

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 137/2019 OF 29TH OCTOBER 2019 &
APPLICATION NO. 143 OF 16TH DECEMBER 2019
(CONSOLIDATED)

BETWEEN

KILINDINI TRAVEL CENTRE LIMITED.....1ST APPLICANT

AND

REGAL TOURS & TRAVEL LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AND

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

FCM TRAVEL SOLUTIONS.....1ST INTERESTED PARTY

AND

BASEL TOURS AND TRAVEL.....2ND INTERESTED PARTY

Review against the decision of Kenya Ports Authority in respect of Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Ambrose Ngare | -Member |
| 4. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
|---------------------|------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for Secretary |
| 2. Ms. Judy Maina | -Secretariat |

PRESENT BY INVITATION

1ST APPLICANT

-KILINDINI TRAVEL CENTRE LIMITED

- | | |
|-----------------------|--|
| 1. Mr. Zadrack Achola | -Advocate, Zed Achoki Hussein Advocates, LLP |
| 2. Mr. Pascal Mwasa | -Director |

2ND APPLICANT

- REGAL TOURS & TRAVEL LIMITED

- | | |
|---------------------|-----------|
| 1. Mr. Alex Inyangu | -Advocate |
|---------------------|-----------|

1ST AND 2ND RESPONDENTS

-KENYA PORTS AUTHORITY

- | | |
|----------------------|----------------------|
| 1. Mrs. Wamuyu Ikegu | -Advocate |
| 1. Mr. Moses Sirgoi | -Procurement Officer |

1ST AND 2ND INTERESTED PARTIES

1. Mr. Gideon Muturi -Advocate, Mwaniki Gachoka Advocates, LLP
2. Mr. Brian Mbabu -Advocate, Mwaniki Gachoka Advocates, LLP
3. Ms. Grace Karinga -Chief Executive Officer, Basel Tours & Travel Limited
4. Mr. Hamisi Guchu -FCM Travel Solutions

OTHER INTERESTED PARTY

1. Mr. Polycarp Moturi -African Bliss Limited

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/004/2019-20/PSM for Framework contract for provision of Air Travel Agencies (hereinafter referred to as “the subject tender”) in the *MyGov* newspaper of 9th July 2019 and the Procuring Entity’s website.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty-five (25) bids by the tender closing dated of 25th July 2019. A Tender Opening Committee recorded the details of the tenderers as follows:-

No.	Name of Bidder	Tender Security of Kshs.100,000.00		Financial Submission
		Bank	Validity Period	
1.	M/s Splash World Ltd	First CommunityBank	21st Aug,2019	Not Provided
2.	M/s Premier Safaris	Not Provided	Not Provided	Provided
3.	M/s FCM Travel Solutions	Bank of Africa	17th Nov,2019	Provided
4.	M/s Boma Travel Services Ltd	Amarco Africa	180 days	Provided
5.	M/s Travel Scope tours &travel Ltd	Monarch Insurance	180 days	Provided
6.	M/s Prime time Travel Ltd	Monarch Insurance	180 days	Provided
7.	M/s Moncal Travel &tours	Amaco Insurance	180 days	Provided
8.	M/s Regal Tour & Travel Ltd	CBA	22nd Dec,2019 and 30days	Provided
9	M/s Dreamz World Group	The Monarch Insurance	150 days	Provided
10	M/s. Magical Holdays	KCB	15th Nov,2019	Provided
11	M/s Kilindini Travel Centre	Credit Bank	25th Dec,2019 and 30 days	Provided
12	M/s Travel Shore Africa	Not Provided	Not Provided	Not Provided
13	M/s Zara's Travel	Monarch Insurance	180 days	Provided
14	M/s Satguru travel	Geminia Insurance Ltd	150 days	Provided
15	M/s Path International Ltd	Not Provided	Not Provided	Not Provided
16.	M/s ATS Travel	KCB	24th Dec,19	Not Provided
17	M/s Helna's Satans	Corporate Bank	21st Dec,2019	Provided
18	M/s Ideal Tours &Travel	Corporate Bank	21st Dec,2019	Provided

19	M/s Marok Safari's	Xplico Insurance	180 days	Provided
20	M/s Basel Tours & travel Ltd	Equity bank	25th Dec,2019	Provided
21	M/s Rosma Tours & Travel	African Merchant Insurance (AMACO)	180 Days	Provided
22	M/s Primate Tours Ltd	Rafiki Micro finance	19th Jan,2020	Provided
23	M/s Gramon Tours & Travel Ltd	Not Provided	Not Provided	Provided
24	M/s Bright Travel Agency	Rafiki Micro finance	23rd Jan,2020	Provided
25	M/s Africa Bliss Travel Ltd	Intra Africa Assurance	90 days	Provided

Evaluation of Bids

Having appointed an Evaluation Committee, bids were evaluated in the following stages:-

- i.** Detailed Preliminary Evaluation
- ii.** Detailed Technical Evaluation;
- iii.** Financial Evaluation.

1. Detailed Preliminary Evaluation

To determine the bidders' responsiveness, the twenty-five (25) bids were subjected to a Preliminary Evaluation on mandatory requirements in accordance with Appendix to Instructions to Tenderers on page 21 to 52 of the Tender Document.

The following firms (8 No.) were found to be Responsive

- 1 M/s FCM Travel Solutions
- 2 M/s Travel Scape Tours & Travel
- 3 M/s Regal Tours & Travel
- 4 M/s Magical Tours
- 5 M/s Kilindini Travel
- 6 M/s Helina's Safaris
- 7 M/s Basel Tours & Travel Ltd
- 8 M/s Ideal Tours & Travel

2. Detailed Technical Evaluation

Nine (9) bidders were found to be responsive, hence qualified to proceed to Technical Evaluation. Bidders who attained technical evaluation pass mark of 75% would then proceed to the next stage of evaluation.

