

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 49/2011 OF 14TH DECEMBER, 2011 AND NO.
50/2011 OF 14TH DECEMBER, 2011

BETWEEN

AFRICA DUTY FREE LIMITED.....APPLICANT
DIPLOMATIC DUTY FREE LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Airports Authority dated 25th September, 2011 in the matter of Tender No. KAA/73/2010-2011 for Request for Proposal for the management of a Duty Free Shop at Kisumu Airport.

BOARD MEMBERS PRESENT

Mr. J.W. Wambua	-	Member (in chair)
Eng. C. A. Ogut	-	Member
Mr. S.M. Kioko	-	Member
Amb. C. M. Amira	-	Member
Mrs. L. G. Ruhiu	-	Member

IN ATTENDANCE

Mr. N. M. Soita - Secretariat
Ms. M.K. Namadi - Secretariat
Mr. L. Otieno - Secretariat (internship)

PRESENT BY INVITATION

Applicant, Africa Duty Free Limited & Diplomatic Duty Free Limited

Mr. O.M.T. Adala - Advocate, Odhiambo M.T. Adala Advocate
Mr. Abdul D. Hassan - Assistant, Odhiambo M.T. Adala Advocate
Mr. Francis Muia - Clerk, Odhiambo M.T. Adala Advocate

Procuring Entity, Kenya Airports Authority

Mr. Victor Arika - Legal Counsel
Mrs. Margaret Muraya - Project Manager
Mr. Jonah Biwott - Procurement Assistant

Interested Candidates

Ms. Mildred A. Okwomi - Advocate, Suzan General Trading
Ashman Sapra - Director, Maya Duty Free Ltd
Hina Parmar - Manager, Maya Duty Free Ltd
Maureen Mulee - Manager, Maya Duty Free Ltd

BOARD'S DECISION

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

BACKGROUND

Tender Notice

The tender for management of duty free shop at Kisumu airport was advertised in the daily Nation on 27th July 2011 and the standard Newspaper on 29th July 2011 and closed on 30th August 2011.

Closing/Opening:

As at the time of tender opening on 30th August 2011, eight (8) bidders had submitted their bids as shown in table 1 below;

Table 1: List of Tenderers

	Bidder	Amount quoted (Ksh)	Tender security
1	Maya Duty Free Ltd	988,915.00 P.A	Provided
2	Mount Gift Ltd	953,610.00 P.A	Provided
3	Green Gems Ltd	973,482.00 P.A	Provided
4	Africa Duty Free Ltd	264,296.00 P.M plus 100,000 fixed concession fee	Provided
5	Suzan General Trading	254,296.00 P.M plus 100,000 fixed concession fee	Provided
6	Silver Duty Free Ltd	Lot 1 - 100,000	Provided bankers

			cheque
7	Diplomatic Duty Free Ltd	244,296.00 P.M plus 100,000 fixed concession fee	Provided
8	Candy Shop Ltd	Lot 2 - 100,000	Provided bankers cheque

EVALUATION

The tenders were subjected to three stages of evaluation namely, Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

Preliminary Evaluation:

The tenders were evaluated for responsiveness based on the criteria stated in the tender document, Instructions to Tenderers, section II, Schedule of requirements section V - Evaluation criteria, and at the qualification Information (Standard Forms). Results of the Preliminary evaluation are as summarized in the table 2 below;

Table 2: Preliminary evaluation results

	Evaluation criteria	Bidder							
		1	2	3	4	5	6	7	8
1	Form of Tender filled	√	-	√	√	√	√	√	√
2	Original and copies of Bid documents (Original and 2 copies)	√	-	√	√	√	√	√	√
3	Company profile provided	√	-	√	√	√	√	√	√
4	Certificate of incorporation (copy)	√	-	√	√	√	√	√	√
5	Tax Compliance (copy provided)	√	-	√	√	√	√	√	√
6	Declaration, Litigation History & Business Questionnaire	√	-	√	√	√	√	√	√
7	Proof of access to liquid assets (Ksh.1 Million)	√	-	√	√	√	√	√	×
	Completeness of Tender	√	-	√	√	√	√	√	×

Bidder No.8 M/s Candy Shop Ltd was disqualified at this stage for failure to proof access to liquid assets to an equivalent of Ksh. 1Million.

The remaining seven (7) bidders met all the requirements and proceeded to Technical evaluation stage.

Technical Evaluation:

The responsive bids were further subjected to a technical evaluation based on the following parameters:

1. Product & Services offered
2. Design, Layout & Displays
3. Experience in managing similar facility
4. Manpower strength and structure
5. Implementation schedule

The results of technical evaluation were summarized as shown in the table 3 below.

