegance Ltd
2. Bevaj Furniture Ltd
3. Office Technologies Ltd
4. Budget Furniture
5. Fursys Kenya Ltd
6. Fairdeal Superstores Ltd
7. DL Furniture & Accessories

A Mandatory pre-bid meeting/conference was held on 10th May, 2012 where prospective tenderers were briefed on the tender document requirements and any clarifications on the same sought.

EVALUATION

The evaluation was carried out by an Evaluation Committee of nine members under the chairmanship of Mr. Stephen Lolchoki, CBK Projects Office. The evaluation was undertaken in four stages namely; Preliminary, Technical, Examination of samples & due diligence, and Financial evaluation.

Bidders were evaluated based on the following criteria:

Table 1: Bid Evaluation Criteria

STAGE	ATTRIBUTE	REQUIREMENTS TO QUALIFY
STAGE 1	Examination of Mandatory Requirements	Bidders must meet the mandatory qualification criteria stated in Section II C. Any bidder who does not meet any of the criteria shall be disqualified and their bid shall not be evaluated.
STAGE 2	Technical Evaluation	Bidders shall be evaluated in accordance to the evaluation criteria set out in stage 2 Section II C. Only bidders who score an aggregate of 40% and above shall proceed to the next stage.
STAGE 3	Examination of samples and due diligence	The Evaluation Committee shall undertake due diligence on all bidders who score above 40% as detailed in stage 2, Section II C. Only bidders who score an aggregate score of 30% in this stage will proceed to the next stage (i.e. only bidders who score an aggregate of 70% in stage 2 and 3 shall proceed to the next stage.)
STAGE 4	Financial Evaluation	The financial evaluation will be done in accordance to Section II C, stage 4.

PRELIMINARY EVALUATION

Bids were examined for responsiveness based on the submission of bid bond, attendance of the pre-bid meeting and mandatory requirements.

Office Technologies and DL Furniture & Accessories Ltd submitted their bids but they did not attend the Mandatory pre-bid conference held at KSMS on 10th May 2012. The Tender Securities provided by the Bidders were confirmed to be in order.

The pre-bid meeting was a mandatory requirement for the bidders to qualify for evaluation hence bidders who did not attend the pre-bid conference were disqualified.

The following five bidders qualified for further evaluation:

Table 2: Qualified bidders after Preliminary Evaluation

NO.	NAME OF BIDDER	BIDDER NO.
1	Furniture Elegance Ltd	1
2	Bevaj Furniture Ltd	2
3	Budget Furniture Ltd	4
4	Fursys (K) ltd	5
5	Fairdeal Superstores Ltd	6

EVALUATION OF THE TENDERS FOR COMPLIANCE AGAINST SET MANDATORY REQUIREMENTS

The Bidders were subjected to mandatory requirements as shown in the table 3 below:

Table 3: Mandatory Requirements

No	Mandatory Requirements
MR 1	All tenderers must provide their detailed work program / delivery and assembly schedule in a GANNT chart format detailing their lead times, milestones and any relevant assumptions made. Note that this timelines shall be used in contract negotiations and in the calculation of liquidated damages if any.
MR 2	Provide documentary evidence of the bidder Company's Certificate of Incorporation / registration (legal structure)
MR 3	Provide certified copy of the company's current Certificate of Tax Compliance issued by Kenya Revenue Authority (KRA)
MR 4	Submit a completed company's profile using the Confidential Business Questionnaire attached.
MR 5	Provide a certified copy of valid Business Trading License (City or Local Council Trading Permit)
MR 6	Certified copy of PIN (personal identification number) certificate
MR 7	Certified copy of VAT (Value Added Tax) certificate of registration
MR 8	Provide verifiable documentary evidence of having successfully supplied and installed institutional furniture in three (3) separate contracts each worth over Kenya Shillings 5 Million, in the last 10