At the end of this stage, the Evaluation Committee recommended the following Seven **(7) Firms** to proceed to the next stage of Financial Evaluation having attained the required minimum score of 75% cut off marks.

- M/s. FCM Solutions - 88.33%

- M/s. Regal Tours & Travel -81.56%
- M/s. Magical Holidays -84.46%
- M/s. Kilindini Travel Centre -91%
- M/s. Helina's Safaris -90%
- M/s. Basel Tours & Travel -75.78%
- M/s. Ideal Tours & Travel -92.5%

3. Financial Evaluation

The financial bids were opened on 19th September 2019. Only the financial envelopes of seven (7) firms were opened and read as below-.

NO	FIRM	Amount quoted in Kenyan Shillings			
		A	B	C	D
1	M/s. Regal Tours & Travel	450.00	500.00	750.00	1000.00
2	M/s. Magical Holidays	500.00	500.00	1000.00	1000.00
3	M/s. Kilindini Travel Centre	500.00	750.00	1000.00	1500.00
4	M/s. Helina's Safaris	500.00	500.00	600.00	800.00
5	M/s. FCM Solutions	399.00	399.00	499.00	499.00
6	M/s. Basel Tours & Travel	300.00	300.00	500.00	750.00
7	M/s. Ideal Tours & Travel	500.00	500.00	1000.00	1000.00

Recommendation

The Evaluation Committee then recommends award to the following lowest evaluated bidders as tabulated below;

No.	Category	Firm (Lowest Evaluated)	Quoted Price (Kshs.)
1	A	M/S. Basel Tours & Travel	300.00
2	B	M/S. Basel Tours & Travel	300.00
3	C	M/S. FCM Solutions	499.00
4	D	M/S. FCM Solutions	499.00

Professional Opinion

The Head of Procurement and Supplies having reviewed the Technical Evaluation Report and the Financial Evaluation Report, issued a Professional Opinion to the Accounting Officer dated 5th November, 2019 in which he opined that the subject procurement had satisfied the constitutional and statutory requirements of the Constitution and the Public Procurement & Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) respectively, and recommended the award of the Tender to M/s Basel Tours & Travel and M/s FCM Solutions for being the lowest evaluated bidders at their quoted bid rates on the basis of as and when need arises for a period of three years, in the respective categories in the above table.

Award and Notification

The Accounting Officer approved the award on 6th November, 2019. Subsequently on 15th November 2019, letters of notification of award to the successful bidders and letters of regret to the unsuccessful bidders were issued.

REQUEST FOR REVIEW NO. 137/2019

M/s Kilindini Travel Centre Limited lodged a Request for Review dated 28th November 2019 and filed on 29th November 2019 together with a Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Statement") sworn and filed on even date and a List of Documents dated and filed on even date.

M/s Kilindini Travel Centre Limited sought for the following orders in the Request for Review:-

- a) An order revoking the decision of the Accounting Officer in awarding Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services for being unlawful, null and void;**
- b) An order declaring the award of Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services to the Interested Party null and void;**
- c) An order directing the Procuring Entity to retender afresh for Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services;**
- d) An order compelling the Respondents to pay the costs to the Applicant arising from/and incidental to this Application; and**
- e) Such and further orders as the Board deems it fit to ensure that the ends of justice are met in the circumstances of this Request for Review.**

REQUEST FOR REVIEW NO. 143/2019

M/s Regal Tours & Travel Limited lodged a Request for Review dated and filed on 9th December 2019 together with a Statement in Support of the Request for Review sworn and filed on even date.

M/s Regal Tours & Travel Limited sought for the following orders in the Request for Review:-

- a) An order nullifying the award to M/s Basel Tours & Travel and M/s FCM Solutions;**
- b) An order cancelling Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services in its entirety;**
- c) Any other relief that the Board deems fit and just to grant;**
- d) An order for costs of the review.**

THE PRELIMINARY OBJECTION

The Respondents raised a Preliminary Objection against the Board's jurisdiction to entertain Request for Review No. 143 of 2019 for the reason

that the said Request for Review failed to meet the statutory timeline under section 167 (1) of the Act which states as follows:-

"Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

The Procuring Entity contended that Request for Review No. 143 of 2019 was filed outside the statutory period of fourteen (14) days stipulated under section 167 (1) of the Act.

The Board, having heard submissions by all parties on the Procuring Entity's Preliminary Objection proceeded to find that Request for Review No. 143 of 2019 met the threshold of section 167 (1) of the Act.

Accordingly, the Board dismissed the Preliminary Objection with no order as to costs and proceeded with the hearing of the Request for Review immediately after its ruling on the Preliminary Objection.

CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS

When the two Request for Review applications came up for hearing, the Board observed that both applications arise from the same tender, that is, Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services, being procured by the same Procuring Entity.

As a result, the Board, in giving directions as to how the two Request for Review applications would proceed, addressed its mind to the provision of Regulation 82 of the Public Procurement and Disposal Regulations, 2006, which provides as follows:-

"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review."

There being no objection from any of the parties present for the hearing, the Board consolidated Request for Review No. 137 of 2019 with Request for Review No. 143 of 2019 as one Request for Review application. Henceforth, the parties to the consolidated Request for Review were identified as follows:-

- | | |
|---|-------------------------------|
| i. Kilindini Travel Centre Limited | - "1 st Applicant" |
| ii. Regal Tours & Travel Limited | - "2 nd Applicant" |

- iii. The Accounting Officer, Kenya Ports Authority - "1st Respondent"
- iv. Kenya Ports Authority - "2nd Respondent"
- v. FCM Travel Solutions - "1st Interested Party"
- vi. Basel Tours and Travel - "2nd Interested Party"

During the hearing of the Request for Review, the 1st Applicant was represented by Mr. Zadrack Achoki on behalf of the firm of Zed Achoki Hussein Advocates, LLP while the 2nd Applicant was represented by Mr. Alex Inyangu. The 1st and 2nd Respondents were represented by Mrs. Wamuyu Ikegu on behalf of Addraya Dena Advocate, the 1st and 2nd Interested Parties were represented by Mr. Gideon Muturi on behalf of the firm of Mwaniki Gachoka & Company Advocates.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the 1st Applicant, Mr. Achoki, fully relied on the 1st Applicant's Request for Review and Statement.

