

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

**REVIEW NO. 24/2013 OF 23<sup>RD</sup> JULY 2013**

**BETWEEN**

**BEVAJ FURNITURE .....APPLICANT**

**AND**

**KENYA SCHOOL OF MONETARY STUDIES .....PROCURING  
ENTITY**

Review against the decision of the Tender Committee of Central Bank dated 28<sup>th</sup> June, 2013 in the matter of Tender No. KSMS/PROC/37/12-13 for supply and assembly of furniture for the academic wing and library.

**BOARD MEMBERS PRESENT**

Mr. Akich Okola	- Chairman
Ms. Judith Guserwa	- Member
Amb. Charles Amira	- Member
Eng. Christine Ogut	- Member
Ms. Natasha Mutai	- Member

**IN ATTENDANCE**

Philemon Chemoiywo	-Secretariat
Shelmith Miano	-Secretariat
Susan Chesang	-Secretariat

**PRESENT BY INVITATION**

**Applicant- Bevaj furniture Ltd**

Daniel Achach	- Advocate
Dennis Moturi	- Advocate
Rosslyn Mbugi	- Director
Richard Mulwa	-Operations
Naomi Okelo	- Lawyer

**Procuring Entity - Kenya School of Monetary Studies**

Chacha Odera	- Advocate
Cindy Oraro	- Advocate
Jane Kariuki	- Officer
Amos Mbugua	- Officer
S.Mweria	- compliance
Winnie Molonko	- Legal Officer

**Interested Parties -**

Stephine Mulandi	- Fairdeal furniture Ltd
Mohamed Khalid	- Fairdeal furniture Ltd
Kepha Omari	- Fairdeal furniture Ltd
Noelle Mutai	- Fursys (K) Ltd
L.D.Sung	-Fursys (K) Ltd

## BOARD'S DECISION

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

## **BACKGROUND**

### Invitation to tender

The Procuring Entity advertised Tender No. KSMS/PROC/37/12-13 for supply and assembly of furniture for the academic wing and library in the Standard and Daily Nation Newspapers of 26<sup>th</sup> and 27<sup>th</sup> February, 2013 respectively

Pre-bid meeting which was held on 8<sup>th</sup> March, 2013

### Closing/Opening:

Tender closed/opened on 17<sup>th</sup> April 2013 at 10.30 am, and four firms responded as follows:

No.	Bidder	Bid Bond Amount (Kshs.)	Bind Bond Issued by	Tender Amount (Kshs.)
1.	Victoria Furniture Ltd	1,000,000	Occidental Insurance	276,817,890.00
2.	Bevaj Furniture Ltd	1,000,000	Paramount Bank	262,177,213.17
3.	Fursys (K) Ltd	1,000,000	Chase Bank	244,585,573.58
4.	Fairdeal Superstores Ltd	1,000,000	Equity Bank	216,070,002.00

## EVALUATION

Evaluation Committee Held several meetings between 26<sup>th</sup> April 2013 and 6<sup>th</sup> May 2013 in their evaluation they adopted the following 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% out of the maximum 60% 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% out of the maximum 40% 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.

### **STEP 2: PRELIMINARY EVALUATION**

1. On Preliminary Evaluation it was noted that the following bidders attended the pre-bid meeting:

- i) Bevaj Furniture Ltd
- ii) Fursys (K) Ltd
- iii) Fairdeal Superstores Ltd

2. Victoria Furniture Ltd submitted their bid but did not attend the Mandatory Pre-bid Conference held at KSMS on 8<sup>th</sup> March 2013.
3. The Tender Securities provided by the Bidders were confirmed to be in order.

### Observation

The pre-bid meeting was a mandatory requirement for the bidders to qualify for evaluation.

- 1) The following bidders were evaluated:

NO.	NAME OF BIDDER	BIDDER NO.
1.	Victoria Furniture Ltd	1
2.	Fairdeal Superstores Ltd	2
3.	Bevaj Furniture Ltd	3
4.	Fursys (K) Ltd	4

### STEP 3: EVALUATION OF THE TENDERS FOR COMPLIANCE AGAINST SET MANDATORY REQUIREMENTS

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

**Table 3: Mandatory Requirements**

NO	REQUIREMENTS	APPLICANT'S RESPONSE
MR 1	All bidders must quote for all items using the original tender document issued by the client. Failure to quote for some items or changing of specifications, editing of the tender document or re-formatting the tender document will lead to automatic disqualification.	

MR 2A	Fully signed and stamped tender document in the original un-edited and un-formatted format. Formatting, editing or not pricing some items will lead to automatic disqualification.	
MR 2B	Provide together with completed tender documents well labeled and annotated samples of items quoted for. The samples provided must represent at least half of the variety of items quoted for. Samples provided shall be evaluated and will determine the performance of the bidder. The delivery and return of the samples shall be at the suppliers cost.	
MR 3	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 these timelines shall be used in contract negotiations and in the calculation of liquidated damages if any. Illegal timelines or timelines without relevant assumptions will be considered non-responsive.	
MR 4A	Provide certified documentary evidence of the bidder Company's Certificate of Incorporation / registration (legal structure)	
MR 4B	Provide certified copy of the company's current Certificate of Tax Compliance valid beyond the date of tender opening.	
MR 4C	Provide certified copy of the company's Value Added Tax Certificate (VAT).	
MR 5	Submit a completed company's profile using the Confidential Business Questionnaire attached. All items must be filled. Editing the questionnaire form will lead to automatic disqualification.	
MR 6	Provide documentary evidence in form of certified audited accounts for the company for the years 2011, 2010, 2009 to indicate the company has had an annual turnover of over Kenya shillings twenty five million( Kshs. 25million).	

MR 7	Provide verifiable documentary evidence of having successfully supplied and installed institutional furniture in four (4) separate contracts each worth over Kshs.10,000,000 (Kenya Shillings Ten Million) in the last five (5) 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 8	Provide a signed mandatory pre- bid meeting attendance form. Refer to paragraph 1.6 of Invitation to tender.	