	(10) years. Provide names of contact persons and their contact information-email and telephone contacts of previous clients who will be contacted during the due diligence stage of bid evaluation.
MR 9	Provide documentary evidence of timely acquisition (own, lease, hire, etc.) of the essential equipment as required for the Works. Refer to paragraph 3.4.5 of the pre-qualification for tender document.
MR 10	Provide a signed mandatory site visit form Refer to paragraph 1.6 of Invitation to tender
MR 11	The tender validity period to be one hundred and twenty (120) days from the date of opening of the tender.
MR 12	A tender security of Kenya Shillings One million (Kshs1 Million) in form of a bank guarantee or Insurance bond from an Insurance company approved by the Public Procurement Authority (PPOA).
MR 13	Provide a receipt for buying the tender document.

The result of the evaluation on the basis of mandatory requirements is as shown in table 4 below:

Table 4: Result on Mandatory Requirements

No.	Furniture Elegance Ltd	Bevaj Furniture Ltd	Fairdeal Superstores Ltd	Budget Furniture Ltd	Fursys (K) Ltd
MR 1	√	√	√	√	√
MR 2	√	√	√	√	√
MR 3	√	X	X	√	√
MR 4	√	√	√	√	√
MR 5	√	X	X	√	√
MR 6	√	X	X	√	√
MR 7	√	X	X	√	√
MR 8	√	√	√	√	√
MR 9	√	X	X	√	√
MR 10	√	√	√	√	√
MR 11	√	√	√	√	√
MR 12	√	√	√	√	√
MR 13	√	√	√	√	√

Key

- √ - Complied
X - Did not comply

Two tenderers, Bevaj Furniture Ltd and Fairdeal Superstores Ltd did not comply with MR 3, MR 5, MR 6, MR 7 and MR 9 and were, therefore, disqualified from further evaluation.

Furniture Elegance Ltd, Budget Furniture Ltd and Fursys (K) Ltd qualified through and were therefore, subjected to Technical Evaluation and Due Diligence.

TECHNICAL EVALUATION AND DUE DILIGENCE

(a) Technical Evaluation

Technical Evaluation was carried out on bidders who qualified through Preliminary and Mandatory stage in accordance with the evaluation criteria set out in the tender document. Each member of the evaluation committee evaluated the bids independently and awarded an individual score to each bidder.

The evaluation criteria set out in the tender document is as shown in the table 5 below:

Table 5: Technical Evaluation Criteria Provided in the Tender Document

	Evaluation Attribute	Break-down of score (%)	Max. score (%)
1	Collaboration with internationally renowned furniture manufacturer whose brand you intend to supply.		
	a Evidenced collaboration	2	2
	b Non- evidenced collaboration	0	
2	Evidence of registration with relevant professional		

	bodies or certification bodies	1	1
3	Number of years in operation as an active furniture supplier company evidenced by projects undertaken:		
	a Less than a year	1	7
	b 1- 3 years	2	
	c 4-6 years	3	
	d 7-10 years	4	
	e More than 10 years	7	
4	Qualified Technical Staff in the company relevant to the furniture supply industry who will be actively involved in the proposed project (Provide detailed CV accompanied by relevant academic and professional certificates. Telephone contacts must be provided):		5
	a 1 to 2	2	
	b Above 2	5	
5	Qualified Management Staff in the company relevant to business management who are actively involved in the management of the company(Provide detailed CV accompanied by relevant academic and professional certificates Telephone contacts must be provided):		3
	a 1 to 2	1	
	b Above 2	3	
	Evaluation Attribute	Break-down of score (%)	Max. score (%)
6	Accomplishments: (previous & current projects) Details of similar projects undertaken successfully within the last ten (10) years each over Kshs. 5 Million and above evidenced by letters of reference from clients. (for a project to qualify it must be at least 70% complete. For Projects that are not completed, letters of reference from the respective Architects and Clients must be provided)	Each to score 5	25
7	Tools and equipment Give a list and type of relevant furniture manufacturing/ installation or assembly equipment owned by the company evidenced by ownership documents. Provide documentary evidence of documents. Provide documentary evidence of their application and performance to demonstrate	3	3

