

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

**REVIEW NO. 2/2014 OF 13<sup>TH</sup> FEBRUARY, 2014**

**BETWEEN**

**MASTI HEALTH & BEAUTY LIMITED .....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Airports Authority dated 16<sup>th</sup> January, 2014 in the matter of Tender No. KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon at JKIA.

**BOARD MEMBERS PRESENT**

Josphine W. Monagare	- Member (in the chair)
Rosemary K. Gituma	- Member
Paul Ngotho	- Member
Hussein Were	- Member

**IN ATTENDANCE**

Ms. Pauline Opiyo	- Secretary
Mr. Philemon Kiprop	- Secretariat
Ms. Judy Maina	- Secretariat
Ms. Sharon Odeny	- Intern

## **PRESENT BY INVITATION**

### **Applicant -Masti Health & Beauty**

1. Owuor Nyahanga - Advocates

### **Procuring Entity -Kenya Airports Authority**

1. Victor Arika - Advocate
2. Obadiah Orora - Procurement
3. S. Kemboi - Procurement Officer
4. J. Chepkorir - Procurement Officer
5. Bernard Bosire - Procurement Officer

### **Interested Party - Sheribiz Supplies Ltd**

1. E. Wetangula - Advocate
2. John Chege - Director
3. Juliah Nyaga - Director

## **BOARD'S DECISION**

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

### **(A) Background of Award**

Jomo Kenyatta International Airport is the largest airport in East and Central Africa. The Airport was opened in 1978 with a design capacity of 2.5 million passengers annually. Due to growth in traffic at JKIA, KAA has embarked on an ambitious facility expansion and improvement

program geared at expanding and improving the airport infrastructure with the aim of positioning it as a major hub on the continent.

**(B) Objectives**

The Airport Health and Beauty Spa is located within the departure area of the new terminal unit and shall be accessible only to passengers.

Through this tender the Kenya Airports Authority wished to engage a reputable local firm to operate and manage an Spa at its new terminal's unit 4. The successful bidder was expected to enter into a long term arrangement of not less than 5 years.

**(C) Proposed Locations**

To meet the ever increasing demand for space and facilities the airport is currently undertaking a passenger terminal facility expansion program. The development of Unit 4 (T4) at Jomo Kenyatta International Airport will open new and exciting opportunities for the expansion of non-aeronautical activities and services to our passengers as well as the airport community.

**(D) Advertisement**

The tender was advertised on the 26<sup>th</sup> November 2013 in The Standard newspaper and on the 27<sup>th</sup> November 2013 in the Daily Nation. One addendum was issued on the 3<sup>rd</sup> of December 2013.

Out of twelve (12) bid documents purchased five (5) were received as indicated below;

	Bidder	Amount Quoted (Annual	Tender Surety
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		Concession) Kshs.	
1.	Nothing Like It	240,000/=	Provided
2.	Dubai Beauty Centre	2,500,000/=	Provided
3.	Masti Health & Beauty Pvt Ltd	500,000/=	Provided
4.	Avena Imani Enterprises	30,000/=	Provided
5.	Sheribiz Supplies Ltd	9,600,000/=	Provided

**(E) MANDATORY, TECHNICAL & FINANCIAL EVALUATION**

The bids were evaluated using the criteria stated in the tender document, Section II – Instructions to Tenderers, Clause 2.20 and 2.22 – Preliminary examination & responsiveness and evaluation and comparison of tenders and as captured in appendix to instructions to tenders:

**I. MANDATORY EVALUATION**

The bids were first evaluated on the mandatory criteria as detailed in the Tender Document:-the outcome of the Preliminary evaluation is as summarised below

No.	Mandatory Requirement	Bidder 1	Bidder 2	Bidder 3	Bidder 4	Bidder 5
		Fulfilled all requirements	Did not fulfil all requirements	Fulfilled all requirements	Did not fulfil all requirements	Fulfilled all requirements

The following bidders did not meet all the requirements as stipulated in the Mandatory evaluation criteria and hence were not considered for both Technical and Financial evaluation: -

Bidder No.2: Dubai Beauty Centre (K) Ltd - the certificate of tenderers visit form not signed by the Procuring Entity and that it further did not provide a letter for its credit line.

Bidder No.4: Avena Imani Salon - did not provide valid tax compliance certificate and also did not provide audited accounts as requested in the Tender Document among other reasons.