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

**Table 4: Result on Mandatory Requirements**

NO	Victoria Furniture Ltd	Fairdeal Superstores Ltd	Bevaj Furniture Ltd	Fursys (K) Ltd
MR 1	√	√	√	√
MR 2A	√	√	√	√
MR 2B	X	X	√	√
MR 3	√	X	√	√
MR 4A	√ Incorporated on 31/7/1969	√ Incorporated on 28/1/2003	√ Incorporated on 19/1/2007	√ Incorporated on 11/12/1995
MR 4B	√ Expiry 18/9/2013	√ Expiry 21/7/2013	√ Expiry 18/9/2013	√ Expiry 26/4/2013
MR 4C	√	√	√	√
MR 5	√	√	√	√
MR 6	X 2008, 2009 & 2010	X 2008, 2009 & 2010	√ 2009, 2010 & 2011	√ 2009, 2010 & 2011

MR 7	√ Safaricom 17.3m -2012 UNHCR 12.3m - 2012 S. Sudan 15.9m - 2012 Kengen 29.8m - 2012	X KIA 13.86 m - 2009	√ KPLC 19.6m -2011 KPLC 10.6m - 2012 KNLS 20.9m - 2011 MoF 10.41m - 2012	√ CUEA 60m - 2010 KCA 20m - 2010 KNLS 20m - 2010 USIU 60m - 2009 Britam 10m - 2011 AGRA 10m - 2012
MR 8	X	√	√	√

**Key**√ - Complied  
X - Did not comply

### Observations

- a) From the foregoing, two tenderers, Victoria Furniture Ltd and Fairdeal Superstores Ltd did not comply with all mandatory requirements and were, therefore, disqualified from further evaluation.
- b) Victoria Furniture Ltd did not comply with MR 2B, MR 6 and MR 8.
- c) Fairdeal Superstores Ltd did not comply with MR 2B, MR 3, MR 6 and MR 7.
- d) Bevaj Furniture Ltd and Fursys (K) were, therefore, subjected to Technical Evaluation and due diligence having qualified in Step 3 on the basis of Evaluation Criteria set out in the tender document.



## STEP 4: TECHNICAL EVALUATION AND DUE DILIGENCE

### (a) Technical Evaluation

1. Technical evaluation was carried out to bidders who qualified in Step 3 in accordance with the evaluation criteria set out in the tender document. Each member of the evaluation criteria evaluated the bids independently and awarded an individual to each bidder.
2. The evaluation criteria set out in the tender document is as shown in the table below:

**Table 5: Technical Evaluation Criteria Provided in the Tender Document**

	Evaluation Attribute	Breakdown of score	Max. score	Score	
1.	Collaboration with renowned furniture manufacturer whose brand you intend to supply (Provide proof by attaching letter of manufacturer's representative or authorization). For the information provided to qualify, the bidder must provide functional contact addresses for verification.		4		
	a	Evidenced collaboration		4	
	b	Non- evidenced collaboration		0	
2.	Number of years in operation as an active furniture supplier company evidenced by projects undertaken. The list of projects undertaken shall include details of the clients and contacts, contract sums and year of supply. The evidence should be in form LPOs, Contracts, Completion certificates.		10		

	Evaluation Attribute		Breakdown of score	Max. score	Score
	a)	Less than a year	0		
	b)	1- 3 years	3		
	c)	4 - 6 years	5		
	d)	7-10 years	7		
	e)	More than 10 years	10		
3.	Qualified Interior Designers who will be actively involved in the proposed project ( <i>Provide detailed CV accompanied by relevant academic and professional certificates</i> ). Telephone contacts must be provided). Any CV's without accompanying certificates and functional contacts will not be considered.			7	
	a	One designer with minimum 2 years' experience.	3		
	b	Two designers with over 3 years' experience.	5		
	c	More than two designers with over 5 years' experience.	7		
	Qualified Technical Staff with relevant experience and certificates in carpentry & joinery or equivalent ( <i>Provide detailed CV accompanied by relevant academic and professional certificates</i> ). Telephone contacts must be provided). Any CV's without accompanying certificates and functional contacts will not be considered.			5	
	a)	Less than 3	1		
	b)	3 and above	5		
4.	Accomplishments: (previous & current projects)		Each to score 4	20	

	Evaluation Attribute	Breakdown of score	Max. score	Score
	Details of five similar projects undertaken successfully within the last five (5) years each over Kshs.20 Million and above evidenced by letters of reference from clients. (for a project to qualify it shall be at least 70% complete). For Projects that are not completed, letters of reference from the respective Architects and Clients must be provided).			
5.	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 6 months of Kshs.100 million (Kenya Shillings one hundred million) per month.	4	4	
6.	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. Timelines that are unrealistic shall be considered non-responsive. <ul style="list-style-type: none"> <li>• Shortest period scores 10 marks</li> <li>• Others pro-rated</li> </ul>		10	
	<b>TOTAL</b>	60	60	

### Technical Evaluation Result

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

**Table 6: Summary of Technical Evaluation Scores**

1.	Tenderer	Bidder No.	Scores out of 60
2.	Bevaj Furniture Ltd	3	43
3.	Fursys (K) Ltd	4	53.5

- 1) 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.
- 2) The two tenderers scored above the pass mark of 40 and, therefore, qualified for the next stage of evaluation.

**(b)Due Diligence**

1. Due diligence was carried out on the qualified bidders in accordance with the tender document.
2. 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.
3. The evaluation criteria for due diligence as stated in the tender document is as shown below:

**TABLE 7: Evaluation Criteria for Due Diligence**

ITEM	ATTRIBUTES	MARKS
1	<p>Quality and workmanship of samples provided.                      Quality and workmanship of samples supplied by the bidder shall be evaluated by the evaluation committee. The committee will consider among others quality, durability, flexibility, comfort.                      Any clarifications that may be required shall be sought by the committee.</p>	15 Marks
2	<p>Bidder's capacity to supply and assemble similar furniture to the one specified in this tender.                      The evaluation committee shall visit previous sites of the bidder under evaluation to determine the bidder's capacity to supply and assemble furniture of similar nature and magnitude comparable to the furniture under description. The committee will verify the bidder's previous projects.</p>	10 Marks
3.	<p>Satisfaction of previous clients                      The evaluation committee shall seek previous client's feedback in terms of quality, timelines, price, after sales service among others.</p>	15 Marks
	<b>Total:</b>	<b>40 Marks</b>

Table 8: Due Diligence Scores

	Suppliers	Attribute	Comments	Scores out of 60
1	Bevaj Furniture Ltd	(a) Quality and workmanship of samples provided.	<p>The Evaluation Committee inspected the samples in the delivered by the bidder and noted the following.</p> <ol style="list-style-type: none"> <li>1. The 5 shelf cabinet has poor joinery workmanship;</li> <li>2. Reading carrel has a weak glass screen and it has no cable management;</li> <li>3. Conference chair is of low quality and the attached microphone is inappropriately located;</li> <li>4. Conference table is low, the height cannot be adjusted and it sits on the floor as it has no legs;</li> <li>5. Straight sofa set is low, the backrest is small and the fabric is of low quality;</li> <li>6. Book racks has MDF sides rather than glass;</li> <li>7. The stackable chairs are not flexible.</li> </ol> <p>However,</p>	30

