

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 35/2013 OF 25<sup>TH</sup> SEPTEMBER, 2013**

**BETWEEN**

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

**AND**

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

Review against the decision of the Tender Committee of Central Bank of Kenya dated 20<sup>th</sup> September, 2013 in the matter of Tender No KSMS/PROC/37/12-13 for supply and assembly of furniture for the academic wing and library for Kenya School of Monetary Studies, Ruaraka Campus.

**BOARD MEMBERS PRESENT**

Mrs. Josephine W. Mongare - Chairman  
Eng. Weche R. Okubo - Member  
Mr. Peter Bitu Ondieki - Member  
Mr. Hussein Were - Member  
Mr. Nelson Orgut - Member  
Mr. Paul Gicheru - Member  
Mrs. Rosemary K. Gituma - Member  
Mr. Paul Ngotho - Member

**IN ATTENDANCE**

Mr. Maurice Juma - Director-General, PPOA  
Mr. Philemon Kiprop - Holding Brief for Secretary

**PRESENT BY INVITATION**

**Applicant – Bevaj Furniture Ltd**

Mr. Daniel O. Achach - Advocate  
Mr. Denis Anyoka - Advocate  
Ms. Rose Mbugi - Director  
Ms. Naomi Okelo - Legal Assistant  
Mr. Richard Mulwa - Operations Manager  
Mr. Omari - Sales Manager

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

Mr. Walter Amoko - Advocate  
Mr. Sammy Njoroge - Advocate  
Mr. Amos Mbugua - Engineer  
Mr. Silon Mugeria - Compliance Officer  
Mr. Nahason Muse - Procurement Officer

**Interested Party – Fursys (K) Ltd**

Mr. Mungai Kalande - Advocate.  
Mr. B. T. Kim - Managing Director  
Ms. Noelle Mutai - Project Manager

## THE BOARD'S DECISION

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

### **BACKGROUND OF AWARD**

#### **Advertisement**

The Procuring Entity advertised the Tender for Supply and Assembly of Furniture for the Academic Wing and Library, tender No. KSMS/37/12-13, in two national newspapers namely, "The Standard" and "The Daily Nation" of 26<sup>th</sup> and 27<sup>th</sup> February, 2013 respectively, besides the website of The Kenya School of Monetary Studies.

#### **Closing/Opening:**

Tender closing / opening was conducted on 17<sup>th</sup> April, 2013 at 10.30 a.m. Bids were received from four (4) firms as tabulated hereafter.

**Table 1: Summary of Received Bids**

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 OF BIDS

The received tenders were to be evaluated in four stages as tabulated below:

**Table 2: Bid Evaluation Criteria**

<b>Stage</b>	<b>Attribute</b>	<b>Requirements to Qualify</b>
<b>Stage 1</b>	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.
<b>Stage 2</b>	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.
<b>Stage 3</b>	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.)
<b>Stage 4</b>	Financial Evaluation	The financial evaluation will be done in accordance to Section II C, stage 4.

## **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) Bevaj Furniture Ltd and Fursys (K) complied with all the mandatory Requirements and were therefore subjected to Technical Evaluation and due diligence having qualified on the basis of Evaluation Criteria set out in the Tender Document.

## **TECHNICAL EVALUATION AND DUE DILIGENCE**

### **(a) Technical Evaluation**

1. Re-evaluation of technical bids was carried out for bidders who qualified in **Step3** in accordance with the evaluation criteria set out in the Tender Document. Each member of the evaluation committee evaluated the bids independently and awarded scores to each bidder.

### **Technical Re-evaluation Result**

The average score was calculated for each bidder and the final results are shown in the table 3.

**Table 3: Summary of Technical Evaluation Scores**

1.	Tenderer	Bidder No.	Scores out of 60
2.	Bevaj Furniture Ltd	3	36
3.	Fursys (K) Ltd	4	48.5

**Observations:**

- 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) Bevaj Furniture Ltd scored 36 marks and was, therefore, disqualified from the next stage of evaluation.
- 3) Fursys (K) Ltd scored 48.5 marks and, therefore, qualified for the next stage of evaluation.