Based on the above evaluation for mandatory requirements, the following bidders qualified to be considered for Technical and Financial evaluation: -

- a) Bidder No. 1: Nothing Like It
- b) Bidder No. 3: Masti Health & Beauty Pvt Ltd
- c) Bidder No. 5: Sheribiz Supplies Ltd

The above three firms were subjected to both technical and financial evaluation based on the criteria.

## II. TECHNICAL AND FINANCIAL EVALUATION

No.	Requirements	Max Score	Bidder No.		
			1	3	5
1.	Design Concept	25	24	24	24
2.	Business Proposal	25	24	20 (Note 1)	24
3.	Personnel	20	18	10 (Note 2)	18

4.	Financial Evaluation	30	KShs. 240,000 per annum. Score is 0.75	KShs. 500,000 per annum. Score is 1.5625	KShs. 9,600,000 per annum. Score is 30
	<b>Total</b>	<b>100</b>	<b>66.75</b>	<b>55.55625</b>	<b>96</b>

Note 1: Bidder No 3 did provide financial projections of sales, profits, cash flows and return on investment.

Note 2: Bidder No. 3 did not provide the relevant CV's of key personnel for each including relevant certificates.

**(F) RECOMMENDATION**

The Evaluation Committee recommended the contract for Development and Management of an Airport SPA and Beauty Salon, be awarded to M/S SheribizSupplies Limited, being the best evaluated bidder at a proposed Concession Fee of Kshs. 9,600,000per annum.

**TENDER COMMITTEE DECISION**

The Tender Committee in its Meeting No. 291 held on 16<sup>th</sup> January, 2014 deliberated on the recommendations of the Evaluation Committee and approved award as recommended to M/s Sheribiz Supplies Ltd for being the best evaluated bidder at proposed concession fee of Ksh.9, 600,000 per Annum.

## THE REVIEW

The Request for Review was lodged by Masti Health & Beauty Limited on 13<sup>th</sup> February, 2014 in the matter of Tender No: KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon AT JKIA.

The Applicant was represented by Mr. Owuor Nyahanga , Advocate, while the Procuring Entity was represented by Mr. Victor Arika, Advocate. The interested party present was M/s Sheribiz Supplies Ltd represented by Mr. E. Wetangula, Advocate.

The Applicant requested the Board for the following orders:

- a) **That the Respondent be directed to evaluate and/ or report to the Board on the evaluation of the tenders in Tender No.KAA/HQS/203/2013-2014 for Development and Management of an Airport Spa and Beauty Salon at JKIA.**
- b) **Any other remedy that the Board may deem fit to give under Section 98 of the Public Procurement and Disposal Act, 2005 including but not limited to awarding the tender to the Applicant.**
- c) **That costs be provided for.**

## PRELIMINARY OBJECTION

M/s Sheribiz Supplies Limited, the Successful Bidder, filed a Memorandum of Response and simultaneously lodged a Preliminary Objection on 28<sup>th</sup> February, 2014 on the following grounds:

- i) That the Applicant's Request For Review is time barred ,having been filled before this Honourable Board after the lapse of the fourteen days period allowed for bringing such request for Review under regulations 73(2)(c) of the Act.*
- ii) That this Honourable Board lacks jurisdiction under the provision of the Act to hear and determined this request for Review as the Procuring Entity and the interested party have entered into a written contract consequent to the Procuring Entity's award in accordance with section 68 of the Act and consideration has passed between the parties.*

At the commencement of the hearing of the Request for Review the Board sought to have the Preliminary Objection dispensed with first and called upon the parties to make submissions on the same. Mr. Wetangula Advocate for the Interested Party submitted that the Request for Review should have been filed at least seven days from the date of Notification. He went further to demonstrate that his client was notified via an e-mail from the Procuring Entity dated 22<sup>nd</sup> January 2014 and collected the hard copy of the Notification on 28<sup>th</sup> January 2014. In view of the same, according to the Interested Party, the Review filed on 13<sup>th</sup> February 2014 was filed out of time because in any event the seven days allowed by Law had lapsed by 29<sup>th</sup> January 2014.



The second limb of the Preliminary Objection was that the Successful Bidder had already been invited by the Procuring Entity vide a letter of offer dated 28<sup>th</sup> January 2014 to accept an offer for the premises. In its submissions the Interested Party stated that it had already gone ahead and accepted the offer and made payments for the premises. According to the Interested Party, the letter of offer dated 28<sup>th</sup> January 2014 was received on 6<sup>th</sup> February 2014, executed and returned to the Procuring Entity on 7<sup>th</sup> February 2014 with payment of the concession fee as per the terms and conditions therein. The Interested Party submitted that, pursuant to the provisions of Section 93(2) of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act"), the Board therefore lacked jurisdiction to adjudicate on a matter where a contract was already executed.