		<p>(b) Bidder's capacity to supply and assemble similar furniture to the one specified in this tender.</p> <p>(c) Satisfaction of previous clients</p>	<p>1. Multi-media shelves and magazine racks are of high quality; 2. Book shelves are of good quality.</p> <p>1. The Evaluation Committee noted that the bidder has the capacity to supply and assemble some of the furniture of the specified quality and quantity as required in the tender document. 2. The furniture previously supplied by the bidder was of fair quality and workmanship. 3. The inspected samples in the bidder's showroom and factory were confirmed that some of the samples provided are in compliance with the specifications.</p> <p>4. The Evaluation Committee concluded that the bidder do not have the capacity to supply all of the specified furniture in terms of quality and quantities.</p> <p>The Evaluation Committee visited Kenya National Library Services at Nakuru noted the following: 1. The L-shaped workstations supplied are weak;</p>
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2	Fursys (K) Ltd	(a) Quality and workmanship of samples provided.	<p>The board room table is of low quality and do not have cable management;</p> <p>3. The reading tables are of poor quality as the edging has failed thereby allowing water to destroy the MDF top;</p> <p>4. The office cabinets are of poor quality;</p> <p>5. The round meeting tables are of good quality;</p> <p>6. The board room chairs are of good quality;</p> <p>7. The magazine racks, newspaper racks, book trolley and reading tables are of good quality.</p>	
			<p>The Evaluation Committee inspected the samples in the delivered by the bidder and noted the following.</p> <ol style="list-style-type: none"> <li>1. Reading carrel has generous space with strong glass screen. It has cable management;</li> <li>2. Workstations are strong with polyurethane lipping;</li> <li>3. Conference table is height adjustable and has legs;</li> <li>4. Straight sofa set is of good quality;</li> <li>5. Book rack has tempered glass sides;</li> <li>6. The stackable chairs are flexible with strong polyurethane seat;</li> </ol>	



		<p>(b) Bidder's capacity to supply and assemble similar furniture to the one specified in this tender.</p> <p>(c) Satisfaction of previous clients</p>	<p>7. Book shelves are of good quality. However,</p> <ol style="list-style-type: none"> <li>1. The fabric sofa set is of low quality.</li> <li>2. The Evaluation Committee confirmed that the bidder has capacity to supply and assemble the specified furniture in terms of quality and quantities as required in the tender document.</li> <li>3. The furniture previously supplied by the bidder is of good workmanship and quality even after usage.</li> </ol> <p>The Evaluation Committee inspected furniture installed by Fursys Ltd at Catholic University, Kenya National Library Services and Central Bank of Kenya and noted the following:</p> <ol style="list-style-type: none"> <li>1. It was established that the clients were satisfied by the bidder's service.</li> <li>2. The Kenya National Library in Buruburu was furnished in 2008 and the furniture is still in good condition even after prolonged public usage.</li> <li>3. The Catholic University Library has a seating capacity of 3,000 and the bidder has</li> </ol>
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			<p>furnished the library to the satisfaction of the client.</p> <p>4. Furniture supplied by the bidder to the clients visited was of good quality.</p>	
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**Observations:**

1. 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.
2. Bevaj Furniture Ltd and Fursys (K) Ltd scored above 30 marks and, therefore, qualified for further evaluation.

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

**Table 9: Summary of Combined Evaluation Scores**

Bidder	Technical evaluation score out of 60	Due diligence score out of 40		Combined score out of 100
		Samples	Site Visit & Previous Client Interview	
Bevaj Furniture Ltd	43	10	20	73
Fursys (K) Ltd	56	13	26	85

The two bidders, namely Bevaj 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.

#### **STEP 5: FINANCIAL EVALUATION**

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

**Table 9: Financial Evaluation**

a)	<p><b>General</b></p> <p>a) 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.</p> <p>b) Confirm the tenderers conformity with the Kenya School of Monetary Studies work plan.</p>
b)	<p><b>Specific.</b></p> <p>a) Check for arithmetic errors in accordance to the tender contract.</p> <p>b) Evaluate the tenderers tender price in reference to other tenderers.</p>

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**a. General**

**1. Authentication of tender security**

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

**2. Conformity with the Kenya school of monetary studies work plan**

The tender committee established that the work plans provided by the bidders were in conformity with the Kenya school of monetary studies work plan.

**b. Specific financial evaluation**

**Arithmetic errors**

The financial bids were checked for arithmetic errors and the following was established:

**Table 11: Summary of Financial Evaluation**

Bidder	Quoted tender amount in Kshs.	Corrected tender amount in Kshs.	Variance Kshs.
Bevaj Furniture Ltd	262,177,213.97	267,074,994.18	4,897,780.21
Fursys (K) Ltd	244,585,573.58	249,434,381.24	4,848,807.66

**Observations**

- 1) Both bidders had omitted prime cost sum for preliminaries in the grand summary amounting to Kshs.4,408,000.00. This amount was,

therefore, taken into consideration for both bidders' to arrive at the corrected tender sums.

- 2) The bid by Bevaj Furniture Ltd had an arithmetic error of Kshs.489,780.21.
- 3) The bid by Fursys (K) Ltd had an arithmetic error of Kshs.440,807.66
- 4) The lowest evaluated bid is by Fursys (K) Ltd at Kes.249, 434,381.24 and the second lowest evaluated bid is Bevaj Furniture Ltd at Kes.267, 074,994.18.

## RECOMMENDATION

From the foregoing the lowest evaluated bid was from Fursys (K) Ltd at Kes.249, 434,381.24 (Kenya shillings Two Hundred Forty Nine Million Four Hundred Thirty Four Thousand Three Hundred Eighty One cents Twenty Four Only).

## TENDER COMMITTEE DECISION

The Central Bank tender Committee at its 166<sup>th</sup> meeting held on 28<sup>th</sup> June, 2013 discussed and adopted the evaluation report presented before it and made the award of contract for Supply and assembly of furniture for the academic wing and Library at a sum of Kes. 249, 434,381.24 to Fursys (K) Ltd

## THE REVIEW

The Request for Review was lodged by Bevaj Furniture Ltd on 23<sup>rd</sup> July, 2013 in the matter of Tender No: KSMS/PROC/37/12-13 for the Supply and assembly of furniture for the academic wing and Library.

The Applicant was represented by Mr. Daniel Achach, Advocate while the Procuring Entity was represented by Mr. Chacha Odera, Advocate. The interested candidates present were Fairdeal Superstores represented by Stephen Mulindi and Fursy (K) Ltd represented by L. D. Sung.

