

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 125/2020 OF 8<sup>TH</sup> SEPTEMBER 2020**

**BETWEEN**

**BYTEWISE LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT**

**AND**

**INDRA LIMITED.....INTERESTED  
PARTY**

Review against the decision of the Accounting Officer of Kenya Civil Aviation Authority with respect to Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement).

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member      |
| 3. Mr. Nicholas Mruttu    | -Member      |

**IN ATTENDANCE**

1. Mr. Philemon Kiprop

-Holding brief for the Secretary

**BACKGROUND TO THE DECISION**

**The Bidding Process**

Kenya Civil Aviation Authority (hereinafter referred to as “the Procuring Entity”) advertised an Open International Tender published on 28<sup>th</sup> April 2020 through the Daily Nation Newspaper, the Procuring Entity’s Website (www.kcaa.or.ke) and MyGov Publication Website (www.mygov.go.ke) inviting sealed tenders from eligible tenderers to bid for Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (hereinafter referred to as “the subject tender”).

**Bid Submission Deadline and Opening of Bids**

The initial bid submission deadline was 29<sup>th</sup> May 2020. However, several prospective tenderers sought clarifications on provisions of the Tender Document. Accordingly, the Procuring Entity extended the bid submission deadline to 18<sup>th</sup> June 2020 following issuance of several Addenda (Procuring Entity’s Response to Clarifications dated 17<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020) in response to clarifications sought by tenderers. The Procuring Entity received a total of 10 bids by the bid submission deadline of 18<sup>th</sup> June 2020. The same were opened shortly thereafter in the presence of tenderers’ representatives and recorded as follows: -

No	Name of Bidder
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1	Ales S.A
2	Joint Stock Company Azimut
3	Intelcan Technosystems Inc
4	Ibross, S.R.O
5	Indra Limited
6	Thales Las Frances SAS
7	Bytewise Ltd
8	Naijing Les Information Technology Ltd
9	Leonard Società Per Azioni (S.P.A)
10	Atech Neogios em Tecnologias S/A

## **Evaluation of Bids**

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following stages: -

- i.** Mandatory Requirements Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Mandatory Requirements Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Clause (a) Mandatory Tender Requirements of Section VI of the Tender Document. At the end of evaluation at this stage, the Evaluation Committee found seven (7) tenderers responsive to the mandatory requirements, hence proceeded to Technical Evaluation.

### **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Clause (b) Technical Evaluation read together with Section VI. Technical

Specifications for an Air Traffic Management System at Jomo Kenyatta International Airport of the Tender Document. Out of the seven tenderers subjected to Technical Evaluation, only three tenderers (i.e. M/s Joint Stock Company, Azimut, M/s Indra Limited and M/s Atech Negocios em Tecnologias S/A) were found responsive and therefore eligible to proceed to Financial Evaluation.

### 3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause (c) Financial Evaluation Criteria of Section VI of the Tender Document which required the Evaluation Committee to compare bid prices and determine the tenderer with the lowest evaluated tender price. The Evaluation Committee recorded bid prices of the three remaining tenderers as follows: -

<b>Bidder No.</b>	<b>Bidder's Name</b>	<b>Currency</b>	<b>Bid Price</b>	<b>Exchange Rates in Kshs.</b>	<b>Total Bid price in Kshs.</b>	<b>Ranking</b>
2	Joint Stock Company Azimut	Euro	6,473,582.00	119.6547	774,594,512.14	3
5	Indra Limited	Euro	2,622,000.00	119.6547	313,734,623.40	2
10	Atech Negocios em Tecnologias S/A	USD	2,897,307.00	106.4206	308,333,149.32	1

### Central Bank Exchange Rate

	<b>Currency</b>	<b>Exchange Rate to Kshs</b>	<b>Effective Date</b>
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<b>1</b>	<b>Euro</b>	119.6547	<b>18<sup>th</sup> June 2020</b>
<b>2</b>	<b>USD</b>	106.4206	

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Atech Negocios em Tecnologias S/A at its tender price of Kshs. USD 2,897,307.00 (i.e. Kshs. 308,333,149.32) for being the lowest evaluated tenderer.

## **Due Diligence**

The Evaluation Committee carried out a due diligence exercise on M/s Atech Negocios em Tecnologias S/A but did not get confirmation from the said tenderer's previous clients on previous projects alleged to have been undertaken by the said tenderer in its original tender document. As a result, the Evaluation Committee carried out a similar due diligence on the next lowest evaluated tenderer (i.e. M/s Indra Limited). Based on the responses received by the Procuring Entity, the Evaluation Committee confirmed that M/s Indra Limited has the capacity to implement the subject tender if the same is awarded to it.

## **Professional Opinion**

In a Professional Opinion dated 13<sup>th</sup> August 2020, the Procuring Entity's Manager, Procurement outlined the procurement process whilst reviewing

the evaluation process in the subject tender. He took the view that the subject procurement process met the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") thus advising the Procuring Entity's Director-General to award the subject tender to M/s Indra Limited at €2,622,000.00. The said professional opinion was approved on 20<sup>th</sup> August 2020.

### **Notification to Tenderers**

In letters dated 26<sup>th</sup> August 2020, the Procuring Entity notified the successful tenderer and all unsuccessful tenderers of the outcome of their bids.