Mr. Achoki submitted that the Request for Review is based on the fact that the Procuring Entity failed to adhere to the provisions of sections 79 (1) and 80 (2) of the Act in its evaluation of the 1st Applicant's bid. According to Mr. Achoki, the instructions given to bidders were that, they were required to submit an original tender document and 2 copies of the Technical and Financial bids respectively.

Counsel submitted that once Technical Evaluation was concluded, the 1st Applicant was invited for the Financial opening wherein the 1st Applicant noted that the 1st Interested Party only presented one copy of its Financial bid despite the Tender Document at clause 1.6 and clause 1.7 of Section II. Instructions to Tenderers requiring bidders to submit 2 copies of the original, in addition to the original. In Counsel's view, the Procuring Entity awarded the subject tender to the 1st Interested Party despite having failed to meet a mandatory requirement in the Tender Document.

Counsel submitted that the 1st Applicant raised the issue of the 1st Interested Party's alleged non-compliance with a mandatory requirement at the time of Financial Opening but was advised that the Chairperson of the Evaluation Committee would forward the issue raised for consideration. Further, Counsel submitted that the Applicant requested for the minutes of the said opening, but that the Procuring Entity declined to supply the same to the Applicant. As a result, the 1st Applicant addressed a letter to the Procuring Entity on 19th November 2019 regarding the issue of financial evaluation on the 1st Interested Party and that the Procuring Entity responded to the said letter on 22nd November 2019.

According to Counsel, the Procuring Entity, through its letter dated 22nd November 2019, it informed the 1st Applicant that it could only disclose the successful tenderer upon concluding evaluation and awarding the tender by notifying bidders in accordance with section 87 (3) of the Act, and not

to supply bidders with a copy of the minutes of opening of tenders. It was Counsel' contention that clause 2.18.4 of the Tender Document provided that the Procuring Entity would supply minutes of tender opening upon request by a bidder, hence ought to have been accorded the said minutes.

Given that the 1st Applicant took the view that the award of the tender to the 1st Interested Party was not lawful, Counsel urged the Board to declare the said award null and void.

On his second ground, Counsel submitted that the Procuring Entity extended the tender validity period of the subject tender long after it had already expired. To support this view, Mr. Achoki submitted that the tender opening date of the subject tender was on 25th July 2019 and the said tender validity period was to run for 90 days from tender opening date. Mr. Achoki then submitted that the Procuring Entity extended the tender validity period on 5th November 2019 long after it had already expired. He made reference to section 88 (1) of the Act, which in his view, requires the accounting officer to extend the tender validity period before its expiry and that the subject tender ought to have been extended before 23rd October 2019, being the date that it was supposed to lapse when 90 days from 25th July 2019 are taken into account.

Mr. Achoki took the view that the Procuring Entity awarded the subject tender outside its tender validity period, hence, the award to the 1st

Interested Party contravenes provisions of the law and the same ought to be nullified.

In conclusion, Counsel urged the Board to allow the Request for Review with costs to the 1st Applicant and to direct the Procuring Entity to re-tender for the services under the subject tender.

2nd Applicant's Submissions

In his submissions, Counsel for the 2nd Applicant, Mr. Inyangu, fully relied on the 2nd Applicant's Request for Review and Supporting Statement.

Mr. Inyangu submitted that the 2nd Applicant was aggrieved by the award criteria used by the Procuring Entity in determining the bidder to be awarded the subject tender. Counsel referred the Board to clause 2.24.2 of the Tender Document and submitted that the Tender Document provided that award of the subject tender would be made to the lowest tenderer who has been determined to be qualified to perform the works of the subject tender. He then submitted that the letter of notification sent to the 2nd Applicant by the Procuring Entity, gives the reasons why the Applicant's bid was non-responsive and further specifies that the successful bidders were the 1st Interested Party and the 2nd Interested Party, but fails to specify the category under which award of the subject tender was made to the aforementioned bidders.

Mr. Inyangou took the view that, in arriving at the decision awarding the tender to the 1st and 2nd Interested Parties, the Procuring Entity computed the average tender price on all the categories in the subject tender, as outlined on page 39 of the Tender Document.

The Board referred Mr. Inyangou to provisions of the Tender Document which specified that award of the tender would be made to the lowest evaluated tenderer per category as expressed in the Appendix to Instructions to Tenderers. On further enquiry by the Board, Counsel admitted that provisions of the Appendix to Instructions to Tenderers prevail in case of a conflict with other provisions in the Tender Document.

1st and 2nd Respondents' Submissions

In her submissions, Counsel for the Respondents, Mrs. Ikegu, fully relied on the Procuring Entity's Response and Replying Affidavit.

Mrs. Ikegu referred the Board to clause 2.11 of Section II. Instructions to Tenderers of the Tender Document which required bidders to submit to envelopes, that is, Envelope A, being the Technical Envelope and Envelope B, being the Financial Envelope but that the Tender Document did not specify how many copies of Envelope B, a bidder ought to submit to the Procuring Entity.

Counsel then submitted that pursuant to section 67 (1) (c) and (d) read together with section 78 (8) of the Act, a procuring entity is under no obligation to provide the minutes of tender opening to bidders, but that the Procuring Entity may provide a copy of the Tender Opening Register, which in any case, was provided to the Applicant as can be evidenced by the letter dated 22nd November 2019.