The Applicant in its response opposed the Preliminary Objection. Counsel for the Applicant observed that in accordance to regulation 77(1) of the Public Procurement and Disposal Regulations, 2006 (hereafter referred to as "the Regulations"), all parties were required to file any papers to the Review within five day of being notified by the Board. Accordingly since a Notification was issued on 20<sup>th</sup> February 2014, then it follows therefore both the Interested Party and the Procuring Entity should have filed their papers by the 25<sup>th</sup> February 2014 and therefore accordingly the Preliminary Objection filed on 28<sup>th</sup> February was filed out of time and the Board ought to dismiss it on that account.

The Applicant further submitted that on the substantive issue of notification, it never received any email from the Procuring Entity on the outcome of the Tender. It further stated that at no one time did the Applicant provide an email address to the Procuring Entity and that the purported email address used belonged to its local partner here in Kenya and was picked from the tender documents submitted but was not provided by it as the contact address. The Applicant urged the Board to disregard that mode of communication.

As regards the second issue of the contract having been executed, the Applicant submitted that the provisions of Section 93 of the Act cannot be read in isolation but must be read together with Section 98 of the Act. It averred that a contract can only be entered into after the expiry of fourteen (14) days from the date of Notification and not earlier.

The Procuring Entity on its part associated itself with the Interested Party's submission on the Preliminary Objection. It submitted that it served the Notification on 22<sup>nd</sup> January 2014 via email. It produced an email report from outlook express confirming delivery of an email sent to [jaqi@studiojaqi.com](mailto:jaqi@studiojaqi.com). However the Procuring Entity was unable to demonstrate whether the Applicant received the said email and the contents of the same therein. The Procuring Entity further submitted that it had indeed made an offer to the Successful Bidder and had indeed received payment of the concession fees and was in the process of finalizing the formal lease for the premises.

The Board having heard all the parties herein and having perused the bundles of documents filed by the various parties notes as follows:-

1. That the Procuring Entity invited bidders through Open Tender on Tuesday, November 26, 2013.
2. That the tenders closed and were opened on 10<sup>th</sup> December, 2013.
3. That M/s Nothing like it, M/s Dubai Beauty Centre, M/s Masti Health & Beauty Pvt Ltd, M/s Avena Imani Enterprises and M/s Sheribiz Supplies Ltd responded.
4. That the Corporation Tender Committee meeting to adjudicate on the tender KAA/HQS/203/2013-2014 was held on 16<sup>th</sup> January, 2014 and approved the award. Both the successful and unsuccessful bidders were purportedly notified vide email notification letters dated 22<sup>nd</sup> January, 2014.
5. That the Instant Request for Review was filed on 13<sup>th</sup> February, 2014.

The issues that the Preliminary objections set out for determination by the Board are;

- (a) Whether the Applicant was notified of the outcome of the Tender by the Procuring Entity in accordance with Section 67 of the Act.
- (b) Whether the contract entered into between the Interested Party and the Procuring Entity was done in accordance with Section 68 of the Act and therefore ousted the Jurisdiction of the Board in the Request for Review filed before it.

The Board notes that time is not an issue of technicality but a jurisdictional one. The Board therefore takes this issue very seriously as it goes to the core of its mandate. In light of the above, the Board observes that the notification to the bidders was done in accordance with Section 67 of the Act however the Board is not able to determine if the Applicant received the notification on the said date. The Board wishes to state that the burden of proving whether or not the Notifications were sent out in accordance with the provisions of the Act rests with the Procuring Entity. The Board therefore holds that the Procuring Entity has not dispensed itself of that burden and subsequently this ground of the Preliminary Objection fails.

On the second ground of Preliminary Objection, the Board notes that from the bundle of documents submitted, the Successful Bidder has attached, the following;

- a. Notification of award letter dated 22<sup>nd</sup> January, 2014 accepted and date stamped 28<sup>th</sup> January, 2014 and a copy received by the Procuring Entity on the same date
- b. Letter of offer dated 28<sup>th</sup> January, 2014 to the Successful Bidder and received by the Successful Bidder on 6<sup>th</sup> February, 2014
- c. The same in (b) above was accepted by the Successful Bidder on 7<sup>th</sup> February, 2014 and received by the Procuring Entity registry on or about, 11<sup>th</sup> February, 2014.
- d. Copies of payment in consideration for the agreement effected on 11<sup>th</sup> February, 2014.