The Applicant has raised twelve grounds of Appeal and urged the Board to make the following orders:-

- 1) *The decision of the Procuring Entity to award the Tender No. KSMS/PROC/37/12-13 to Fursy's (K) Ltd or any other person to be annulled.*
- 2) *The Board to substitute the ~~decision of the Respondent~~ awarding the Tender No. KSMS/PROC/37/12-13 to Fursy's (K) Ltd or any other person award the said tender to the Applicant.*
- 3) *In the alternative and without prejudice to the above the board to cancel and nullify the award of the tender to Fursy's (K) Ltd or any other person and direct the Respondent to re-tender in accordance with the laws of Kenya.*
- 4) *Fursy's (K) Ltd be debarred from participating in the tendering process of the Procuring Entity.*

- 5) *That the costs of these proceedings be assessed by the board and awarded to applicant to be paid by the Respondent.*

The Applicant in its Request for Review raised twelve (12) grounds of review which the Board deals with as follows:-

At commencement of the hearing, the Applicant informed the Board that it would make its submissions in two parts. It stated that it would demonstrate to the Board that:

- 1) Firstly, the tendering process by the Procuring Entity was grossly unfair to the extent that one of the parties who participated in the tendering process as the bidder did also participate in preparation of the tender document.
- 2) Secondly, that the tendering process was done in violation of express provisions of the law and particularly that the Procuring Entity corrected alleged arithmetic error in the Applicant's tender without notifying the Applicant.
- 3) Thirdly, that the Procuring Entity failed and neglected to apply the preference margin as required by the law and the tender document.
- 4) Lastly, there was a 30 day delay in the notification of the Applicant by the Procuring Entity.

**GROUND: 1, 2 and 3**

These three grounds of Review have been consolidated since they are general factual statements and the Board need not make any finding on them.



**GROUND: 4,7,8, 9 ,10,11 and 12**

These seven grounds of Review have been consolidated since they raise similar issues on the integrity, fairness and transparency of the procurement process which the applicant alleged was unfair and biased as it favoured one bidder.

The Applicant submitted that the whole tender document was tailor made to suit Fursys K Ltd one of the parties in the tender process. It alleged that Fursys K Ltd had participated in the preparation of the tender document. It stated that Mr. Jared Momanyi, an architect from a firm named "Aprim Belgin" who had visited Korea was not a party to the Request for Review, yet he had filed a sworn affidavit. It submitted that the matter before the Board was the Request for Review between Bevaj Furniture and Kenya School of Monetary Studies. It further alleged that the award to Fursys K Ltd was made on a basis of a skewed tender process.

The Applicant stated that M/s Fursys K Ltd who was declared as the successful bidder of the tender ought not to have participated in the process having participated in the preparation of the tender document. It alleged that it had re-examined the tender documents and specifications and established that the tender specifications were tailor-made to suit the needs of one bidder, Fursy's (K) Ltd and that most of the specification and photographs were obtained/secured from Fursy's (K) Ltd marketing catalogue clearly suggesting unlawful collusion

between the Procuring Entity and the Fursy's (K) Ltd. It requested the Board to go through pages 325 of the catalogue from Fursys K Ltd and compare the same with the specifications in the tender document. It submitted that it had downloaded similar items as filed on page 4 of its request for review and items coded on the left as D017 & D018 after the bids had closed. It stated that the Procuring Entity failed to utilize fair procedures and/or criteria and further violated the provisions spelt out in the Public Procedures and Disposal Act, 2005 and the Regulations made there under thus resulting in Successful Bidder gaining an unfair advantage from the design of the tender and the specifications therein.

The Applicant averred that a party who participates in the preparation of the tender documents or assists the Procuring Entity in preparing the tender documents should not participate in the tendering process. It alleged that it was clear from the specifications that Fursy's (K) Ltd prepared, participated in the preparation of, or assisted the Procuring Entity document by donating their catalogue photographs for use. It further submitted that the photographs that were used by the Procuring Entity in provision of the technical specifications were picked from the Catalogue of Fursys Limited.

On the question of correction of arithmetical errors by the Procuring Entity, the Applicant submitted that the Procuring Entity corrected its bid unilaterally and arbitrarily without notifying it of the alleged errors thereby breaching Section 63 of the Public Procurement and Disposal Act, 2005 (herein after referred to as the Act) by failing to notify it of the

corrections. It submitted that whereas Section 63(1) of the Act gives the Procuring Entity the right to correct errors, Section 6(2) makes it clear that the Procuring Entity must promptly notify a bidder whose tender sum has been corrected. It submitted that failure by the Procuring Entity to notify it of correction of arithmetic error directly affected the outcome of the tender process in that since only two bidders qualified for the financial evaluation stage, had both parties been notified of the correction of the arithmetic errors, and had the Successful Bidder decided to reject the corrections, only the Applicant would have remained at this stage of evaluation.

The Applicant submitted that the Procuring Entity infringed the objectives of Section 2 of the Public Procurement and Disposal Act in that the tender evaluation process and award lacked integrity and fairness, transparency and accountability. It further submitted that by awarding the tender to the successful bidder the Procuring Entity did not maximize economy and efficiency. It stated that the Article 10 of the Constitution of Kenya entrenches the concept of accountability and transparency.

On the issue of preference, Applicant argued that the Procuring Entity failed to take into account the fact that the Applicant was entitled to be given preference in the evaluation of financial bids in accordance with the provisions of Section 39(8)(b)(i) and Regulation 28(1) and (2). In support of this position it cited [*Miscellaneous Civil Application No. 540 of 2008*], in which the High Court set out the law governing the

application of the preference scheme. It stated that in that decision Justice Nyamu stated at page 27 that:

*“Adherence to the Applicable law is the only guarantee of fairness and in the case of the Procurement Law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by a decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice... ..”*

The Applicant submitted that Section 39(8) of the Act sets out the circumstances and the manner in which preferential treatment should be provided. It further submitted that Regulation 28 (1) of sets out the threshold below which exclusive preference shall be given to citizens of Kenya. It stated that Regulation 28 (2) sets out the margin of preference which, for purpose of Section 39 (8) b) i), to be 15% of the evaluated price of the tender. It further stated that the margin of preference for purposes of Section 39 (8) b) ii) was 6% of the evaluated tender price if the share holding of the local company is less than 20% of locals, and 8% if shareholding is between 20-50% of locals. It argued that in the instant case, whereas the percentage for preference was not provided for in the bid document, it could not be stripped of the entire preferential treatment by the Procuring Entity during the financial evaluation in light of the provisions of the law as set forth in Section 39 and Regulation 28. It stated that its bid should have been subjected to 15% preferential treatment . It alleged that if the Procuring Entity had

compared the outcome of subjecting its bid to the prescribed margin of preference with the price of the successful bidder, its bid would have been the lowest evaluated. It argued that if the Board perused its bid document as submitted, the Board would establish that it is wholly owned by the locals and should, therefore, have been entitled to a margin of preference of preference of 6% or 8%. It submitted that whereas the Act was couched in discretionary manner with the use of the word "*may*", Regulation 28(2) was couched in mandatory terms. In conclusion, the Applicant submitted that, whereas its furniture was not manufactured in Kenya, the Procuring Entity ought to have evaluated its bid in accordance with the preference and reservations margin as envisaged by the Act and Regulations, specifically on account of ownership of company as they were locals.