In respect of whether the Procuring Entity awarded the subject tender within the tender validity period, Mrs. Ikegu submitted that the Accounting Officer approved extension of the tender validity period of the subject tender on 23rd October 2019, and that bidders were notified of such extension subsequently thereafter in the letter dated 5th November 2019. Counsel therefore urged the Board to find that the 1st Applicant's contention that the tender was awarded outside the tender validity period is an assertion that lacks merit, since in Counsel's view, the Procuring Entity complied with the provisions of section 87 (1) of the Act.

In respect of the ground raised by the 2nd Applicant, Mrs. Ikegu referred the Board to clause 2.24 of Section II. Instructions to Tenderers of the Tender Document as amended by the Appendix to Instructions to Tenderers, which specified the award criteria to be used by the Procuring Entity.

She further made reference to clause 2.22 at page 24 of the Tender Document which in her view, provides that award of the tender shall be made to the lowest evaluated bidder per category bidden for by a respective bidder. She urged the Board to consider the Replying Affidavit of the Respondents which reproduces the award criteria used by the Procuring Entity as provided for in the Tender Document.

In conclusion, Counsel urged the Board to dismiss the consolidated Request for Review with costs to the Procuring Entity.

1st and 2nd Interested Parties' Submissions

In his submissions, Counsel for the 1st Interested Party, Mr. Muturi, fully relied on the 1st and 2nd Interested Party's respective Replying Affidavits and documents attached thereto.

On the first issue raised by the 1st Applicant, that is, whether the 1st Interested Party did not comply with a mandatory requirement of the Tender Document, that is, to submit three bids; 2 copies and 1 original.

According to Counsel, the 1st Interested Party complied with this requirement, in that, in terms of Envelope B, the Interested Parties provided 1 Original bid and not copies.

On the second issue of the tender validity period of the subject tender, Counsel submitted that initially, the Tender Document specified a period of 90 days, and that pursuant to section 88 (1) of the Act, the Procuring Entity extended that period on 23rd October 2019 and notified bidders of the said extension in its letter dated 5th November 2019.

On evaluation of tenders, Mr. Muturi referred the Board to the Opening Phrase of the Appendix to Instructions to Tenderers of the Tender Document and submitted that the Tender Document already specified that in the event of a conflict, provisions of the Appendix to Instructions to Tenderers prevail. He then made reference to clauses 2.24 and 2.22 (3) of Section II. Instructions to Tenderers of the Tender Document which specified that financial evaluation shall be undertaken per category and that such categories were outlined at page 39 of the Tender Document. To buttress this point, Counsel referred the Board to the letter of award issued to the 1st Interested Party, which according to Counsel, specified that award was made to the 1st Interested Party in categories (c) and (d) in addition to the price at which such categories were awarded to the said bidder.

In respect of categories (a) and (b), Counsel referred the Board to the letter of award issued to the 2nd Interested Party and submitted that the same specifies the aforementioned categories were awarded to the 2nd Interested Party, in respect of the price quoted per category. In essence,

Counsel urged the Board to note that no average prices were arrived at by the Procuring Entity in awarding the tender to the Interested Parties, in the respective categories.

In conclusion, Counsel urged the Board to dismiss the consolidated Request for Review with costs, since according to Counsel, the Procuring Entity undertook the subject procurement process in accordance with Article 227 (1) of the Constitution.

1st Applicant's Rejoinder

In a rejoinder, Mr. Achoki for the 1st Applicant referred the Board to clause 2.1.3.2 of Section II. Instruction to Tenderers of the Tender Document wherein the Procuring Entity informed bidders that minutes of the tender opening would be prepared and forwarded to bidders, thus making a commitment to supply the same upon request. It was Counsel's view that the Procuring Entity is bound by provisions of its Tender Document and could not later depart from the said provisions.

On extension of the tender validity period, Mr. Achoki submitted that extension of the tender validity period was done through the Procuring Entity's internal procedures without involving bidders, hence took the view that such process failed to meet the threshold of a transparent

procurement process as one of the principles enshrined in Article 227 (1) of the Constitution.

In conclusion, Mr. Achoki urged the Board to nullify the award made to the Interested Parties and to order the Procuring Entity to re-tender for the services in the subject tender.

2nd Applicant's Rejoinder

In a rejoinder, Counsel for the 2nd Applicant referred the Board to the letter of notification issued to the 2nd Applicant by the Procuring Entity and submitted that the same only informed the 2nd Applicant why its bid was not successful, but failed to specify the categories under which award of the subject tender was given.

In conclusion, he urged the Board to make a determination on the Procuring Entity's alleged failure to specify the categories under which award was given and allow the Request for Review as prayed by the 2nd Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and oral submissions of the parties.

The issues for determination are as follows:-

- I. Whether the Procuring Entity evaluated the 1st Interested Party's financial bid in accordance with provisions of the Tender Document;***
- II. Whether the Procuring Entity awarded the subject tender in accordance with the criteria set out in clause 2.24 (b) read together with provisions of the Appendix to Instructions to Tenderers of the Tender Document and Article 227 (1) of the Constitution;***
- III. Whether the Tender Validity period of the subject tender exists, if not, what are the appropriate orders to grant in the circumstances?***

The Board now proceed to address the issues framed for determination as follows:-

On the first issue, the Board observes that the 1st Applicant was aggrieved by the Procuring Entity's decision in respect of the following two limbs:-

- 1. Failure to supply the 1st Applicant with a copy of the minutes of financial opening;*
- 2. An alleged failure by the Procuring Entity to evaluate the 1st Interested Party's bid in accordance with provisions of the Tender Document.*

On the first limb of the first issue, clause 2.18.3 of Section II. Instructions to Tender Document provides that:-

"The Procuring Entity will prepare minutes of the tender opening which will be submitted to the tenderers that signed the tender opening register and will have made the request"

Pursuant to this provision, the 1st Applicant submitted that on 19th November 2019, it wrote to the Procuring Entity requesting for a copy of the tender opening minutes for the subject tender. In its response letter dated 22nd November 2019, the Procuring Entity declined to grant the 1st Applicant's request and informed it that pursuant to section 87 (3) of the Act, the Procuring Entity can only disclose the successful tenderer and the reasons why the 1st Applicant's bid was non-responsive.