Table 3: Results of Technical Evaluation

Evaluation Criteria	Bidder						
	(1) Maya Duty Free	(2)Mount Gift Ltd	(3)Green Gems Ltd	(4)Africa Duty Free	(5)Suzan General Trading	(6)Silver Duty Free	(7)Diplomatic Duty Free
Product & Services offered	√	√	√	x	x	√	x
Design, Layout & Displays	√	√	√	√	√	√	√

Experience in managing similar facility	x	x	x	x	x	√	x
Manpower strength and structure	√	√	√	√	√	√	√
Implementation schedule	√	√	√	√	√	√	√
Responsiveness	x	x	x	x	x	√	x

Six bidders were disqualified at this stage for failure to meet various requirements. Only one bidder, M/s Silver Duty Free Shop Ltd qualified and proceeded to Financial evaluation.

Table 4: FINANCIAL EVALUATION

Bidder	Price Schedule	Ranking
Silver Duty Free Shop Ltd	<ol style="list-style-type: none"> 1. Annual Concession fee of Ksh.100,000 payable quarterly in advance at Ksh. 25,000 2. Building rental fee at the prevailing rates 	1

RECOMMENDATIONS

The Evaluation Committee recommended that the tender be awarded to M/s Silver Duty Free Shop Ltd at a concession fee of Ksh.100,000 per

annum. In addition, M/s Silver Duty Free Shop Ltd will pay space rental fees at the prevailing rates.

TENDER COMMITTEE DECISION

The Tender Committee at its meeting No.165 held on 25th September, 2011 adopted the recommendations of the Evaluation Committee and approved award of the contract for management of Duty Free Shop at Kisumu Airport to M/s Silver Duty Free Ltd as follows:

- Concession fee of Kshs. 100,000.00 per annum
- Pay space rental fees at the prevailing rates

THE REVIEW

The Applicants M/s Africa Duty Free Limited and Diplomatic Duty Free Limited, lodged these Requests for Review against the decision of Kenya Airports Authority on 14th December, 2011 in the matter of Tender No. KAA/73/2010-2011 for Request for Proposal for the management of a Duty free shop at Kisumu Airport. The Applicants were represented by Mr. O.M.T. Adala, Advocate, while the Procuring Entity was represented by Mr. Victor Arika, Legal Counsel. The Interested Candidates present were M/s Suzan General Trading, represented by Ms. Mildred A. Okwomi, Advocate and M/s Maya Duty Free Ltd, represented by Ashman Sapra, Director.

The Applicants seeks for the following orders:

- a) The Board do allow the Applicants request.*
- b) The procuring Entity be compelled to retender afresh.*
- c) The Procuring Entity be compelled to pay the Applicants the costs arising from and incidental to the tender process.*
- d) The Procuring Entity be compelled to pay the costs to the Applicants arising from and incidental to this request.*
- e) The Board do make such and further orders as it may deem fit and appropriate to meet the ends of justice in the circumstances of this request.*

At the hearing it was agreed that the two cases be heard together, since the two Requests for Review raised the same issues against the same tender.

Preliminary Objection

The Procuring Entity filed a preliminary objection on 19th December 2011 and prayed for the following:

- a. The Applicants' Requests for Review be dismissed and to allow continuation of the procurement process.
- b. The Applicants to be condemned to pay the costs of the proceedings.
- c. The Procuring Entity requests that the Applicants requests be rejected and the Board to take any appropriate action against the Applicants for making such serious unsubstantiated allegations against the Procuring Entity.

The Procuring Entity submitted that the Requests for Review were time-barred as they were contrary to Regulation 73(2) (c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") which stipulates that Request for Review under the Public Procurement and Disposal Act 2005 (hereinafter referred "the Act") shall be made within fourteen (14) days of the notification. It argued that the Applicants had confirmed that they received the Notification letters on 28th November 2011, and therefore filing the Requests for Review on 14th December 2011, was out of time, as the Appeals window closed on 13th December 2011.

The Procuring Entity alleged that, as drafted and presented to the Board, the Requests for Review did not have the legal backing of Section 93 of the Act and the Regulations in so far as the jurisdiction of the Board is concerned. It further alleged that the Requests for Review did not plead any grounds on loss or damage suffered by the Applicants due to breach of the duty imposed on the Procuring Entity by Section 93(1) of the Act.

The Procuring Entity averred that none of the reliefs sought in the Request for Review should be granted, for the reasons that under section 98 of the Act, the power of the Board to grant any of the remedies sought is discretionary and that the appeals were not only frivolous and / or vexatious, but also mischievous, the same having been filed solely for the purpose of delaying the procurement process.