**(b)Due Diligence**

1. Due diligence was carried out on the qualified bidder 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 re-evaluation results for due diligence as stated in the tender document is as tabulated below:

**Table 4: Evaluation Results for Due Diligence**

<b>Item</b>	<b>Attributes</b>	<b>Marks</b>	<b>Fursys (K) Ltd</b>
<b>1</b>	<p>Quality and workmanship of samples provided.</p> <p>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.</p> <p>Any clarifications that may be required shall be sought by the committee.</p>	<b>15 Marks</b>	<b>13</b>
<b>2</b>	<p>Bidder's capacity to supply and assemble similar furniture to the one specified in this tender.</p> <p>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>	<b>10 Marks</b>	<b>8</b>
<b>3.</b>	<p>Satisfaction of previous clients</p> <p>The evaluation committee shall seek previous client's feedback in terms of quality, timelines, price, after sales service among others.</p>	<b>15 Marks</b>	<b>15</b>
	<b>Total:</b>	<b>40 Marks</b>	<b>36</b>

## 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. Fursys (K) Ltd scored above 30 marks and, therefore, qualified for further evaluation.

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

**Table 5: Summary of Combined Evaluation Scores**

<b>Bidder</b>	<b>Technical evaluation score out of 60</b>	<b>Due diligence score out of 40</b>		<b>Combined score out of 100</b>
		<b>Samples</b>	<b>Site Visit &amp; Previous Client Interview</b>	
Fursys (K) Ltd	48.5	13	23	84.5

Fursys (K) Ltd attained a 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 tabulated below:



**Table 6: Financial Evaluation**

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

a. General

1. Authentication of tender security

The Committee established that the tender securities provided by the bidder 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 bid was checked for arithmetic errors. The results of the Financial Evaluation were as tabulated hereafter.

**Table 7: Summary of Financial Evaluation**

<b>Bidder</b>	<b>Quoted tender amount in Kshs.</b>	<b>Corrected tender amount in Kshs.</b>	<b>Variance Kshs.</b>
Fursys (K) Ltd	244,585,573.58	249,434,381.24	4,848,807.66

**Observations**

- 1) The bidder, Fursys (K) Limited 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 the bidder to arrive at the corrected tender sum.
- 2) The bid by Fursys (K) Ltd had another arithmetic error of Kshs.440,807.66.
- 3) The total arithmetic error amounts to Kshs.4,848,807.66.
- 4) The arithmetic error was communicated to the bidder, Fursys (K) Ltd and the bidder accepted the corrected figure.
- 5) The lowest evaluated bid is by Fursys (K) Ltd at **Kshs.249,434,381.24**.

**CONCLUSION**

The lowest re-evaluated bid is by **Fursys (K) Ltd** at **KShs.249,434,381.24 (Kenya Shillings Two Hundred Forty Nine Million Four Hundred Thirty Four Thousand Three Hundred Eighty One and Cents Twenty Four Only)** and is, therefore, recommended for consideration for award of the tender.

## **TENDER COMMITTEE'S DECISION**

The Central Bank of Kenya Tender Committee at its Meeting held on 20<sup>th</sup> September, 2013 deliberated on Tender No. KSMS/PROC/37/12-13 for Supply Delivery and Assembly of Furniture for the Academic Wing and Library for the KSMS and awarded the tender to **M/s Fursys (K) Ltd** at a total corrected sum of **Kshs 249,434,381.24**.

The outcome of the tender was communicated to all the bidders vide letters dated 20<sup>th</sup> September, 2013.

## **THE REVIEW**

The Request for Review was lodged by M/s Bevaj Furniture Limited on 25<sup>th</sup> September, 2013 against the decision of the Tender Committee of the Central Bank of Kenya in the matter of Tender No. KSMS/PROC/37/12-13 pursuant to the Public Procurement Administrative Review Board decision dated 22<sup>nd</sup> August, 2013 in Review No. 24 of 23<sup>rd</sup> July 2013.

The Applicant was represented by Mr. Dennis Anyoka and Mr. Daniel Achach, Advocates while the Procuring Entity was represented by Mr. Walter Amoko, Advocate. The Interested Party, M /s Fursys (K) Ltd was represented by Mr. Mungai Kalande, Advocate.

The Interested Party was informed that should issues touching on it be canvassed before the Board then the Board would allow its counsel to respond orally.