The Board having considered parties' submissions on this issue, addressed its mind to the provisions of the Act on tender opening which provide as follows:-

"78. Opening of tenders

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a) the committee shall have at least three members; and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security.

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) Each member of the tender opening committee shall—

(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

(10) The tender opening committee shall prepare tender opening minutes which shall set out—

(a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.”

The above provisions explain the procedure of tender opening, the responsibilities of a tender opening committee, including the obligation to prepare tender opening minutes.

On its part, section 67 (1) of the Act states as follows:-

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations"

The Board observes that section 67 (1) of the Act provides categories of information within a procuring entity's custody that ought not be disclosed, if such disclosure is likely to prejudice legitimate commercial interests, intellectual property rights or inhibit competition as specified in section 67 (1) (b) above.

However, section 67 (4) read together with section 68 (2) (d) (iii) of the Act provides as follows:-

"67 (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2) (d) (iii) [that is section 68 (2) (d) (iii)].

68 (1);

(2);

(a);

(b);

(c);

(d) for each tender, proposal or quotation that was submitted—

(i);

(ii); and

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed"

It is the Board's considered view that a procuring entity does not have an obligation to disclose the minutes prepared after financial opening. However, if such a bidder has lodged a Request for Review, the Board upon considering an application by such bidder to be supplied with a summary of the proceedings of the opening of tenders, may direct that such a summary be supplied to the bidder, who would in those circumstances, be an Applicant seeking a review.

Even though the Tender Document states that tender opening minutes would be supplied upon request by a bidder, the Board observes that where provisions of the Tender Document are in conflict with the Act, the provisions of the Act prevail.

The Board finds that the Procuring Entity was under no obligation to supply minutes of the financial opening to the 1st Applicant at the time the request for the said minutes was made, since at that time, the 1st Applicant was not "an Applicant seeking a review" as required by section 67 (4) read together with section 68 (2) (d) (iii) of the Act.

On the second limb of the first issue, the Board notes that the 1st Applicant challenged the Procuring Entity's decision awarding the subject tender to the 1st Interested Party. According to the 1st Applicant, the 1st Interested

Party failed to meet the requirements of the Tender Document, in so far as submission of Envelope B is concerned. According to the 1st Applicant, the 1st Interested Party failed to submit 1 original bid and two copies as part of the 1st Interested Party's Envelope B.

During the hearing, all parties were in agreement that the subject tender was a two-enveloped tender. This position is reiterated in clause 2.11 of the Appendix to Instructions to Tenderers of the Tender Document which provides as follows:-

"Tenders shall be submitted in a two-envelope system (Envelope A-Technical submission and Envelope B-Financial Submission

The tender prepared by the tenderers shall comprise of a Technical Submission, "Envelope A", and a Financial Submission," Envelope B" sealed in two separate envelopes clearly marked Envelope A and Envelope B. Envelope A shall contain NO indication of the tender price or other financial information of the bid"

The Board studied the Tender Document to establish the specific provisions in so far as Technical submission as Envelope A and Financial submission

as Envelope B, to determine whether the Procuring Entity rightfully evaluated the 1st Interested Party.

Firstly, Clause 1.7 of Section I. Invitation to Tender of the Tender Document provides that:-

"All Tenders in one original plus (two-2 copies), properly filled in, and enclosed in plain envelopes must be delivered to the address below and addressed as follows:-

Tender No. KPA/004/2019-20/PSM

FRAMEWORK CONTRACT FOR PROVISION OF AIR TRAVEL AGENCY SERVICES

"DO NOT OPEN BEFORE 1000 HOURS ON THURSDAY 25TH JULY 2019"

Clause 2.14.1 of Section II. Instructions to Tenderers of the Tender Document states that:-

"the tenderer shall prepare two copies of the tender, clearly/markings each "ORIGINAL TENDER" and "COPY OF TENDER" as appropriate. In the event of any discrepancy between them, the original shall govern"

Further, clause 2.15.1 of Section II. Instructions to Tenderers of the Tender Document provides as follows:-

"The tenderer shall seal the original and each copy of the tender in separate envelopes, duly marking the envelopes as "ORIGINAL" and "COPY". The envelopes shall then be sealed in an outer envelope."

The Board observes that, despite the Appendix to Instructions to Tenderers of the Tender Document having already specified that bidders must submit two envelopes, that is, Envelope A as the Technical submission and Envelope B as the Financial submission, the three provisions cited above, that is, clause 1.7 of Section I. Invitation to Tender and clauses 2.14.1 and 2.15.1 of Section II. Instructions to Tenderers, failed to specify whether submitting two copies and one original of the tender relates to one of the two envelopes or to both envelopes.

In that regard, the Board studied provisions of the Appendix to Instructions to Tenderers to establish whether there are any specific provisions relating to the two envelopes. It is important to note that the introductory clause of the Appendix to Instructions to Tenderers of the Tender Document is instructive on the purpose of the provisions therein as it states thus:-

"The following information for procurement of services shall complement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to tenderers"

This means, in interpreting the provisions in the instructions to tenderers, the Board must consider whether a conflict exists between the provisions of the instructions to tenderers and the provisions of the appendix. Given that the Invitation to Tender is still part of the Tender Document, the Board observes that the provisions in the Invitation to Tender should also be taken into consideration when interpreting the appendix to instructions to tenderers. If a conflict exists, then the provisions in the appendix will prevail.