In response, the Applicants submitted that they received the Procuring Entity's letters of Notification on 28th November 2011, through an e-mail. They argued that, notification by e-mail is not proper notification as envisaged by Section 37 of the Act. They stated that the period of Fourteen (14) Days prescribed under the Act and the Regulations within which any bidder could file a Request for Review expired on 12th December 2011 which was the Jamhuri Day, a Public Holiday, observed in Kenya and accordingly the last date for filing the Requests was 13th December 2011. They submitted that the Applicants' authorized officer SANKAR ANANTHANARAYANAN, was out of Nairobi on business assignment but returned on 9th December 2011 when he signed the Affidavit in support of the Requests for Review.

They further submitted that after the Affidavit was duly signed, Mr. Adala, Counsel for the Applicants, who was up-country over the long weekend, returned to Nairobi at 3.30 P.M on Tuesday, 13th December 2011 to find his skeletal staff, as most of them had gone on leave, struggling to file the Requests for Review. The Applicants stated that, their Counsel rushed to the Board's office at 10th Floor, National Bank Building, to assist his staff and to ensure that the Applications were lodged with the Board timeously. They further stated that, Mr. Adala met the Officer in Charge of the Registry who prepared the Authorisation Voucher for payment into the Bank of the filing Fees which he had assessed at Kshs. 24,372.00.

They submitted that on rushing to the Bank to make the said payment, he

found the Bank doors had just been closed and his desperate pleas to the Bank Security to allow him to enter and make the payment was refused.

They stated that on Wednesday, 14th December, 2011 the Bank accepted his payment, thereby enabling the Board's Registry to open the Review Files No.49/2011 and No.50/2011 which had been submitted on 13th December, 2011 but could not be actioned due to the technicality of having to make payment in the Bank. The Applicants stated that while they were unreservedly sincerely apologetic to the Board for the technical hitch which was occasioned by time expiring on Public Holiday, they humbly and sincerely prayed that the Board acts humanely and compassionately by permitting the Requests for Review to proceed to the hearing on the substantive issues.

They stated that the Preliminary Objection on time bar or limitation, given the circumstances explained above, was not well founded and should be dismissed with costs or otherwise dismissed on such terms as may be prescribed by the Board.

The Applicants sought to rely on the Civil Procedure Rules 2010 which under Order 50, Rule 6 states as follows: *"where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made*

until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise".

The Applicants argued that pursuant to the Constitution of Kenya, 2010, Article 159 (2) (d), the Board is required while exercising Judicial Authority to be guided by the principle that:- **"Justice shall be administered without undue regard to procedural technicalities"**. They urged the Board to dismiss the Preliminary Objection and allow the Requests for Review to proceed to full hearing.

With regard to the issue of loss or damage suffered or due to be suffered by the Applicants, the Applicants argued that Section 93(1) of the Act provides as follows: ***"Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review in such manner as may be prescribed"***. They stated that, the Procuring Entity did not demonstrate any breach by the Applicants of any statutory requirement in the manner in which they had drafted and presented their Requests for Review. They further argued that there is no hard and fast rule prescribed either by the Act or the Regulations regarding any specific words or terms to be used in drafting and presenting a Request for Review.

In conclusion, they stated that there is no frivolity demonstrated by the Procuring Entity in the Applicants' Requests for Review. The Applicants therefore urged the Board to dismiss the Preliminary Objection and allow the matter to be heard on its merits.

On its part, the Interested Party, M/s Susan General Trading, stated that it had not received the letter of Notification on the award by the Procuring Entity. The other Interested Party, M/s Maya Duty Free Ltd, stated that it had received the e-mail notification on 19th October, 2011 and the Post Office registered mail, sometimes in November, 2011.

The Board has carefully considered the representations of the parties and the documents presented before it.

The Board notes that, one of the Applicants, Africa Duty Free Ltd admits that it received the Procuring Entity's Letter of Notification addressed to it on 28th November, 2011. The Board further notes the submission that being "a Sister Company" to the other Applicant, it checked its E-mail address and therein found a scanned copy of the Notification Letter from the Procuring Entity addressed to Diplomatic Duty Free Ltd.

In this regard, the Board finds that the Letters of Notification, one addressed to Africa Duty Free Ltd, and the other to Diplomatic Duty Free Ltd, were received by the two bidders on 28th November 2011, as

acknowledged by the Applicants. These are facts that are not disputed by any of the Parties.

The issues for the Board to determine are whether there were notifications of the awards in line with the requirements of the Act; whether the Requests for Review as filed by the Applicants on 14th of December 2011, were in time, pursuant to the Act; and lastly whether there are procedural technicalities that hindered the Applicants from filing their Applications on time.