In response, the Procuring Entity stated that it was opposed to the request for review as filed by the Applicant as it did not meet the requirements of Regulation 73(1) and 73(2)(a) & (b) on filing of requests for review which provide as follows:

*73 (1) "A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these regulations.*

*73(2) the request for Review referred to in paragraph (1) shall-*

- (a) State the reasons for the complaint, including the alleged breach of the Act or these Regulations;*
- (b) Be accompanied by such statements as the applicant considers necessary in support of its request*

The Procuring Entity stated that at the time a request for review is filed, the appeal must be supported by breach of the Act or Regulations. It stated that in this case the Applicant had not cited any breaches of the Act or the Regulations. It submitted that the Applicant through an affidavit and written submissions dated 12<sup>th</sup> August 2013 introduced new grounds. It further submitted that for the Applicant to rely on the ruling by Justice Nyamu, it must also be bound by the same justice that Justice Nyamu described. It argued that the affidavit as filed was not in conformity with the requirements of Regulation 73(2)(b). It urged the Board to make a determination on the request for review as filed and not on the basis of the affidavit filed by the Applicant.

With regard to the allegation that Mr. Momanyi travelled to Korea as sworn in the affidavit by Ms Rosalin Mbugi, the Procuring Entity averred that the Applicant was trying to show that the procurement process was skewed, fraudulent and tainted. It stated that Mr. Jared Momanyi had taken trouble in replying the affidavit to annex his entire passport period to show that he never travelled anywhere close to North or South Korea. It stated that it had become fashionable for litigants to make allegations which border on criminality and to give absolutely no evidence to back up the same. It stated that the Board must frown upon such allegations which are made recklessly and without care as to the professional reputation of the person who is accused.

The Procuring Entity stated that a mandatory pre-bid meeting was held on 8<sup>th</sup> March, 2013 which was aimed at briefing prospective tenderers on the Tender Document requirements and also for the bidders to have an

opportunity to seek clarification on any aspect of the tender requirement. It further indicated that the Applicant attended the pre-bid meeting and did not raise any objection.

With regard to the allegation that Fursy (K) Ltd ought not to have participated in this tender process on the basis of the allegation that it participated in the preparation of the tender document, the Procuring Entity submitted that section 34(4) of the Act provides that technical requirements shall not refer to a particular trademark, name, design, type producer of services. It also denied the allegation of collusion between the Procuring Entity and Fursys (K) Ltd, the Successful Bidder, in the preparation of the Tender Document or in the formulation of the specifications used in the tender or the photographs on the marketing catalogue of the Successful Bidder. It supported this assertion by stating that it sought and obtained professional services of an independent consultant to prepare the specifications in the tender document. It further stated that the specifications in the bid document did not refer to any manufacturer, supplier or brand names, which is forbidden by the Act. It argued that the photographs attached or descriptions given were for guiding reasons only and should not be used to imply any particular manufacturer or brand. It further stated that, in any event, the Applicant complied with, and met all the specifications. It reiterated that no bidder assisted it in developing or preparation of specification or use of bidders catalogue as alleged by the Applicant.

The Procuring Entity urged the Board to peruse through the tender document and verify whether it had stated a trade name or trade mark.

It submitted that it had identified the type of furniture it needed for its purpose and placed the same in the tender document. It submitted that, whereas the photographs in the bid document looked like what was in Fursy's catalogue, that was not sufficient evidence to show that Fursy K (Ltd) participated in the preparation of the tender document.

The Procuring Entity stated that the procurement process was conducted in a fair and transparent manner as per the requirements of section 2 of the Act. It further stated that the Applicant submitted its bid pursuant to the invitation alongside other three bidders, namely, Victoria Furniture, Fairdeal Superstores and Fursys (K) Ltd. It submitted that all the four bids were subjected to four stages of evaluation i.e. Examination of Mandatory requirements, Technical evaluation Examination of samples and due diligence, and financial evaluation. It further submitted that the Applicant's bid and that of the Successful Bidder, passed the first three stages of evaluation, and proceeded to the financial evaluation stage.

With regard to the correction of arithmetic error, the Procuring Entity submitted that both the Applicant and the Successful Bidder had not included a component of Kes 4.8 million in their bids . It stated that during the financial evaluation, the Applicants' bid of Kes.262, 177,213.97 was corrected for an arithmetic error of Kes.4,843,843.69 to read Kes. 267,021,057.66, while Fursys bid of Kes.244, 585,573.58 was corrected for an arithmetic error of Kes 4,848,807.66 to read Kes.249, 434,381.24. It further stated that the correction was advantageous to both bidders as it provided for some items they had not included in the bid



document. It argued that none of the two parties was prejudiced as a result of the correction.

The Procuring Entity submitted that the purpose of the Act as set out in section 2 provides that it must ensure maximum economy and efficiency. In this regard it stated that some of the factors to be considered in maximising economy are contained in section 66(4) of the Act which states that the successful tender shall be the tender with the lowest evaluated price. It averred that the award to the Successful Bidder was properly made by the Tender Committee as recommended by the evaluation committee.

With regard to the margin of preference, the Procuring Entity submitted that the margin of preference was a ground through which the request for review had initially been applied. It stated that clause 2.25.1 provided that "preference where allowed in the evaluation of tenders shall not exceed 15%". It stated that under clause 2.25 of section IIB - Appendix to instruction to tenderers, no preference was to be allowed in this tender. It argued that it complied with the requirements on preference of margin as set out in the tender document.

The Board has carefully listened to the submissions by the parties and perused the documents before it and finds as follows:

1. The Procuring Entity advertised Tender No. KSMS/37/12-13 for the supply and assembly of furniture for the academic wing and library in two newspapers, that is, the Standard and the Daily Nation newspapers on 26th and 27th February, 2013 respectively.

2. That the tender attracted eight bidders who attended the pre-bid meeting, which was held on 8th and 12th March, 2013 vide clause 1.6 of Section 1 (Tender Document).
3. That the Applicant was among the eight tenderers who participated in the above meeting.
4. That during the pre-bid meeting tender closing date was changed to 17th April, 2013 and an addendum was issued in that regard vide The Daily Nation and The Standard Newspapers of 20th March and 28th March, 2013 respectively;
5. That during the Preliminary Evaluation attendance to pre-bid meeting was used in evaluation as provided in the tender Document. The Consultant was present during the meeting.
6. That out of the eight bidders who responded to the tender notice, only four submitted tenders.
7. The bill of quantities and schedule of requirement was provided in the Tender Document with the photos and item description quantity required and column for bidder to quote their price.