The Applicant had raised fifteen grounds of Review and urged the Board to make the following orders:

- 1. That the decision of the Procuring Entity awarding the TENDER NO. KMSC/PROC/37/12-13 to Fursys (K) Ltd or to any other person be annulled.*
- 2. That the Board do substitute the decision of the Procuring Entity awarding the TENDER NO KMSC/PROC/37/12-13 to Fursys (K) Ltd or any other person and award the said tender to the Applicant.*
- 3. That the costs of these proceedings be assessed by the Board and awarded to Applicant to be paid by the Procuring Entity.*

At the onset, the Board notes that the instant Request for Review is premised on the Board's findings and orders in the review of the same tender under **Application No. 24 of 2013**. The Board further notes that the general statements in the Request for Review comprise the historical background of the instant Request for Review.

The Applicant submitted as follows:

1. That the Procuring Entity invited tenders for the supply and assembly of furniture for the academic wing and library for Kenya School of Monetary Studies Ruaraka Campus.
2. That the Procuring Entity irregularly and without any legal basis awarded the tender to one of the bidders, **M/s Fursys (K) Ltd.**
3. That the Applicant subsequently filed a Request for Review at the Public Procurement Administrative Review Board under **Application Number 24 of 2013** vide its request dated 23<sup>rd</sup> July 2013.

4. That the Public Procurement Administrative Review Board heard all parties subsequent to the filed request and rendered its decision on 22<sup>nd</sup> August 2013.
5. That the Board made detailed findings relating to the entire tendering process inter alia:
  - i. That both the Applicant and Fursys (K) Ltd had passed the first three stages of evaluation to wit;
    - Examination of Mandatory Requirements.
    - Technical Evaluation
    - Examination of samples and due diligence.
  - ii. That Fursys (K) Ltd had scored fifty three point five (53.5) out of the possible sixty (60) marks while the Applicant had scored forty three (43) out of the possible sixty (60) marks in the technical evaluation.
  - iii. That the pass mark for the technical evaluation was a mark of Forty (40) out of the possible Sixty (60) marks.
  - iv. That both the Applicant and Fursys (K) Limited had scored above the mark of Forty (40) and therefore had passed the technical evaluation.
6. That the Board in its ruling delivered on 22<sup>nd</sup> August, 2013 faulted the Procuring Entity in its evaluation of tenders at the last stage - the financial evaluation and in particular;
  - (a) That the Procuring Entity failed to comply with the mandatory legal requirement on correction of errors as set out in **Section 63** of the Public Procurement and Disposal Act 2005.

(b) That the Procuring Entity failed to apply the Margin of Preference as envisaged under **Section 39(8)(b)(ii)** of the Act and **Regulation 28(2)(b)(ii)** of the Regulations while doing the financial evaluation of the bids of the Applicant and that of Fursys (K) Limited.

7. That the Board then ordered the respondents to re-evaluate the bids and award the tender within 30 days and factor in the margin of reference as envisaged under the Act and the Tender Document after complying with the law in the correction of errors.
8. That by its unreferenced letter dated 29<sup>th</sup> August 2013, the Procuring Entity sought submissions from the Applicant on various issues in a bid to purportedly comply with the Ruling of the Review Board dated 22<sup>nd</sup> August 2013 which included;

- (a) Re-inspection of Furniture samples
- (b) Extension of Tender Security
- (c) Validation and Confirmation of quoted prices and tender Price
- (d) Sources of Furniture
- (e) Ownership.

9. That the Applicant, vide its letter dated 3<sup>rd</sup> September 2013, Ref BFL/KSMS/2/2013, in response to the Procuring Entity's letter complained to the Respondent on various issues to wit:
  - i) That it was apparent the Respondent intended to clearly misinterpret the Board's ruling dated 22<sup>nd</sup> August 2013 and start re-evaluation from the beginning yet the part that ought to have been re-evaluated was the financials at the financial evaluation stage as per the Review Board's ruling.