The Board studied the provisions in the appendix and notes that, in respect of Envelope A, clause 2.11 thereof states as follows:-

"Envelope A shall contain the Technical submission and shall be clearly marked "Envelope A-Technical Submission

Envelope A shall contain NO indication of the tender price or other financial information of the bid and:-

"1.;"

2.;
3.;
4. ***Shall be submitted in one original and two copies of the original (Mandatory)”***

The provisions in the appendix proceed to outline other documents to be provided by a bidder in its Envelope A running through pages 22 and 23 of the Tender Document.

At page 23 of the Tender Document, the appendix specifies provisions relating to Envelope B- Financial Submission as follows:-

"The prices for services offered and rates charged to include all applicable taxes

The inner and outer envelope shall:

- i) be addressed to the Authority at the address given in the Invitation to Tender...***
- (ii) bear tender number and date in the Invitation to Tender and the words "DO NOT OPEN BEFORE 1000 HOURS ON THURSDAY, 25TH JULY 2019"***

The inner envelope shall also indicate the name and address of the tenderer to enable the tender to be returned unopened in case it is decaled "late"

If the outer envelope is not sealed and marked as required, the Authority will assume no responsibility for the tender's misplacement or premature opening"

The Board studied the remaining provisions in the appendix and the Tender Document in its entirety but did not find any provision stating whether the Procuring Entity required Envelope B to be submitted as an original together with a specified number of copies. The Tender Document only specified 1 original and two copies in so far as Envelope A-Technical Submission is concerned.

During the hearing, the Board asked Counsel for the 1st Interested Party to confirm what the 1st Interested Party provided in respect of Envelope B-Financial Submission. In response, Counsel initially submitted that the 1st Interested Party submitted one original and two copies. However, upon being prompted to consult his client, Counsel later changed his position and submitted that the 1st Interested Party only submitted one original.

The Board would like to note that Counsel for the 1st Interested Party initially gave an incorrect position which would have misled the Board.

However, from the Procuring Entity's confidential file, the Board notes that it is only one original Financial bid of the 1st Interested Party that was submitted by the Procuring Entity. Furthermore, the Procuring Entity and the 1st Interested Party upon being questioned by the Board, both confirmed that the 1st Interested Party only submitted one original bid comprising of Envelope B-Financial Submission.

Having considered the provisions of the Tender Document, and having established that the provisions in the appendix modified the provisions in the instructions to tenderers, the Board finds that bidders were only required to submit one original Financial Bid in so far as Envelope B-Financial Submission is concerned.

Given that the 1st Interested Party fully complied with this requirement, the Board finds that the Procuring Entity evaluated the 1st Interested Party's bid in accordance with the criterion set out in page 23 of the Tender Document, which is specific to Envelope B-Financial Submission.

On the second issue, the Board proceeds to make the following findings:-

The Board notes that the 2nd Applicant confirmed that the Procuring Entity informed it of the reasons why its bid was found non-responsive, but did not challenge the said reasons. The 2nd Applicant only urged the Board to

make a determination whether the Procuring Entity awarded the subject tender in accordance with the award criterion set out in the Tender Document.

It is not in dispute that page 39 of the Tender Document outlined the category of the services to be executed in the subject tender as follows:-

Item	Category	Description	Service Charge	Remarks if any
1	A	Air Ticketing Services for domestic air travel		
2	B	Air Ticketing for East Africa Air Travel		
3	C	Air Ticketing Services for Regional (rest of Africa) air travel		
4	D	Air Ticketing for International air travel		

The Board studied the financial proposals of the two successful bidders, that is, the Interested Parties herein and notes that both successful bidders bid for all categories listed hereinabove, as can be seen at page 3 of the 1st Interested Party's financial proposal and page 162 of the 2nd Interested Party's financial proposal.

On the other hand, the letter of notification dated 15th November 2019 that was issued to the 2nd Applicant contains the following details:-

"Reference is made to your participation in the captioned tender

This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because you were not the lowest evaluated bidder

The successful bidder in regard to this tender is M/s Basel Tours & Travel and M/s FCM travel Solutions

Also attached herewith, kindly find your tender security of Kshs. 100,000.00 from Commercial Bank of Africa and un-opened financial bid for your record.

We thank you for your participation in the tender and look forward to working with you in future. Should you require any further clarification, please do not hesitate to contact the office of the undersigned"

From the above letter, the Procuring Entity disclosed the reason why the 2nd Applicant's bid was not successful and further disclosed the successful

bidders, save that the categories under which award to the two successful bidders was made, was not specified. The 2nd Applicant took the view that the Tender Document required the Procuring Entity to award the subject tender to the lowest evaluated bidder, yet, contrary to this award criterion, the Procuring Entity arrived at an average price to award the subject tender.

In order to ascertain whether or not the 2nd Applicant's allegations have merit, the Board studied the provisions of the Tender Document to establish the manner in which financial evaluation would be conducted and the award criteria specified therein. To begin with, clause 2.22 (iii) of the Appendix to Instructions to Tenderers of the Tender Document states that:-

"Financial Evaluation- lowest evaluated tender price per category"

The Award Criteria is further provided for in three separate clauses of the Tender Document as follows:-

- At Clause 2.24.3 of Section II. Instructions to Tenderers of the Tender Document it is stated as follows:-

"Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose

tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"

- At Clause 2.24 of the Appendix to Instructions to Tenderers of the Tender Document, it is provided thus:-

"Award of tender is to the lowest evaluated tender per category"

- The foot of Form 2 of Section VI. Standard Forms of the Tender Document states as follows:-

"Award of contract shall be to the lowest evaluated bid price per category"