8. That it was mandatory requirement to provide together with Tender Bid Document well annotated samples of the items quoted for and that the same shall be evaluated.
9. That the Applicant submitted together with its Application a catalogue title "Fursys Products" office system Furniture.
10. The tenders were subjected to the following stages of evaluation, namely, Examination of Mandatory requirement; technical evaluation; examination of samples and due diligence; and financial evaluation;
11. That at the preliminary evaluation stage, two of the four bidders, namely, Victoria Furniture and Fairdeal Superstores Ltd, were disqualified thus leaving only Bevaj Furniture Ltd, the Applicant in this case, and Fursys (K) Ltd to proceed to the technical evaluation stage.
12. That at technical evaluation stage bidders needed to attain pass mark of 40 marks to proceed to financial stage and both bidders passed having scored 43 and 53.5 for Bevaj and Fursys respectively.
13. That due diligence was carried out on the two bidders and the outcome of this stage recommended that the two bidders to proceed to the next stage having passed the required pass mark of 30 marks. Bevaj scored 30 and the successful bidder scored 36

marks on aggregate the combined scores for the two bidders are Bevaj 73 marks and Fursys 92 marks .

14. That at the financial stage the two bidders were evaluated and the Procuring Entity corrected arithmetic errors as follows:

- (i) M\s Bevaj quoted Kes.262, 177,213.97 and was corrected for an arithmetic error of Kes.4, 843,843.69 to Kes. 267,021,057.66
- (ii) Fursys quoted Kes.244, 585,573.58 and was corrected for an arithmetic error of Kes 4,848,807.66 to Kes.249, 434,381.24 and was declared the lowest evaluated bidder.

15. That the Tender Committee meeting held on 28th June, 2013 awarded the tender to Fursys (K) at Kes 249, 434, 381.24.

Arising out of the foregoing, the issues for determination are as follows:

- 1) Was the Request for Review as filed admissible?
- 2) Was the tender specifications skewed to favour any of the bidders?
- 3) Was the correction of error and award of tender done in line with Act?
- 4) Was the Preference of Margin applicable in this procurement?

To answer the first question, the Board notes that Regulation 73(2) (a) & (b) provides as follows:

*73(2) the request for Review referred to in paragraph (1) shall-*

*(a) State the reasons for the complaint, including the alleged breach of the Act or these Regulations;*

*(b) Be accompanied by such statements as the applicant considers necessary in support of its request*

From the above provision of the Regulation, it is clear that for any party to be properly before the Board, it has to demonstrate breach of a duty imposed on a Procuring Entity by the Act or Regulations and the Request for Review must be accompanied by such statements necessary to support its request. As is clear from the Request for Review, the Applicant raised twelve grounds of review but did not cite specific Sections of the Public Procurement and Disposal Act, 2005 or Regulations, 2006 that had been breached by the Procuring Entity. This contravenes Regulation 73(2) (a) which requires that any candidate who claims to have suffered or to risk suffering, loss or damage state the reasons for the complaint, including any alleged breach of the Act or Regulations.

The Board is aware that its mandate is set out in Section 93(1) of the Act which provides as follows:

*"93(1) Subject to the provisions of this part, any candidate who claims to have suffered or risk suffering loss or damage due to breach of a duty imposed on a Procuring Entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed."*

The Board has duty to enquire whether a candidate who participated in a tender has suffered loss or risks suffering loss or damage due to breach

of duty imposed on a Procuring Entity by the Act or Regulations. The Board also notes that it is upon the Applicant who files a request for review to set out grounds for all its complaints, provide supporting statements and clearly specify which section of the Act or Regulations has been breached.

Although the Applicant did not state in its Request for Review the sections of the Act, and the Regulations which it claims to have been breached by the Procuring Entity, it has by way of an affidavit sworn by one of its executives, attempted to demonstrate that the Procuring Entity breached the Act and the Regulations. The question which arises from this method by the Applicant of setting forth its complaint is whether or such a procedure sufficiently meets the requirements of Regulation 73(2) cited above to entitle it to assert its claim before the Board. In answer to this question, the Board takes note of the provisions of Article 159(2) (d) of the Constitution which sets out the principles which should guide courts and tribunals in the exercise of judicial authority. In this regard, Article 159(2)(d), in particular, provides that:

*"justice shall be administered without undue regard to technicalities."*

Taking into account this principle, the Board finds that although the Applicant failed to comply with the provisions of Regulation 73(2), it would be unjust to dismiss its case without examining the merit of its claim. Accordingly, the Board is obliged to hear the Applicant's case on its merits, notwithstanding failure by the Applicant to adhere to the requirements of Regulation 73(2).

With regard to the second question on the tender specifications being skewed and involvement of Mr. Jared Momanyi in the tender process, the Board notes that the Procuring Entity had a contract signed on 11<sup>th</sup> November, 2009 with Aprim Beglin Woods Architects to assist the Kenya School of Monetary studies with bidding process, in particular with the pre-bid conference, evaluation of bids, and the award of contracts for new building, renovations, rehabilitation works and furniture and equipment (goods) supply. There is, indeed, nothing wrong with the hiring of a consultant by a Procuring Entity to assist it in all phases of the tendering process. Accordingly, the presence of Mr. Momanyi, as an employee of Aprim Belgin Woods Architects in the whole tendering process cannot be faulted. The Board further notes that despite the presence of the Consultant, the Applicant was not prejudiced as it passed all the stages of evaluation except on the issue of ranking where the Applicant price was higher than that of the Successful Bidder .

The Board further notes that in an affidavit sworn by Rosalin Mbugi, the Applicant claims that Mr. Jared Momanyi travelled to South Korea as part of a scheme to tilt the tender in favour of the Successful Bidder. In rejoinder to this claim, the Procuring Entity filed an affidavit sworn by Mr. Momanyi in which he depons that he never travelled to South Korea. Mr. Momanyi attached photocopies of his passport to support his averment that he never travelled to South Korea. The Board is persuaded by Mr. Momanyi's affidavit and finds that the claim by the

Procuring Entity that such a trip ever took place to be totally without foundation.

From the foregoing the Board observes the following:-

- Although the pictures/photos of the furniture's are those in the Fursys catalogue specifications given do not refer or imply to any manufacturer, supplier or brand names, and that the photos attached or descriptions given do not imply the Successful Bidder as they are not labeled in the name of the Successful Bidder
- That the Procuring Entity did not in its evaluation, use specification to the detriment of the Applicant neither was it used in other comparison
- That in line with mandatory requirement MR 2B which required bidders to submit samples the Applicant was affirmatively scored and its Samples were approved.
- That on further scrutiny of the Catalogue submitted with request for review, the Board would see some resembles of photos in catalogue and schedule of requirement submitted by the Procuring Entity. It includes the following

<i>Catalogue reference</i>	<i>schedule of requirement</i>
<i>CS9400</i>	<i>staff lounge seats</i>
<i>CR2</i>	<i>Conference table</i>
<i>CS5300</i>	<i>Single Seater Sofa</i>

The Board also notes that some photographs appearing in the catalogue from "Fursys" are those in the schedule of requirement of the Procuring Entity however the description of the same items are



not reflected in the item catalogue. The Board further notes the provision of clause 2.13 of the Tender Document section II B which provides as follows:

*"The specifications given herein do not refer or imply to any manufacturer supplier or brand names .Photos attached or description given are for guiding reason only and should not be used to imply any particular manufacturer or brand"*

The Board also notes the provisions of Sections 34(1) and 52(2) of the Act which provide as follows;

Section 34(1):-

*"The Procuring Entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."*

Section 52(2)

*"The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders."*

The Board finds that the Procuring Entity provided the bidders with the detailed and clear Technical Specifications and the use of the similar photographs from Fursys (K) Ltd was only for guiding purposes. .