- ii) That the furniture sample re-inspection was inappropriate as the same had been inspected and had remained in the custody of the Respondent and re-evaluating the same could affect the Applicant's technical evaluation and the same had no relationship with the Review Board's ruling dated 22<sup>nd</sup> August 2013.
10. That the Procuring Entity vide its letter dated 20<sup>th</sup> September 2013 notified the Applicant that their tender was unsuccessful having failed to meet the minimum forty Marks (40) out of the possible sixty (60) marks on technical requirement.
11. That the Applicant was notified vide the Respondent's letter dated 20<sup>th</sup> September 2013 that it had only scored a total of thirty six (36) marks out of the possible sixty marks (60) in total contrast to the earlier 43 marks yet there was no change of tender or tender documents re-submitted.
12. That the Procuring Entity clearly acted in total violation of the Review Board's decision dated 22<sup>nd</sup> August 2013 by failing to re-evaluate the bids in the manner contemplated by the board to wit:
- i) Re-evaluating the bids to factor in the margin of preference as contemplated in the Public Procurement and Disposal Act and its regulations.
  - ii) Correcting of the arithmetic error as per the law.
13. That the Procuring Entity has clearly conceived an illegal scheme with the sole intention of blocking the Applicant from winning the tender.

14. That the Procuring Entity's decision to disqualify the Applicant at the technical stage of the evaluation, having previously evaluated the Applicant above the pass mark, is in direct contravention of Section 2 of the Public Procurement and Disposal Act, 2005, which sets the objectives of the procurement process as set out in the Act to wit:

- a) To maximize economy and efficiency;
- b) To promote competition and ensure that competitors are treated fairly;
- c) To promote the integrity and fairness of the procedures;
- d) To increase transparency and accountability in those procedures; and
- e) To increase public confidence in those procedures; and
- f) To facilitate the promotion of local industry and economic development.

In response, the Procuring Entity submitted that it advertised the Tender for Supply and Assembly of Furniture for the Academic Wing and Library, tender No. KSMS/37/12-13, in two national newspapers namely, "The Daily Nation" and "The Standard" besides the website of The Kenya School of Monetary Studies. It averred that the award of the Tender was not made irregularly.

The Procuring Entity submitted that it is true that the Applicant filed a Request for Review No. 24 of 2013 which the Board heard and rendered its decision on 22<sup>nd</sup> August 2013. It avers that the Board's Ruling was unequivocal and required the procuring entity to re-evaluate the bids afresh using the specified criteria outlined in the Ruling and subsequently make an



award. It argues that the various stages and results of the annulled proceedings are therefore not relevant to the re-evaluation process.

The Procuring Entity submitted that the Board ordered it to “re-evaluate the bids” in their entirety which meant that the bids should be re-evaluated through all the evaluation stages. It submits that the Applicant’s averment that the Board ordered the Respondent to “re-evaluate the last stage of the Tender” is therefore mischievous, incorrect and misleading.

The Procuring Entity submitted that, in compliance with the Board’s Ruling dated 22<sup>nd</sup> August, 2013 and the orders issued therein, it commenced the Tender re-evaluation which was conducted in a six steps process as follows:

Step 1: Overview of the tender opening minutes and procedures

Step 2: Preliminary Evaluation as provided under Regulation 47 (1) (a) of the Public Procurement and Disposal Regulations, 2006;

Step 3: Evaluation of the tenders on the basis of the set Mandatory requirements;

Step 4: Technical Evaluation and due diligence on tenders that qualified in Step 3 on the basis of Evaluation Criteria set out in the tender document;

Step 5: Financial evaluation as set out in the tender document; and

Step 6: Conclusions.

The Procuring Entity submitted that besides the Applicant, there were three other tenderers namely: Victoria Furniture Limited; Fairdeal Superstores Limited and Fursys (K) Limited whose bids were also subjected to the tender re-evaluation using the procedure set out above.

The Procuring Entity further submitted that it notified all the bidders including the Applicant of the impending re-evaluation and requested for submission of standard information and documents which the committee deemed necessary. It averred that the notification of errors following the conduct of the re-evaluation was made to Fursys alone since it was the only bidder qualified for the financial evaluation.

The Procuring Entity argued that there was no need to apply the margin of preference since only one bidder qualified to proceed to financial evaluation. It further argued that this notwithstanding, even if the margin of preference was applied, the Applicant, being as alleged fully owned by locals, would have been entitled to a 10% margin of preference, while the successful bidder, being 5.14% locally owned would have been entitled to a 6% margin of preference. The Procuring Entity submitted that the Applicant scored 36 marks in the Technical Evaluation Stage thereby failing to meet the 40 marks threshold prescribed in the Tender Document.