In respect of financial evaluation, the Board studied the Procuring Entity's Financial Evaluation Report received on 24th October 2019 by its Head of Procurement and Supplies, which report forms part of the Procuring Entity's confidential file and notes that, the Financial Evaluation Committee reproduced the prices quoted per category, by all bidders who made it to Financial Evaluation. These prices were recorded as follows:-

NO	FIRM	Amount quoted in Kenyan Shillings per category			
		A	B	C	D
1	M/s Regal Tours & Travel	450.00	500.00	750.00	1000.00
2	M/s Magical Holidays	500.00	500.00	1000.00	1000.00
3	M/s Kilindini Travel Centre Limited	500.00	750.00	1000.00	1500.00
4	M/s Helina's Safaris	500.00	500.00	600.00	800.00
5	M/s FCM Solutions	399.00	399.00	499.00	499.00
6	M/s Basel Tours & Travel	300.00	300.00	500.00	750.00
7	M/s Ideal Tours & Travel	500.00	500.00	1000.00	100.00

The Financial Evaluation Committee then proceeded to recommend award to the bidders determined to be the lowest evaluated bidders per category, and tabulated their prices as hereunder:-

NO	CATEGORY	FIRM (LOWEST EVALUATED)	QUOTED PRICE (KSHS)
1	A	M/s Basel Tours & Travel	300.00
2	B	M/s Basel Tours & Travel	300.00
3	C	M/s FCM Solutions	499.00
4	D	M/s FCM Solutions	499.00

Having studied the Financial Evaluation Report, the Board notes that, at no point did the Financial Evaluation Committee compute average prices of any of the bidders. On the contrary, the Financial Evaluation Committee

determined the lowest evaluated bidders per category and proceeded to recommend such bidders for award of the subject tender as;

- Categories A & B -2nd Interested Party; and
- Categories C & D -1st Interested Party

In line with the award criteria of the subject tender, the Procuring Entity's Accounting Officer proceeded to award the subject tender per category to the 1st Interested Party in Categories C & D and the 2nd Interested Party in Categories A & B.

Article 227 (1) of the Constitution provides that:-

"When a State Organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

Having studied the confidential documents submitted by the Procuring Entity, it is the Board's considered view that the Procuring Entity complied with the award criteria previously disclosed in the Tender Document to all bidders who participated in the subject tender, for them to be cognizant of the manner in which financial evaluation and award of the tender would be conducted. This in our view, demonstrates that the Procuring Entity acted in a transparent and accountable manner noting that no new award

criterion was introduced by the Procuring Entity as alleged by the 2nd Applicant.

Accordingly, the Board finds that the Procuring Entity awarded the subject tender in accordance with the criteria set out in clause 2.24 (b) of Section II. Instructions to Tenderers read together with provisions of the Appendix to Instructions to Tenderers of the Tender Document and Article 227 (1) of the Constitution.

On the third issue for determination, the Board observes that all parties to this Request for Review agree that the tender validity period of the subject tender was specified in clause 2.13.1 of Section II. Instructions to Tenderers of the Tender Document as follows:-

"Tenders shall remain valid for 90 days or as specified in the invitation to tender after date of tender opening prescribed by the Procuring Entity, pursuant to paragraph 2.18. A tender valid for a short period shall be rejected by the Procuring Entity as non-responsive"

The Board studied clause 2.18 which is referenced by clause 2.13.1 above and notes the following:-

"The Procuring Entity will open all tenders in the presence of tenderers' representatives who choose to attend, at (day, date and time of closing specified in the Invitation to Tender) and in the location specified in the invitation to tender. The tenderers' representatives who are present shall sign a register evidencing their attendance"

Since the above provision does not specify the tender opening date, the Board further considered clause 1.7 of Section I. Invitation to Tender which specifies that the tender opening date of the subject tender was scheduled to take place on 25th July 2019. The Tender Opening Minutes dated 25th July 2019 also confirm that tenders were opened on the aforementioned date.

This therefore means that the tender validity period of the subject tender was supposed to run for 90 days after the 25th day of July 2019 and would therefore lapse on 23rd October 2019. However, upon studying the Procuring Entity's confidential file, the Board notes that on 22nd October 2019, the Acting Head of Procurement and Supplies addressed a letter to the Procuring Entity's Managing Director stating as follows:-

"RE: EXTENSION OF TENDER VALIDITY PERIOD

Tender No. KPA/004/2019-20/PSM, Framework Contract for Provision of Air Travel Agency Services

The Authority invited for the above requirement through Open Tendering process in MyGov Newspaper of 9th July 2019 and was also posted on the website

Bid submission were opened on 25th July 2019 and twenty-five (25) bidders participated and the tender is currently under evaluation.

Pursuant to clause 88 of the Public Procurement and Asset Disposal, 2015 we are requesting for your approval to extend the tender validity period for a further thirty (30) days with effect from 23rd October 2019 to enable us complete the remaining part of the process”

The Procuring Entity’s Managing Director approved the above request for extension of the tender validity period on 23rd October 2019. The Board notes that on 5th November 2019, the Procuring Entity addressed letters to all bidders who participated in the subject procurement process stating as follows:-

"RE: EXTENSION OF BID VALIDITY PERIOD

**TENDER NO. KPA/004/2019-20/PSM, FRAMEWORK
CONTRACT FOR PROVISION OF AIR TRAVEL AGENCY
SERVICES”**

Reference is made to your participating in the captioned tender.

Pursuant to clause 88 (3) of the Public Procurement and Asset Disposal Act, 2015, you are hereby requested to extend your tender validity period by additional thirty days with effect from 23rd October, 2019

Kindly acknowledge receipt of this communication and give us your response within three (3) days from the date of this letter.

The Board notes that the dispute before it in relation to the third issue for determination is in respect of the 1st Applicant's contention that the Procuring Entity failed to seek bidders' consent before extension of the tender validity period given that a provision in the Tender Document requires such consent.