	technical capacity.		
8	Insurance covers Provide documentary evidence of having the following valid insurance covers a) Group personal accident cover b) Public liability cover		2
		1	
		1	
9	Evidence of access to credit facilities, net of other contractual commitments and exclusive of any advance payments which may be made under the Contract, of no less than 6months of Kshs. 30 Million (Kenya Shillings Thirty Million) per month;	2	2
10	Certified financial statements for the last two years 2009 and 2010 /and, or 2011. Evaluation shall consider Profitability Index and Liquidity and Asset Ratio	2	2
11	Certified bank statements for the last six months (March, February, January 2012, December, November, October 2011)	2	2
12	Letters of reference from bankers	1	1
13	Proposed supply and installation period for the project accompanied by a proposed Works Program Chart. Detailed description on how the applicant intends to meet the strict timelines will earn higher marks.	5	5
	TOTAL	60	60

The average score was calculated for each bidder and the results are shown in the table 6 below.

Table 6: Summary of Technical Evaluation Scores

	Tenderer	Bidder No.	Scores out of 60
1.	Furniture Elegance Ltd	1	42
2.	Budget Furniture Ltd	4	43
3.	Fursys (K) ltd	5	56

As required in the tender document, a pass mark of 40 out of 60 was required for a bidder to qualify to the next stage of evaluation.

All the three tenderers scored above the pass mark of 40 and, therefore, qualified for the next stage of evaluation.

(b) Due Diligence

Due diligence was carried out on the qualified bidders in accordance with the tender document.

As required in the tender document, due diligence was part of technical evaluation and carried a total of 40 marks out of which a pass mark of 30 marks was required for a bidder to qualify for the next stage of evaluation.

The evaluation criteria for Due Diligence as stated in the tender document is as shown in the table 7 below:

Issues under consideration

Before undertaking due diligence, the evaluation committee held discussions on the following issues that were relevant to the exercise of due diligence.

- i. What was the expected quality of the furniture to be supplied?
- ii. What are the comparable standards (in reference to particular projects) that are to be considered?
- iii. What was the cost of supply and installation of the comparable furniture?
- iv. Is there any preference to either local or imported furniture?
- v. What is the expected durability of the furniture?

Detailed analysis of the issues for consideration during due diligence

After deliberations the committee agreed that the following issues will be considered during due diligence:

- i. Expected Quality and standards

Background

The school objective is to be a premier institution of training and research in the financial sector. The school aims to be comparable with other international renowned institutions e.g. Harvard school of business. Therefore the furniture to be procured must meet international standards and be comparable to any other furniture that could be found in schools of international repute.

Issues to be considered in establishing the quality of the furniture were;

1. Aesthetics

It was agreed that the furniture must be of very high standards to meet the stringent aesthetic standards expected in a development of the nature being put up at KSMS. The standards must be comparable with international standards in institutions of the same category as the one anticipated by KSMS.

2. Compliance with circuit/ future information technology (IT)

It was agreed that the furniture must be information technology (IT) ready with flexible, intelligent and modern cable management systems.

3. Modularity

It was observed that the furniture specified in the tender document need to be modular i.e. the furniture should offer good flexibility, allowing you to add components like shelves, drawers, file cabinets or computer accessory storage as needed without compromising the original furniture.

4. Strength

Due to heavy usage and frequent abuse that institutional furniture experience, the evaluation committee noted that the strength and the durability of the furniture required need to be considered. To achieve this, the manufacturers strength rating must be considered and furniture that have been tested used as a guide to better quality furniture.