The Procuring Entity submitted that it notified the Applicant by a letter dated 20<sup>th</sup> September, 2013 that it had not qualified for the next stage of evaluation and gave the reasons thereof.

The Procuring Entity submitted that the initial evaluation was relatively accommodating with a view to promoting competition and did not strictly conform to the requirements under the Tender Document. It averred that the re-evaluation on the other hand was conducted in strict adherence to the specifications prescribed in the Tender Document in order to comply with the directions of the Board. It submitted that the re-evaluation was therefore finalized procedurally and marks were awarded only as prescribed in the

Tender Document and that both the Applicant and Fursys Kenya Limited scored less marks than they had in the initial evaluation.

The Procuring Entity submitted that it conducted the bid re-evaluation as directed by the Board and as envisaged in Section 66 of the Act and since the Applicant did not qualify to proceed to the financial evaluation stage, there was no need to advise the Applicant of any arithmetic errors or apply the margin of preference to the Applicant. It denied the allegations of illegality and ill intent.

The Procuring Entity requested the Board for the following orders:

- i) That the Board makes a finding that all the allegations made by the Applicant are unfounded.***
- ii) That the prayer by the Applicant for the annulment of the award to the Successful Bidder or to any other person be dismissed on the basis that the request does not disclose any element of illegality or impropriety by the Respondent and is frivolous and vexatious and an abuse of the due process.***
- iii) That the request by the Applicant for the Board to substitute the Procuring Entity's decision to award the tender to any other entity and award the tender to the Applicant be dismissed as the Applicant did not qualify for the tender award.***
- iv) That the costs of these proceedings be assessed by Board and awarded to the Respondent and be paid by the Applicant.***

## **THE ISSUES FOR DETERMINATION**

Both the Applicant and the Procuring Entity addressed the Board at length on the grounds in support and in opposition to the Request for Review and although the parties set out several grounds of Review and in opposition to the Review all these grounds and the Request for Review however turn on two narrow issues, namely:-

- 1. What was the scope of the decision made by the Board on 22<sup>nd</sup> August, 2013 in the Request for Review No. 24 of 2013?**
- 2. Did the Procuring Entity comply with the decision of the Board made on 22<sup>nd</sup> August 2013 as set out in the in Review No. 24 of 2013?**
- 3. In applying the margin of preference as ordered by the Board, who was entitled to the same?**

The Board's in its decision delivered on 22<sup>nd</sup> August 2013 in Review No. 24 of 2013 had made the following Orders in so far as the same are relevant to the issue before the tribunal:-

***"Pursuant to the Provisions of Section 98 for 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 tits 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."*

It was common ground by all the parties who appeared before the Board that the Board made a decision in **Review No. 24 of 2013** and that the said decision was binding as neither party had challenged it or filed Judicial Review proceedings in the High Court. It was the Applicant's case that the Board, in its decision given on 22<sup>nd</sup> August 2013 in **Review No. 24 of 2013**, did not direct the Procuring Entity to go through all the steps it had gone through when it first evaluated the tenders but that it was only bound to comply with the law while correcting errors and that it ought to have also applied the margin of preference in favour of the Applicant as envisaged by the Act while re-evaluating the tender. The Applicant argued that had the Procuring Entity done that, the Applicant would have emerged as the successful bidder. The Procuring Entity on its part submitted that the ruling in Review No. 24 of 2013 required the Procuring Entity to restart the entire evaluation process right from the beginning; namely from the examination of mandatory requirements to the Financial evaluation of the bids. The Procuring Entity submitted that that was its understanding of what the Board had in mind by ordering that the Procuring Entity should re-evaluate the bids and award the tender "**using the criteria set out in the Tender Documents**".

The Procuring Entity submitted that it then proceeded to re-evaluate the tenders based on its understanding of the decision given by the Board on 22<sup>nd</sup> August, 2013 and that it is upon such reconsideration that the Applicant failed in the technical evaluation and could not therefore proceed to the Financial evaluation stage.