As already noted by the Board, the Applicant qualified at all stages of evaluation as the scores of technical evaluation were not used as the

basis of determining the best evaluated bidder rather it was the bidder who ranked lowest in terms of its price proposal that was declared the winner.

Accordingly this limb of review fails.

With regard to the third question on the correction of error and award of tender, the Board notes the following:

The Board notes the provisions of section 63 and 59(2) & (3) of the Act, respectively on correction of Arithmetical errors and change to tenders provides as follows:

*63(1) The Procuring Entity may correct an arithmetic error in a tender*

*63(2) The Procuring Entity shall give prompt notice of the correction of an error to the person who submitted a tender.*

*63(3) if the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security forfeited.*

*59(2) After the deadline for submission of tenders, a person who submitted a tender shall not change or offer to change the substance of the tender.*

*59(3) The Procuring Entity shall not attempt to have the substance of the tender changed.*

The Procuring Entity has not denied the claim by the Applicant that following correction of arithmetic errors in accordance with Section 63(1), it did not notify the Applicant and the Successful Bidder. The

further notes that, the evaluation committee corrected errors for both the successful bidder and the Applicant but failed to notify them of the corrections.

The rationale for Section 63 is that in the course of evaluating a tender a Procuring Entity might find arithmetic errors which ultimately might affect the commitment by a bidder as set out in the form of tender. In such event it is only prudent that a bidder is informed of this discovery so that it can accept consequential changes in arithmetic computation, or reject them. This prudence in practice is backed by the law as inscribed in Section 63(2), which makes it mandatory for the Procuring Entity to promptly notify a bidder of arithmetic errors discovered in the course of evaluation. It is then up to the bidder to chose to accept the corrections, and if he rejects them, his tender will be rejected with the consequential forfeiture of his tender security.

The Board also notes that the Evaluation Committee recommended to the Tender Committee the award to the Successful Bidder, at a corrected sum of Kes. 249, 434,381.24 which was different from the bid offered by the Successful Bidder in its form of tender. The form of tender is the document in which the offer is communicated to a Procuring Entity. It is the offer that the Procuring Entity would consider and either accept or reject.

The Board further notes the provisions of Section 59(3) of the Act cited above, which forbids a Procuring Entity from altering the substance of a tender. In the view of the Board the act by the Procuring Entity to correct

arithmetic errors and to unilaterally base its decision to award the tender without notification to the affected bidders, amounted to a change in the substance of the tender in terms of Section 59(3)

Taking all the above into account, the Board holds that the Procuring Entity breached section 63(2) by failing to give prompt notice of the correction of errors to the bidders. The Board further holds that the Tender Committee and the Evaluation Committee breached section 59(3) by changing the bid prices of both the Applicant and successful bidder.

Accordingly this limb of Review succeeds.

Turning to the issue of whether or not the Applicant's claim to entitlement to preference during the financial evaluation is sustainable, the Board notes the following:

1. That the Tender Document, paragraph 2.25 provides that;  
***"Preference where allowed shall not exceed 15%."***
2. That at section II:B - Appendix to instructions to tenders clause 2.25 states that ***" No preference is allowed in this tender."***
3. That the list of shareholders for the Applicant is all Kenya whereas the Successful Bidder's list of shareholders are national and citizens of Korea.
4. That the Evaluation Committee did not consider the margin of preference during the financial evaluation.

The Board further notes the provisions of Section which 39(8) provide as follows:

*In applying the preferences and reservations under this section -*

*(a) Exclusive preference shall be given to citizens of Kenya where*

*(i) The funding is 100% from Government of Kenya or a Kenyan Body.*

*(ii) The Amounts are below the prescribed threshold.*

*(b) A prescribed margin of preference may be given-*

*(i) In the evaluation of bids to candidates offering goods manufactured, mined, extracted or grown in Kenya; or*

*(ii) Works, goods and services where preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.*

The Board further notes the provisions of Regulation 28(2) which states as follows:

*"The margin of preference-*

*a) For purposes of section 39(8) (b) (i) of the Act shall be fifteen percent of the evaluated tender price.*

*b) For purposes of section 39(8) (b) (ii) of the Act shall be*

*(i) Six percent of the evaluated tender price where percentage holding of locals is less than twenty percent ; and*

*(ii) Eight percent of the evaluated tender price where percentage holding of locals is less than fifty percent but above twenty percent. "*

The Board further notes the provisions of Section 39(5) which states that:

*"A Procuring Entity shall, when processing procurement, comply with the provisions of this Act and the regulations in respect of preferences and reservations."*

The Board also notes the provisions of Section 2 of the Act which states that:

*"The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives -*

- (a).....*
- (b).....*
- (c).....*
- (d).....*
- (e).....*
- (f) to facilitate the promotion of local industry and economic development."*

It is clear from the various provisions of Section 39 and Section 2 cited above, that the framers of this Act were conscious of the need to have in place a scheme of preferences in our procurement system whose sole objective is to favour Kenyan bidders, bearing in mind, however, the need for competition and non-discrimination. This explains why Section 39(1) of the Act provides that *"Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations."*

The objective of the scheme of preferences is stated in Section 2(f) cited above, which is basically, the promotion of local industry. It is further elaborated in Section 39(2) of the Act which states that "*Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.*" The underlying rationale for such a scheme is that taxpayers should, to the extent that competition and the principle of non-discrimination are not compromised, be the first beneficiaries of the taxes they pay for use by the Government in procurement.

It is clear that pursuant to the powers vested in him by Sections 39(2) and 39(8)(b) of the Act, the Minister has prescribed in Regulation 28 the scheme of preferences that should be available to Kenyan bidders.

Before going into the question of whether the Applicant is entitled to the benefit of this scheme, it is first necessary to deal with the issue as to whether a Procuring Entity can disregard the scheme by way of proscribing it in the tender document. As observed earlier, section II: B - Appendix to instructions to tenders clause 2.25 states that "*No preference allowed in this tender.*" In effect, by this fiat the Procuring Entity seeks to exempt itself from that which the law imposes by the dint of Section 39 and Regulation 28 cited above. This it cannot do, as Section 27 of the Act expressly compels it to comply with the Act and the Regulations. The Section provides that:

*"A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each procurement."*

It therefore follows that, the Procuring Entity in this case, cannot rely on its illegality to deny the Applicant a right which the Act entitles it to by excluding such a right in the Tender Documents.