5. Quality control

The evaluation committee noted that there must be a consistent level of quality of construction and finishing within. The committee noted that the challenge of replacements or additional pieces must be considered. New items that are not identical to the original furniture will require professional design drawings. Consideration must be given on the manufacturer's ability to back up the furniture supplied in terms of warranties obtained from the manufacture's history and stability to make the warranties relevant must be considered.

Comparable Standards

It was agreed that locally, the schools furniture should be benchmarked with:

- a) United States International University
- b) Catholic University of East Africa
- c) Kenya College of accountancy
- d) Kenya national library

Cost of supply

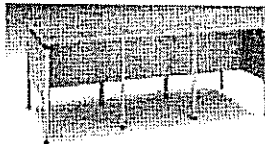
The cost of supply to the sites considered above was varied as shown in the table below:

READING TABLE

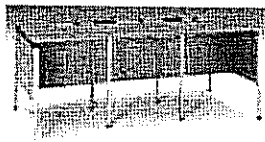
K.C.A	2008	UPD126C	DOUBLE SIDED READING TABLE W/WIRE OUTLET-6PAX	1	66720
		UPD124C	DOUBLE SIDED READING TABLE W/WIRE OUTLET-4PAX	1	55008



K.N.L.S	2009	UPD126	DOUBLE SIDED READING TABLE -6PAX	1	57120
		UPD124	DOUBLE SIDED READING TABLE -4PAX	1	48960



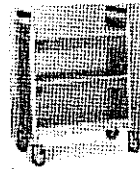
C.U.E.A	2009	UPD126C	DOUBLE SIDED READING TABLE W/WIRE OUTLET-6PAX	1	48222
		UPD124C	DOUBLE SIDED READING TABLE W/WIRE OUTLET-4PAX	1	40273



<u>MAGAZINE SHELF</u>									
K.C.A	2008	UPM135	5 SHELF MAGAZINE SHELVING			1		09,385.00	



K.N.L.S	2009	UPA1001	BOOK TRUCK			1		51,542.00	
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<u>BOOK TRUCK</u>									
K.C.A	2008	UPA1001	BOOK TRUCK			1		51,542.00	

KEY:

KCA Kenya College of Accountancy

KNLS Kenya National Library Services

CUEA Catholic University of East Africa

Prices exclusive of VAT. Time of tender is critical in interpreting costs.

Preferred quality of furniture

The committee discussed and agreed that considering the issues discussed above, the quality of furniture must be of:

- a) Higher aesthetic standards

- b) Compliance with information technology (IT) management systems e.g. outlets, cable management e.t.c.
- c) Higher quality control standards
- d) Ability to supply the quantities required within the limited time
- e) Availability of higher modular combinations and flexibility
- f) Lower prices due to mass production and economies of scale
- g) More reliable manufacturer's and supplier's warranties and better services and spares support.

Strength/ durability of furniture

It was agreed that this being a public institution, the furniture must therefore be of very high durability to withstand sustained abuse and heavy usage. This must be considered during due diligence.

Categories of Furniture to be supplied

The committee discussed and agreed that the furniture to be supplied can be categorized into the following categories:

	Category	Type of furniture
1	Library furniture	<ul style="list-style-type: none"> • Bookshelves • Reading tables • Reading chairs • Computer tables • Carrels • Lounge chairs/sofas • Display cabinets / racks

		<ul style="list-style-type: none"> • Multimedia cabinets
2	Classroom furniture	<ul style="list-style-type: none"> • Tables • Chairs • Cabinets
3	Lecture theatre furniture	<ul style="list-style-type: none"> • Students seats
4	Office furniture	<ul style="list-style-type: none"> • Table • Chairs • Cabinets

Specific requirements for the categories of furniture required

The committee discussed and agreed that the following requirements institute the basis for due diligence:

	Category	Type of furniture	Requirements
	Library furniture	<ul style="list-style-type: none"> • Bookshelves • Reading tables • Reading chairs • Computer tables • Carrels • Lounge chairs/sofas • Display cabinets /racks • Multimedia cabinets 	<ul style="list-style-type: none"> - Network ready reading tables /computer tables(on line based) - Reading chairs should match reading tables - Should be light and elegant - Ability to be modular - Elegant design - Lounge chairs /sofas come in flexible and modular design enable us to achieve our theme - Display cabinets /racks

			should meet international standards
	Classroom furniture	<ul style="list-style-type: none"> • Tables • Chairs • Cabinets 	<ul style="list-style-type: none"> - Network ready reading tables /computer tables (on line based) - Ability to be modular - Display cabinets / racks should meet <ul style="list-style-type: none"> - International standards
	Lecture theatre furniture	<ul style="list-style-type: none"> • Students seats 	
	Office furniture	<ul style="list-style-type: none"> • Table • Chairs • Cabinets 	<ul style="list-style-type: none"> - Network ready - Ability to be modular - Same colour - Same design - Polyurethane lipping to protect the edges of the tables has to be melted on timber .This cannot be achieved in locally made furniture.

Table 7: Evaluation Criteria for Due Diligence

ITEM	ATTRIBUTES	MARKS
1	Bidder's ability to supply and assemble similar furniture. The Evaluation Committee shall visit previous sites of the bidder under evaluation to determine the bidder's ability to supply and assemble furniture of similar nature and magnitude comparable to the furniture under description.	5 Marks

2.	Quality and workmanship. Quality and workmanship of furniture previously supplied by the bidder shall be established by the Evaluation Committee. Bidders who have similar furniture in their showrooms/ warehouses should state so, so that the Evaluation Committee can do an inspection.	10 Marks
3.	Satisfaction of previous clients. The Evaluation Committee shall establish the level of satisfaction of the previous clients in terms of: - quality -timelines -price -after sales service etc.	10 Marks
4.	Samples. The Evaluation Committee shall study and establish the quality of samples provided by the bidder and their compliance to the specifications. Bidders are advised to make necessary arrangements to have the relevant samples available in their premises or indicate previous clients whom they have supplied with similar furniture. All samples shall be at the bidder's showroom or warehouse and should not be delivered to the client unless instructed so by the Evaluation Committee.	15 Marks
	Total:	40 Marks

Table 8a: Due Diligence Report

	Suppliers	Premises/sites	Comments	Scores out of 40
1	Furniture Elegance Ltd	<ol style="list-style-type: none"> 1. Showroom at Paramount Plaza, Nairobi 2. Ministry of industrialization - Teleposta Towers 3. Anti-Counterfeit 	<ol style="list-style-type: none"> 1. The bidder stated that they had tendered for alternative furniture and showed the Evaluation Committee the alternative furniture quoted for. 2. The Evaluation Committee noted that the alternative furniture quoted by the bidder were of lower standard of quality 3. The evaluation committee noted that some furniture supplied to some clients less than two years ago have already started wearing out. 	

		<p>authority - Teleposta Towers</p> <p>4. NSSF - Community area</p>		
2	Budget Furniture Ltd	<p>1. Showroom, Mombasa Road</p> <p>2. Factory, Mombasa Road</p> <p>3. Client-Kenya School of Monetary Studies, Ruaraka</p>	<p>1. The Evaluation Committee noted that the bidder has the capacity to supply and assemble furniture as specified in the tender document.</p> <p>2. The Evaluation Committee established that the furniture previously supplied by the bidder was of good quality and workmanship.</p> <p>3. The Evaluation Committee inspected the samples in the bidder's showroom and factory and confirmed that the samples provided are in compliance with the specifications in the tender document.</p> <p>4. The Evaluation Committee concluded that the bidder had the capacity to supply the specified furniture.</p>	
3	Fursys (K) Ltd	<p>1. Catholic University Library, Karen</p> <p>2. Kenya National Library Services, Buruburu</p> <p>3. Central Bank of Kenya, Nairobi</p>	<p>1. Having visited the Catholic University Library that has a seating capacity of 3,000 and which the bidder has furnished, the Evaluation Committee confirmed that the bidder has the capacity to supply and assemble the specified furniture as required in the tender document.</p> <p>2. Similarly, the Evaluation Committee inspected the furniture previously supplied by the bidder to Kenya National Library in Buruburu in 2008 and noted that the furniture is still in good condition even after prolonged public usage.</p> <p>3. The Evaluation Committee also established that the clients were satisfied by the bidder's service. Further, it was noted that the furniture supplied by the bidder and inspected by the Evaluation Committee met the specifications set out in the tender document.</p>	