From the foregoing therefore, the Board observes that the Successful Bidder has already entered into contract which has partly been performed. The Board may need to therefore determine if the Procuring Entity complied with the provisions of Section 68 (1) and (2) of the Act.

Section 68(1) and (2) of the Act state as follows:-

*68.(1) The person submitting the successful tender and the Procuring Entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.*

*(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.*

The Board notes from the documents submitted by the Interested Party that the offer letter issued to it was done on 28<sup>th</sup> January 2014, even before the lapse of the mandatory 14 days set under Section 68 of the Act and the same was acted upon by the 6<sup>th</sup> February 2014. This was in total contravention of the provisions of the Act. Accordingly, this ground of the Preliminary objection also fails.

#### **RULING ON THE PRELIMINARY OBJECTION**

In view of the foregoing, the Board finds that the Preliminary Objection filed by the Interested Party has no merit and proceeds to dismiss it forthwith. The Request for Review may proceed to be heard on merit.

## **HEARING OF THE REQUEST FOR REVIEW**

The Applicant raised five (5) grounds of Review which the Board deals with as follows:

**Grounds 1, 2, 3 and 4 - Breach of Article 227(1) of the Constitution of Kenya, Section 2 And 66 of the Public Procurement and Disposal Act,2005(hereafter referred to "the Act") & Regulation 46(1) And 65(2) of the Public Procurement And Disposal Regulations, 2006 (hereafter referred to as "the Regulations")**

The four grounds of Review have been consolidated since they revolve around the evaluation of the tenders and alleged failure by the Procuring Entity to notify the Applicant of its tender outcome.

The Applicant alleged that the Procuring Entity had undertaken the above tender in total breach of Article 227(1) of the Constitution of Kenya by not upholding key principles like fairness, equity, transparency, competitiveness and cost-effectiveness and further that the Procuring Entity acted in disregard of the purpose of the Act.

The Applicant further alleged that the Procuring Entity ought to have evaluated and communicated the outcome of the tender within the period stipulated under the Act and Regulations. It submitted that given the fact that the Tender was opened on 10<sup>th</sup> December, 2013, then at extreme the Procuring Entity ought to have communicated on or about 10<sup>th</sup> January, 2014 as the Procuring Entity was obliged under the regulations to have concluded evaluation within a period of 15 days.

The issue on whether or not the Applicant was notified had already been canvassed at the Preliminary Objection by the Applicant in its response therein. The Applicant still submitted that it had not received any notification letter from the Procuring Entity and as such had no idea what the outcome of the Tender was. It therefore reiterated that this rendered the process of evaluation as opaque and not transparent in contravention of the objectives of the Act as envisioned under Section 2 thereof. The Applicant further submitted that the Procuring Entity in evaluating the tender should have been guided by the tenets of the constitution as envisioned under Article 227(1).

In response, the Procuring Entity averred that the evaluation of the tender under review was carried out fairly and within the law and only applied the criteria set out in the Tender Documents. It further averred that proper extension of the evaluation period was sought and granted as required by the amended regulation and such evaluation and communication was completed by 22<sup>nd</sup> January, 2014. The Procuring Entity produced an internal memo by which the said extension was sought and granted.

The Procuring Entity submits that the appeal is not only vexatious but also mischievous and the same was made solely for the purpose of delaying the procurement process.

The questions that arise for the Board's determination include:

- i. Whether the Procuring Entity carried out evaluation as envisaged by Section 66 of the Act.

- ii. Whether the extension of evaluation period by the Procuring Entity is justifiable.