This prompted the Board to interrogate the said provision in comparison with provisions of the Act on tender validity.

Section 88 of the Act provides that:-

- "(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***
- (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1)."***

On its part, clause 2.13.2 of Section II. Instructions to Tenderers of the Tender Document provides as follows:-

"In exceptional circumstances, the Procuring Entity may solicit the tenderer's consent to an extension of the period of validity. The request and the responses thereto shall be made in writing. The tender security provided under paragraph 2.12 shall also be suitably extended. A tenderer may refuse the request without forfeiting its tender security. A tenderer granting the request will not be required nor permitted to modify its tender"

The Board observes that section 88 (1) of the Act does not recognize extension of the tender validity period as a joint effort between a procuring entity and bidders. On the contrary, an accounting officer of a procuring entity has the discretion to extend such period before its expiry. Subsection (2) thereof then requires the accounting officer to give written notice of such extension to all bidders who participated in the tendering process.

Regulation 41 (5) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") further states that:-

"The procuring entity shall, where it extends the tender validity period, request the tenderers' to extend the period of validity of their tender securities"

It is the Board's considered view that Regulation 41 (5) of the 2006 Regulations supports the main reason why bidders are notified of the extension of the tender validity period, so that, bidders can in turn extend the period of their tender securities. It is worth noting that ordinarily, bidders submit a tender security that would lapse (30) days after the date the tender validity period is supposed to lapse. It is therefore necessary that upon extension of the tender validity period, a procuring entity notifies such bidders, in good time, of such extension so that they can also extend the validity of their tender securities.

However, in our view, section 88 of the Act does not expressly require bidders' consent in so far as a procuring entity's decision whether or not to extend the tender validity period is concerned.

Having established that the tender validity period of the subject tender was extended by the Procuring Entity for a further 30 days from 23rd October 2019, the question that the Board must now address is when would such period lapse after the said extension and what would be the effect of any process undertaken by the Procuring Entity after such period lapses.

The answer to the first limb of this question is straightforward since 30 days from 23rd October 2019 would lapse on 22nd November 2019.

The Board studied the Procuring Entity's confidential file and notes that as at 22nd November 2019, the Procuring Entity's Managing Director had already approved the Head of Procurement and Supplies' Professional Opinion on 6th November 2019, wherein the Managing Director was advised to award the subject tender to the Interested Parties herein, in the respective categories.

On 15th November 2019, all bidders were notified of the outcome of their bids. This notification complied with section 87 (1) and (3) of the Act which states that:-

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted;***
- (2)***
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof."***

The Board finds that by the time the Procuring Entity awarded the subject tender and notified all bidders of the outcome of their respective bids, the tender validity period of the subject tender was still in existence, therefore the Procuring Entity issued a notification of intention to enter into a contract in accordance with section 87 of the Act.

Despite the foregoing findings, the Board must determine whether the tender validity period of the subject tender existed as at the time the

Request for Review was filed with the Board, in order to determine the appropriate orders to grant in the circumstances.

The 1st and 2nd Applicants herein filed their Request for Review applications on 29th November 2019 and 9th December 2019 respectively, when the tender validity period of the subject tender had already lapsed. Ordinarily, having found that the Procuring Entity awarded the subject tender to the Interested Party in accordance with the award criteria set out in the Tender Document, this Board would direct the Procuring Entity to proceed with the procurement process to its logical conclusion.

However, section 135 (3) of the Act provides that:-

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

The above provision expressly states that a procurement contract must be entered into within the tender validity period. In **Civil Appeal No. 35 of 2018, Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR**, the Court of Appeal while considering the import of section 135 (3) of the Act held as follows:-

"the express provisions of Section 135 of the Act states that the written contract should be entered into within the period specified in the notification but not before fourteen (14) days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

It is true to say that a contract entered in contravention of the law is against public policy, it is illegal and cannot be allowed to stand"

The Court of Appeal in the above case held that a contract executed in contravention of the law goes against public policy, the said contract is illegal and cannot be allowed to stand. The Board would like to reiterate that having found that the tender validity period of the subject tender lapsed on 22nd November 2019, the Procuring Entity herein cannot execute a contract with the successful bidders as such a contract would be null and void.

Given that as at the time the Applicants filed their Request for Review, the subject tender already "died a natural death" on 22nd November 2019, there would be no need to nullify anything undertaken after that date, since any process initiated after a tender has lapsed is of no legal consequence as the same amounts to nothing.

The Board further notes that both Applicants prayed for costs of this Request for Review. As regards the issue of costs, The Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of this discretionary power to award costs:

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation"

Suffice it to say, and having considered the above case, the Board notes that, in exercising the discretionary power to award costs, this Board must look at the circumstances of each case to determine whether or not to award costs to a party.

Having found that the Procuring Entity cannot execute a contract in respect of the subject tender, the most appropriate action for the Procuring Entity to take is to re-advertise for the subject procurement process afresh. This would provide another opportunity to the Applicants to participate in this process, if the Procuring Entity re-advertises for the services and would therefore afford the Applicants a second chance to compete for award of the re-advertised tender. In the circumstances, the Board shall refrain from awarding costs in this Request for Review application.

In totality, the Consolidated Request for Review succeeds in so far as the issue on tender validity is concerned, and the Board proceeds to make the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Consolidated Request for Review:-

- 1. The Procuring Entity is hereby directed to retender afresh for Framework Contract for Provision of Air Travel Agency Services forthwith.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 20th day of December 2019

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i.** Mr. Ogada holding brief for Mr. Achoki for the 1st Applicant;
- ii.** Ms. Ayako holding brief for Mr. Inyangu for the 2nd Applicant;
- iii.** Mr. Muturi holding brief for Mrs. Ikegu for the Respondents; and
- iv.** Mr. Muturi for the 1st and 2nd Interested Parties