Table 8b. Due diligence results

Company	Attribute 1	Attribute 2	Attribute 3	Attribute 4	Total Marks
Furniture Elegance Ltd	2	5	6	5	18
Budget Furniture Ltd	5	8	7	10	30
Fursys (K) Ltd	5	10	10	14	39

Observations

- a) As required in the tender document, due diligence was part of technical evaluation and carried a total of 40 marks out of which a pass mark of 30 marks was required for a bidder to qualify for the next stage of evaluation.
- b) Budget Furniture Ltd and Fursys (K) Ltd scored above 30 marks and therefore qualified for further evaluation.
- c) Furniture Elegance Ltd scored 18 marks and therefore disqualified from further evaluation.

The combined score in technical evaluation and due diligence is as follows:

Table 9: Summary of the combined scores

Bidder	Technical evaluation score out of 60	Due diligence score out of 40	Combined score out of 100
Furniture Elegance Ltd	42	18	60
Budget Furniture Ltd	43	30	73
Fursys (K) Ltd	56	39	95

Two bidders namely, Budget Furniture Ltd and Fursys (K) Ltd attained combined score in technical and due diligence of above 70% and, therefore, qualified for financial evaluation as required in the tender document.

FINANCIAL EVALUATION

Financial Evaluation was carried out in accordance with the criteria specified in the tender document as shown below:

Table 10: Criteria for Financial Evaluation

a)	<p>General</p> <ol style="list-style-type: none"> 1. Authentication of the tender security. Confirmation of its availability and its sufficiency as per the contract as well as authenticity from the necessary bank/ insurance entity. 2. Confirm the tenderers conformity with the Kenya School of Monetary Studies work plan.
b)	<p>Specific</p> <ol style="list-style-type: none"> 1. Check for arithmetic errors in accordance to the tender contract. 2. Evaluate the tenderers tender price in reference to other tenderers.

General

i. Authentication of tender security

The tender committee established that the tender securities provided by the bidders were in compliance with the tender documents.

The Applicant requests the Board for the following orders:

- a) *Annul in whole the decision of the tender committee of the Procuring Entity.*
- b) *Award the tender to the Applicant.*
- c) *The Procuring Entity be condemned to pay Costs of this Review to the Applicant.*

PRELIMINARY OBJECTION

At the commencement of the hearing, the Board on its own motion informed the parties that it had noted that there was a Preliminary Objection raised by the Procuring Entity in its response to the Request for Review filed on 14th November, 2012 by the Applicant. The Board informed the parties that it needed to determine whether it had jurisdiction to hear the Request for Review based on whether the Request for Review was filed out of time as alleged by the Procuring Entity in its pleadings. Accordingly the parties were invited by the Board to make submissions on the issue of the Board's jurisdiction.

The Procuring Entity submitted that the Request for Review filed on 14th November, 2012 by the Applicant was out of time. It stated that the Request for Review was filed 26 days after its decision of 19th October, 2012 contrary to Regulation 73(2)(c)(ii) of the Public Procurement and Disposal Regulations 2006 (hereinafter referred to as "the Regulations") read together with Section 67 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act"). It stated that it had notified all bidders vide letter dated 19th October, 2012. It urged the Board to examine its dispatch register of letters with an entry date of 19th

October, 2012 attached to its pleadings, which indicated that the letter of notification was dispatched to M/s Furniture Elegance Limited the Applicant, on 19th October, 2012 through ordinary mail. It admitted that it sent the notification letters outside the tender validity period of 120 days, but the said notifications were within the validity period of tender security which was 150 days.