The Board has carefully read the decision made by the Board in the Request for Review No. 24 of 2013, the documents filed by the parties in that Review together with the submissions made by Counsel for the parties before the Board then. The Board notes that in the previous decision in the subject matter of this review, the Board went into great length to consider the process of evaluation from Preliminary evaluation and Technical evaluation to the Financial evaluation and that the Board in its ruling determined that technical evaluation of the tenders was not in issue and that the only matters that were in issue were:-

- (i) Whether the Procuring entity complied with the Provisions on the correction of arithmetical errors as required by Section 63 as read together with Provisions of Section 59 (2) and (3) of the Act.***
- (ii) Whether the procuring entity took into account the Provisions of Sections 2 and 39 (8) (b) of the Act and Regulation 28 (2) (b) (ii) on the applicable margins of preference.***

In its decision, the Board discussed the two issues at great length and faulted the Procuring Entity on both issues leading upto the order that the Procuring Entity should re-evaluate the tenders to correct those errors.

It is the understanding of this Board that the Board did not direct that the Procuring Entity starts the entire process afresh for the simple reason that other than financial evaluation, the Procuring Entity in its response to the first Request for Review dated 26<sup>th</sup> July 2013 and particularly at paragraphs 4, 5, 6 and 7 and in paragraph 3(d) of its the Replying Affidavit filed before the Board then, had conceded and deponed under oath that both the Applicant and the Successful Bidder qualified in the technical evaluation. The Procuring Entity cannot and should not therefore be allowed to make an issue out of that which it admitted was not an issue in previous proceedings

between the same parties, but to address the issues touching on notification of arithmetic errors to the bidders and application of the preference of margin to the benefit of the Applicant. Further, the Procuring Entity confirmed that the evaluation was carried out by the same Tender Evaluation Committee as before and therefore there is no plausible explanation on how a score on technical evaluation was altered from 43 to 36 marks by the same committee. The Board cannot therefore come to any other conclusion other than that this change was only calculated at ensuring that the Applicant did not make it to the next stage.

The Board therefore finds that the interpretation by the Procuring Entity of the said order is erroneous and that the order should have been read and interpreted in its entirety and not in piecemeal as the Procuring Entity sought to do.

The Board notes that in its response the Procuring Entity tendered a hypothetical analysis to show that if the Applicant had been evaluated financially and the margin of preference applied then the Interested Party would still have been successful. Documents available to the Board to confirm ownership were a copy of a CR 12 showing that the Applicant was a fully owned Kenyan Company while a CR 12 presented to the Board dated 22<sup>nd</sup> January 2013 indicates that Fursys (K) Ltd, the Interested Party herein, is owned by foreigners with a minority shareholding by a Kenyan. However in its presentation to the Procuring Entity, the Interested Party has submitted in its own letterhead a letter dated 13<sup>th</sup> April 2013 indicating that the Company is fully owned by Korean Nationals. This is the latest communication on that issue and the Board takes it to be the actual position. The Board therefore directs that only the Applicant is entitled to the margin of preference at the financial evaluation and not both the Interested Party and the Applicant. It is

the Board's observation that the Procuring Entity was ordered to re-open the financial evaluation of the bids that involved:

- (i) Compliance with **Section 39 (8) (b) (ii)** of the Act and **Regulation 28 (2) (b) (ii)** of the Regulations with regard to application of Margin of Preference on tenders.
- (ii) Compliance with the mandatory legal requirement on correction of errors as set out in **Section 63** of the Act

Regulation 28 (2) provides as follows:

*"on the margin of preference-*

*(f) ... ..;*

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

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

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

For a bidder to benefit from the provisions of **Section 39 (8) (b) (ii)** of the Act and **Regulation 28 (2) (b) (ii)** of the Regulations with regard to application of Margin of Preference on tenders the bidder requires to prove the composition of its shareholding. The Board notes that the Applicant is wholly owned by Kenyans. The Interested Party has not satisfied the Board that it has a component of local shareholding in its ownership. The Procuring Entity was enjoined to rely on the tender documents as submitted to it by the bidders but not to go on a fishing expedition.



It is therefore the finding of the Board that the Applicant qualified for a Margin of Preference on their tender under the provisions of Section 39 (8) (b) (ii) of the Act and Regulation 28 (2) (b) (ii) of the Regulations. It is also the finding of the Board that the interested party is not entitled to the Margin of Preference under the provisions of Section 39 (8) (b) (ii) of the Act and Regulation 28 (2) (b) (i) of the Regulations.