The first issue that the Board directs itself to is to determine whether use of E-mail as done in the Notifications of the Awards in these two tenders is proper and adequate in line with the requirements of the Act.

The Board notes that, Section 37 of the Act requires that all communications from the Procuring Entity to the bidders be in writing. The Board further notes that Section 37(3) of the Act requires that any electronic communication by Procuring Entities, in place of written Communication must be approved in writing by the Public Procurement Oversight Authority (PPOA).

The Board further notes the Procuring Entity's submission that it sent the Letters of Notification through Registered Mail by Post-Office on November 2nd, 2011, although the Date Stamp by the Post Office was not clear, even after obtaining and examining the original receipt issued by

the Post Office and the Register of Mails thereof. The Board notes that the Procuring Entity wrote the Notification letters and scanned them, and thereafter attached them to an e-mail that was sent to the Applicants. In this regard, the Board finds that, the Procuring Entity used the e-mail as a way of transmitting the scanned Notification letter. The Board notes that the said letter was duly signed and hence authenticated. Consequently, the Board finds that the Notification letters as scanned and delivered through e-mail are in writing, as the e-mail was only used as a medium of delivery, which the Applicants duly acknowledged and used as the communication to trigger their process of filing the Requests for Review.

In its past decisions, the Board has consistently held that the burden of proof of evidence of delivery of Notifications to the bidders lies with the Procuring Entity. However, the Board finds that in these two cases, the Applicants admitted that they received the Letters of Notification on 28th November, 2011 and then embarked on the procedures of preparing to file the Requests for Review. The Board finds this to be adequate evidence that indeed the Applicants received the Notification Letters.

The next issue for the Board to make a finding on is whether the Requests for Review were filed on time or not. As noted above, the Board finds that the appeal window opened on 29th November, 2011, one day after the Applicants received their Notification Letters. Counting fourteen days from the 29th November 2011, the appeals window closed on 12th December, 2011.

The Board notes that the Requests for Review were filed on the 14th December, 2011. The Board further notes that the 12th December, 2011 was a public holiday and hence 13th December, 2011 was the last day for filing the Requests for Review. The Board has taken note of the submissions of the Applicants that they visited the Board's office on 13th December 2011, the last day they should have filed the Requests for Review.

The Board has noted the representations by the Applicants that, their counsel came to the Board's Offices on 13th December, 2011 in the afternoon, carrying the two Requests for Review, ready to file. The Board further notes the Applicants' allegation that upon presentation of the Requests for Review, and upon assessment by the Registry Officer, the Counsel was required to pay the filing fees on the two Requests for Review at the National Bank, Harambee Avenue, Ground Floor, the same building where Board has its offices.

In order for the Board to determine whether it could extend the Appeals window by one day, due to the alleged procedural technicalities, pursuant to Section 159(1) and (2) of the Constitution of Kenya, 2010; the Board has called for the Register where all persons who visit the Board's offices enter their particulars, to check and confirm whether the Applicants' Counsel indeed visited the Board's offices on the two days, as alleged. After perusing the said Register, the Board finds that on the 14th December, 2011 one Mr. Adala, an Advocate, Identity card Number 4825177 and also one

Ms. Awinja, Identity card Number 22500179, are listed as having entered the Board's offices, with the purpose of "Filing Requests for Review".

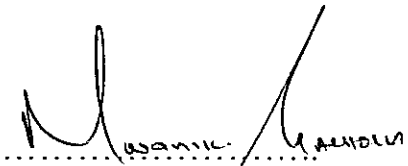
The Board notes that there is no indication that the Applicants' Advocates or any other official from the Applicants' firms entered their names in the Visitors Register maintained at the Board, on the 13th December, 2011. In this regard the Board finds no evidence to the effect that the Applicants' counsel entered the Board's offices on 13th December 2011. In addition, the Board also called for the Register of visitors kept at the entry of the National Bank House by the security and where as it was found that the same two persons listed above entered their names in the visitors Register on 14th December 2011, there is no entry for December 13th, 2011. Noting that there is no evidence to show that the Counsel or any other official of the Applicants entered the Board's offices on 13th December, 2011, the Board declines to grant the extension of the appeals window as requested by the Applicants.

Taking into account all the above, the preliminary objections as raised and argued by the Procuring Entity succeed.

Accordingly, the Board orders pursuant to Section 98 of the Act that the procurement processes continue.

On the issue of costs, the Board has on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

Dated at Nairobi on this 11th day of January 2012.



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

Chairman, PPARB



A large, stylized handwritten signature in black ink, written over a horizontal dotted line.

Secretary, PPARB