The Procuring Entity submitted that it was aware that the Applicant had filed a complaint to the Director General (PPOA) dated 30th October, 2012 and copied the same to it. It argued that based on its own analysis, 14th November, 2012 the date when the Applicant filed its Request for Review was outside the 14 days appeal window. It stated that it had erroneously addressed the notification letter to "Furniture Elegance Ltd of P.O.Box 81937-80100 Nairobi" whereas the Applicants correct address was P.O.Box 8776-00200 Nairobi. In conclusion, it urged the Board to dismiss the Request for Review.

In response, the Applicant submitted that contrary to the claim that the notification letter was allegedly posted on 19th October, 2012, there was no proof adduced by the Procuring Entity that it had dispatched the said letter to the Applicant. It stated that it had collected a copy of the notification letter on 30th October, 2012 and filed this Request for Review on 14th November, 2012. It further stated that it had not received its letter of notification to date as the copy of the letter found at page four (4) of its Request for Review was erroneously addressed and not on an official letterhead. It informed the Board that it had communicated to the Procuring Entity by email informing it that the bid validity had lapsed.

It argued that the 14 days Appeal window could not run from 31st October, 2012 since the Procuring Entity had sent the notification letter to a wrong address. Accordingly, it urged the Board to dismiss the Preliminary Objection that the Request for Review was filed out of time since the Procuring Entity had not officially notified it.

On its part, the Successful Bidder stated that it received its letter of notification through ordinary mail on 26th October, 2012.

The Board has carefully considered the submissions of the parties & examined the documents presented before it.

The Board notes that a procurement process is a race governed by rules set out in the Act, Regulations and tender documents. A bidder enters the race by buying the bid documents and lodging its Request for Review before the set deadlines. Likewise the Procuring Entity's role in the race is crucial in that it must finalize the procurement process before the expiry of the set deadlines.

In this regard, the issue to be determined by the Board under the Preliminary Objection is whether the Request for Review was lodged within 14 days pursuant to Regulation 73(2) (c) (ii) and Sections 67 or Section 83 of the Act? The Board has noted that Regulation 73(2) (c) gives aggrieved bidder discretion as to when to make a request for review. This may be:-

- (a) Within fourteen days of occurrence of the breach in cases where the aggrieved party choose to make its request for review before the award or;
- (b) Within fourteen days of notification required under Section 67 or 83 of the Act.

Upon perusal of the documents filed by the parties, the Board notes the following:

- a) That this was an open tender that closed/opened on 23rd May,2012;
- b) That the letters of notification to the Successful Bidder and the unsuccessful bidders were dated 19th October, 2012;
- c) That, the Procuring Entity's dispatch register shows that letters of notification to bidders were recorded for dispatch on 19th October, 2012;
- d) That the Notification letter to the Applicant had the address P.O Box 81937-80100 Nairobi whereas the address used was erroneous and the address code was for Mombasa instead of Nairobi. The Applicant's correct address as provided in its tender document is P.O Box 8776-00200, Nairobi with the Physical address being Paramount Plaza Murang'a Road, Nairobi;
- e) That the Applicant wrote an email addressed to a Mr. Amos of the Procuring Entity on 29th October, 2012 indicating that the validity period of the tender had lapsed yet they were yet to be informed of any updates regarding the tender;
- f) That the tender validity period expired on 20th September,2012;

- g) That the Applicant was able to obtain a copy of the notification letter on 30th October, 2012. In addition, the Board notes that the Applicant filed its Request for Review on 14th November, 2012.
- h) That the Applicant wrote a letter to PPOA dated 30th October, 2012 and copied the same to the Procuring Entity.