Turning to the issue as to whether the Applicant's claim to preference is anchored in the law, the Board notes the provision of Section 39(8) (b) which states that *a prescribed margin of preference may be given:*

- (i).....
- (ii) *works, goods and services where preference may be applied depending on the percentage of shareholding of locals on a graduating scale as prescribed."*

Regulation 28(2)(b) prescribes the applicable margins of preference to which those described in Section 39(8)(b) cited above are entitled. According to the documents provided to the Board, the Applicant is a local company whose shareholding is wholly Kenyan. On this premise, therefore, the Applicant is by law entitled to a margin of preference as set forth in Regulation 28(2)(b)(ii), namely eight per cent of the evaluated price of the tender.

As noted above, the Applicant sought to rely on the Miscellaneous Civil Application No. 540 of 2008 in support of its claim for preference. In that case of *De Larue versus the Kenya Revenue Authority, Application No.24 of 2008*, which was the case that gave rise to Application No.540



cited herein, the Board rejected the claim by the Applicant in that case that it was entitled to a margin of preference under Section 38(b), on the ground that such margin of preference was only available if the conditions set forth in Section 38(8)(a) were satisfied. In its ruling in Misc. Application No. 540, Justice Nyamu faulted the decision by the Board and stated at page 12 of his decision that "*...the Board failed to distinguish the two categories of statutory margins of preferences namely the exclusive preference which the Board proceeded to make its holdings and a margin of preference in specified circumstances set out in Section 39(8)(b)(i) and Regulation 28(2)(a) which the Board did not address.*" The Learned Judge therefore ruled that "*The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word "may", in Regulation 28(2)(a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement.*"

The Board finds that decision by the Learned Judge applies in this case. Accordingly, the Board, therefore, finds that the Procuring Entity erred by failing to apply the margin of preference set out the Act and the Regulations in evaluating the bid price of the Applicant.

Accordingly these grounds of review succeed.

#### **Grounds 5 and 6**

The Applicant submitted that the tender closed/ opened on 17<sup>th</sup> April, 2013. It further submitted that Section 66(6) of the Act provided that

evaluation be done within a stipulated period. It stated that Regulation 46 provided that the technical evaluation be done within thirty (30) days. It informed the Board that it was notified on 18<sup>th</sup> July, 2013. It submitted that its letter of notification was dated 17<sup>th</sup> June, 2013. It further submitted that the delay in its notification raised the issue of credibility of the whole tender process. It alleged that it was not given reasons for the Procuring Entity's decision and that there were no indication of the winner but that it later learnt that Fursys Ltd had won the tender.

In response the Procuring Entity stated that all the notification of award letters were written on 17<sup>th</sup> July, 2013 and were all delivered to the bidders on 18<sup>th</sup> July, 2013 . It further stated that there was a typographical error in the letter to the Applicant in that the date was written 17<sup>th</sup> June, 2013 instead of 17<sup>th</sup> July, 2013. It submitted that this was a typographical error, which, in any event, did not in any way place the Applicant at a disadvantage.

The Procuring Entity stated that the requirement for it to provide written reasons as to why the Applicants bid was unsuccessful as envisaged under Sec.67 of the Act and Reg. 66 (2) had not been received from the Applicant.

The Board has considered the submissions of the parties and examined the documents presented before it and makes the following findings:

- i. That the letter of award to the successful bidder and some letters of notification for the two unsuccessful bidders were dated 17<sup>th</sup> July, 2013 whereas that to the Applicant was dated 17<sup>th</sup> June 2013, respectively;
- ii. The Procuring Entity in its response averred that the date on the letter of notification to the Applicant was a typographical error;
- iii. The Procuring Entity delivery note for all the letters of notification, including that to the Applicant, is dated 18<sup>th</sup> July, 2013 .
- iv. The evaluation report was concluded on 16<sup>th</sup> May, 2013 and adjudicated by the Central Bank 166th Tender Committee on 28<sup>th</sup> June, 2013.
- v. That the Applicant filed its request for review on 23<sup>rd</sup> July, 2013 based on information that it had received from the Procuring Entity on notification of being unsuccessful on 18<sup>th</sup> July, 2013.

The issue for the Board to determine is whether the Applicant was prejudiced in any way by the delay in issuance of the letter of notification.

The Board notes that Section 67(2) of the Act provides that:

**"At the same time as the person submitting the successful tender is notified, the Procuring Entity shall notify all persons submitting tenders that their tenders were not successful."**

The Board has perused the copy of the delivery note provided by the Procuring Entity which shows that all four bidders collected their notification letters on 18<sup>th</sup> July, 2013. The Board accepts the submission

by the Procuring Entity that the date was a topographical error considering that the tender committee made the award on 28<sup>th</sup> June, 2013.

On the issue of whether or not the Procuring Entity supplied the reason why the Applicant was unsuccessful as envisaged by the Act, the Board notes that the Applicant did not request for reasons as to why the tender, was unsuccessful as envisaged in the Regulation 66(2) which states that *Where so requested by an unsuccessful tenderer Procuring Entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful.*

The Board holds that the Procuring Entity did not breach sections 67(2), of the Act, and Regulation 66(2) of the Regulations. In any event, the Applicant has managed to file its request for Review within 14 days of notification and has been heard by the Board.

In view of the foregoing, the Board finds no prejudice suffered by the Applicant as a result of the action by the Procuring Entity as it was able to file its application in time.

Consequently, these grounds of Review fail.

Taking all the above matters into consideration, the Board finds that the Procuring Entity:


1. Did not allow for preference of margin as envisaged under Section 39(8)(b)(ii) of the Act read together with Regulation 28(2)(b)(ii);
2. Failed to notify the parties of correction of arithmetic errors in breach of Section 63(2) of the Act.

Accordingly this Request for Review succeeds.

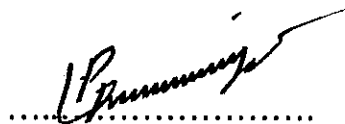
Pursuant to the provisions of Section 98 of the Act, the Board directs as follows:-

- 1) The award of the tender to the Successful Bidder M/s Fursys K Ltd is hereby annulled.
- 2) The Board orders, pursuant to Section 98 (b) of the Act that the Procuring Entity re-evaluates the bids and awards the tender within 30 days as follows:
  - (a) Using the criteria set out in its Tender Documents.
  - (b) Correction of arithmetic error as envisaged by the Act.
  - (c) Apply the Margin of Preference as envisaged by the Act and the Regulations.
- 3) There will be no orders as to costs.

Dated at Nairobi on this 22<sup>nd</sup> day of August, 2013



CHAIRMAN  
PPARB



SECRETARY  
PPARB

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