The Board has taken into account the following provisions of the Constitution, the Act, the Regulations and the Tender Documents:

Article 227(1) of the Constitution:-

*"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."*

Section 66(2) of the Act:-

*"66(2) the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used".*

Regulation 46 of the Public Procurement and Disposal Regulations, 2006:-

*"A procuring entity shall, for purposes of Section 66(6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender."*

Regulation 14 (2) of the Public Procurement and Disposal (amendment) Regulations, 2013:-



*14(2) Where a tender is complex or has attracted a high number of tenderers, the accounting officer or head of the Procuring Entity may extend the period for tender evaluation under paragraph (1) for a further period within the tender validity period not exceeding thirty more days from date of expiry of initial period*

Clause 2.24 of the appendix to Instructions to tenderers:-

<b>2.24</b>	<b>award criteria</b>	<b>Successful tenders shall be the one that is eligible to participate in the tender, is responsive to preliminary requirements and shall have the highest score</b>	<b>Firm with the highest score to be awarded</b>
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In view of the above the Board observes that the tenders were evaluated using the criteria provided for in the Tender Documents, which had scoring criteria in compliance with Section 66(4) of the Act. The Board notes that marks were apportioned against key technical parameters such as Design concept (25 marks), Business proposal (25 marks) and Personnel (20 marks) and financial proposal (30 marks).

The Board further notes that the Applicant's low score at the technical evaluation stage is attributed to its low performance in meeting the Procuring Entity's need for the bidders to provide financial projection and failure to provide CVs and certificates for its key personnel. Further the Applicant's price proposal was lower than that of the Successful Bidder therefore it scored lowly in terms of the **price element**.

The Board notes that the evaluation process was concluded on or about 6<sup>th</sup> January, 2014, that is, 14 days beyond what is envisaged by the amended regulations. From the documents submitted before the Board, the Procuring Entity invoked the provision of Regulation 14(2) and extended the evaluation period appropriately. The tender under review was adjudicated by the Tender Committee on 16<sup>th</sup> January, 2014 within the tender validity period.

The Board observes that the Procuring Entity awarded the Tender to the **highest evaluated bidder** in line with its Tender Document Clause 2.24 as this was a concessionary tender and therefore the Procuring Entity's action is in line with Article 227(1) of the Constitution and Section 2 of the Act as awarding the tender to the highest evaluated bidder guaranteed maximum return to the Procuring Entity and in it promoted competition and maximum economy.

On the issue of Notification to the Applicant, the Procuring Entity submitted that it served notification to the Applicant by registered post and produced a photocopy document titled "*The Postal Corporation of Kenya List of Registered Postal packets, Registered and Ordinary Parcels Posted by.....*". The Applicant is listed as one of the entities to whom parcels were sent on 5<sup>th</sup> February 2014.

The Board invited the Applicant to look at the document and confirm that indeed its address was captured correctly. The Applicant's Counsel confirmed that the Applicant's name was the one listed under entry "*Registration or Parcel No. 00348129*". He also confirmed that the

Applicant's postal address on the list was correct. However he did not object to the document being produced as evidence in support of the assertion by the Procuring Entity that it had indeed served the Applicant with the Notification in compliance with the Act.

The Board notes that the Procuring Entity's late production of the postal record, which the Procuring Entity admitted it had in its possession even during the hearing of the preliminary objection, is inexcusable especially considering that the Procuring Entity had prior notice that notification was one of the pillars of the preliminary objection. Timely production of the record would have saved valuable time and costs for the Board, the Procuring Entity, the Applicant and the Interested Party. Be that as it may the Board finds that the Procuring Entity duly notified the Applicant of the outcome of the tender by registered post.

The net effect of all the above is that all the grounds of appeal adduced in grounds 1, 2, 3 & 4 of the Request for Review fail.

#### **Ground 5-Statement on loss**

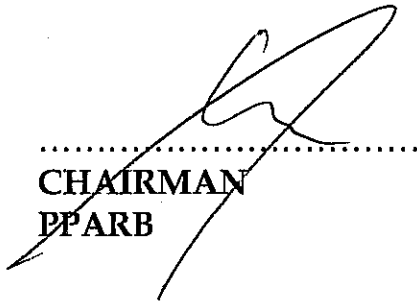
The Board notes that both the Applicant and the Procuring Entity claimed for costs in these proceedings based on the costs incurred / anticipated to be incurred in the course of this tender.

With regard to this issue of costs, the Board has held severally that tendering costs are commercial business risks to be borne by parties in


the course of doing business. Subsequently the claim for loss of expectations of business cannot be sustained as a ground of Review.

Taking into account all the foregoing, the Board hereby dismisses this Request for Review on all the grounds listed by the Applicant, with no orders on costs. The Board allows the Procuring Entity to proceed with the procurement process.

Dated at Nairobi on this 10<sup>th</sup> day of March, 2014.



.....  
CHAIRMAN  
PPARB



.....  
SECRETARY  
PPARB