The High Court has ruled before that , the first thing that a court or a quasi judicial body must determine before hearing an Application is whether it has jurisdiction to hear a matter brought before it. In the case of **D. Chandulal K. Vora Company Ltd v. Public Procurement Administrative Review Board (MISC. APP. No. 1160 of 2004**, the Learned Judge quoted Justice Nyarangi in the case of **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd C.A No.50 of 1989** as follows:

“Jurisdiction is everything and without it the court has no juris power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction”.

In this matter, the Board finds that the Applicant was notified on 30th October, 2012 when it collected a copy of the notification letter from the Procuring Entity. The Board further finds that time for the purposes of the appeal window started running on 31st October, 2012. Therefore the

last day the Applicant could have filed the Request for Review was 13th November, 2012.

Never the less the Board directs its attention to the provision of Section 67 of the Act which deals with notification on open tenders. The Board notes that Section 67 of the Act provides as follows:

(1) "Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

(2) At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all other persons submitting their tenders that their tenders were unsuccessful."

Having set out the applicable provisions, it is necessary to examine the sequence of events that led to the notification of the award to the Successful Bidder and the tender validity provisions as set out in the bid document.

The Board notes that all tenderers were notified of the outcome of the tender vide letters dated 19th October, 2012 posted by ordinary mail. The Board further notes that clause 2.15.1 of Instruction to Tenderers indicated that the validity period of the tender would be 120 days from the date of tender opening which was 23rd May, 2012. Counting from that date, 120 days expired on 20th September, 2012. The Board also notes that clauses 2.15.2 and 2.28.1 of the bid document provide as follows:

"In exceptional circumstances the Procuring Entity may solicit the tenderers consent to an extension of period of validity of tenders. The request and responses there to shall be in writing."

"Prior to the expiration of the period of tender validity, the Procuring Entity will notify the successful tenderer in writing that its tender has been accepted."

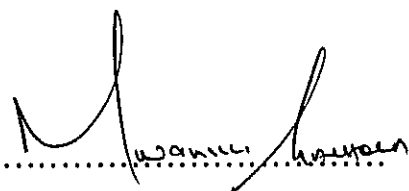
As mentioned above, the decision to award the tender to the Successful Bidder was made on 12th September, 2012 and the Successful Bidder was notified on 26th October, 2012. The Board further notes that the Procuring Entity has admitted that it notified the Successful Bidder and other bidders outside the tender validity period. Section 67 of the Act on notification provides for notification to be done before the expiry of the tender validity period. The Board has held in a number of cases and in accordance with the provision of Section 67 of the Act, that once the period of validity of a tender has expired, there is no tender to award and therefore no need for the notification. It is clear in this case that notification was done well outside the tender validity period. Therefore there was no tender to award after expiry of the tender validity period. Accordingly the Board finds that the notification to the Successful Bidder was a nullity, and that the question of whether the Request for Review was filed within time or not would not arise as in the first instance, there was no tender to award.

Taking into consideration all the above matters, the Preliminary Objection fails because the notification was made outside the tender

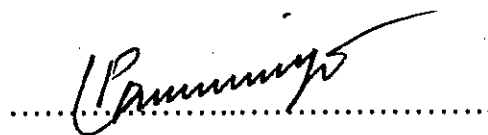
validity period which implied that there was no tender award to be notified. The notification to the Successful Bidder was a nullity *ab-initio*.

Taking into account all the above, the Board pursuant to Section 98 of the Act orders the Procuring Entity may retender. There are no orders as to costs.

Dated at Nairobi on this 7th day of December, 2012

A handwritten signature in black ink, appearing to read 'M. M. M. M.', written over a horizontal dotted line.

**CHAIRMAN
PPARB**

A handwritten signature in black ink, appearing to read 'A. G.', written over a horizontal dotted line.

**AG. SECRETARY
PPARB**