With regard to errors in the bid documents, the Board notes the provision of Section 63 on Correction of Errors. This section provides as follows:-

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

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

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

The Board finds that the Procuring failed to comply with the requirements of the Act in this regard.

The Board wishes to reiterate that upon rendering the decision dated 22<sup>nd</sup> August 2013, the said decision became binding on the Procuring Entity and the only option open to it was to seek a Judicial Review if it was dissatisfied. It did not do so and therefore the decision is binding on it as provided in Section 100 (1) and (3) of the Act which states as follows:-

**100(1) "A decision made by the Review Board shall be final and binding on the parties unless judicial Review thereof commences within fourteen days from the date of the Review Board's decision.**

**(2).....**

**(3)A party to the Review which disobeys the decision of the Review Board or the High Court shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court shall be null and void."**

The Board wishes to observe that in carrying out its functions under the Act and the Regulations, the Procuring Entity is bound to act in a fair, equitable, transparent, competitive and cost effective manner. The Procuring Entity is also required to comply with the Provisions and the objective of the Act. The Procuring Entity should not act capriciously in disregard of the law. The Board notes that the duty to act fairly, equitably, transparently in order to promote competition is also enshrined in **Article 227(1) of the Constitution** which provides as follows:-

***"When a state organ or any other Public entity contracts for goods or services, it shall do so in accordance with a system that is fair equitable, transparent, competitive and cost effective."***

The Board notes that this is not reflected in the actions of the Procuring Entity in the matter before it. The Procuring Entity's Tender Committee has acted in excess of powers in disregarding the recommendations and the orders issued by the Board and as the Board observed in ***Horsebridge Network Systems (E.A) Ltd -Vs- Central Bank of Kenya (PPARB Review No. 65 of 2012)***;

*"If blatant acts of the Procuring Entity are allowed to stand, this will promote impunity in the Procurement Sector and reverse all the gains made since the enactment of the Act. A Procuring Entity that attempts to run away from the parameters set by the Act and the Regulations should be contained and forced to comply with the Act and the Regulations."*

The Board further made the following observation which is relevant to this Review;

"The decision of the Board was binding and had to be implemented by the Tender Committee. The said decision cannot be said to have lapsed by passage of time as alleged by the Procuring Entity. The Board holds that the tender validity period in this case did not lapse before the award of the tender. On the contrary, the Procuring Entity's Tender Committee wrongly assumed that it could ignore the clear directions of the Board and later set up technical legal defenses. As already stated, such defenses fly in the face of the clear provisions of the Law".

Taking into account all the foregoing matters and the reasons set out in the Board's decision, and Pursuant to Section 98 of the Act , the Board directs as follows: -

- 1) The award of the tender to M/s Fursys (K) Ltd as communicated in the letter of award dated 20<sup>th</sup> September 2013 is hereby annulled.**
- 2) The re-evaluation of bids conducted by the Procuring Entity purportedly pursuant to the Board's Ruling dated 22<sup>nd</sup> August 2013 in Review No. 24 of 2013 is hereby declared null and void.**

3) For the avoidance of doubt, the Board orders pursuant to the Provisions Section 98 (b) of the Act, that the Procuring Entity shall re-evaluate the bids and award the tender within 15 days and that the re-evaluation shall only be limited to the following matters:-

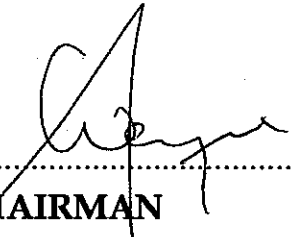
(a) Correction of arithmetical errors as envisaged by the Act.

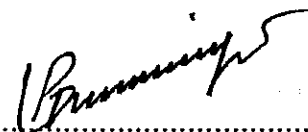
(b) The Application of the margin of preference as envisaged by the Act and the Regulations in favour of the Applicant which the Board has found to be the only party entitled to the margin of preference.

4) The Procuring Entity shall take steps to extend the validity of the bids for a period necessary for it to comply with these orders.

5) The Board makes no orders as to costs.

Dated at Nairobi on this 24<sup>th</sup> day of October, 2013.

  
.....  
**CHAIRMAN**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**