### **THE REQUEST FOR REVIEW**

M/s Bytewise Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 7<sup>th</sup> September 2020 and filed on 8<sup>th</sup> September 2020 together with a Statement in Support of the Request for Review sworn on 7<sup>th</sup> September 2020 and filed on even date, through the firm of Muriu, Mungai & Company Advocates, seeking the following orders: -

- a) An order annulling the Respondent's decision awarding Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management***

***System at Jomo Kenyatta International Airport to M/s Indra Limited in violation of the Constitution and the law;***

- b) An order directing the Respondent to re-evaluate all bids submitted in Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport in a manner that is consistent with the Constitution and the law, and to complete the procurement process accordingly;***
- c) In the alternative to (b), an order directing the Respondent to terminate the procurement process and commence a new procurement process based on a fair, equitable, open, clear and unambiguous Tender Document; and***
- d) An order awarding costs of the proceedings to the Applicant against the Respondent.***

In response, the Respondent lodged a Memorandum of Response to the Request for Review dated 16<sup>th</sup> September 2020 and filed on even date through Kuchio Tindi Advocate while the Interested Party lodged a Replying Affidavit sworn on 17<sup>th</sup> September 2020 and filed on even date through the firm of Iseme Kamau & Maema Advocates.

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the Covid-19

pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

The Applicant lodged its Written Submissions dated and filed on 25<sup>th</sup> September 2020, the Interested Party lodged its Written Submissions dated and filed on 25<sup>th</sup> September 2020 while the Respondent did not lodge any Written Submissions.

### **BOARD'S DECISION**

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -



***I. Whether the Board has jurisdiction to address the Applicant's allegation that provisions of the Tender Document were ambiguous and that the Tender Document became ambiguous after issuance of Response to Clarifications dated 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020.***

Depending on the outcome of the above issue: -

- II. Whether provisions of the Tender Document were ambiguous and whether the Tender Document became ambiguous after issuance of Response to Clarifications dated 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020;***
- III. Whether the Procuring Entity's decision violates section 3 (i) & (j) of the Act;***
- IV. Whether the Applicant met the eligibility criteria specified in Clause 2.1.1 of Section II. Instructions to Tenderers and Clause 2.12 of the Appendix to Instructions to Tenderers of the Tender Document read together with the Procuring Entity's Response to Clarifications issued on 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020;***
- V. Whether the Applicant satisfied the requirements at the Preliminary Evaluation Stage with respect to the following criteria: -***

- **Clause (a) 13 of Section VI of the Tender Document read together with Response to Clarification No. 103 dated 18<sup>th</sup> May 2020;**
- **Clause (a) 12 of Section VI of the Tender Document;**
- **Clause (a) 23 of Section VI of the Tender Document;**  
**and**
- **Clause (a) 25 of Section VI of the Tender Document**

**VI. Whether the Interested Party met the eligibility criteria specified in the Tender Document.**

The Board now proceeds to address the above issues as follows: -

It has well been an enunciated principle that jurisdiction is everything following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter***

**before it the moment it holds the opinion that it is without jurisdiction.**"

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

This Board is a creature of statute owing to the provision of section 27 (1) of the Act which provides that: -

***"27. Establishment of the Public Procurement Administrative Review Board***

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

Further, Section 28 of the Act provides as follows: -

**"28. Functions and powers of the Review Board**

**(1) The functions of the Review Board shall be—**

**(a) reviewing, hearing and determining tendering and asset disposal disputes; and**

**(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."**

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review in accordance with section 167 (1) of the Act, which provides that: -

***"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"*[Emphasis by the Board]**

Section 167 (1) of the Act gives candidates and tenderers the right to seek administrative review of the decision of a procuring entity within fourteen days of notification of award or date of occurrence of an alleged breach at any stage of the procurement process or disposal process. In addressing the first issue, the Board observes that at paragraph 5 (a) of its Request for Review, the Applicant avers that the Procuring Entity's decision was made pursuant to a Tender Document that was either ambiguous ab initio; or became ambiguous with the three (3) clarifications offered by the Respondent; or was made ambiguous by the manner in which the Respondent interpreted its provisions, contrary to section 60 of the Act.

In addressing the question whether the Applicant raised its allegation within the statutory timeline specified in section 167 (1) of the Act, the Board observes that the Applicant raises three scenarios under which it considers the Tender Document to be ambiguous that is; (i) the Tender Document issued before the tender submission deadline is ambiguous, (ii) the Tender Document became ambiguous after issuance of 3 clarifications of the Tender Document and (iii) the Tender Document was made ambiguous by the manner in which the Procuring Entity interpreted provisions of the Tender Document.

On the first and second scenarios, the Board observes that by the tender submission deadline of 17<sup>th</sup> June 2020, the Procuring Entity had issued the Tender Document applicable in the subject tender and three Responses to

Clarifications dated 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020. The Applicant never challenged contents of the Tender Document and the aforesaid Clarifications issued by the Procuring Entity, but instead subjected itself of the subject procurement process and is now raising the first two scenarios challenging contents of the Tender Document and Clarifications issued thereunder. It is worth noting that, candidates are one of the persons under section 167 (1) of the Act that have a right to seek administrative review of the decision of a procuring entity within fourteen days of the date of occurrence of an alleged breach at any stage of the procurement process or disposal process. Section 2 of the Act defines the term "candidate" as: -

***"a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"***

The Applicant herein obtained the Tender Document pursuant to the Tender Invitation Notice dated 28<sup>th</sup> April 2020 by the Procuring Entity thus meets the definition of a candidate under section 2 of the Act. The Applicant ought to have approached this Board seeking administrative review at the early stages of the subject procurement process, before subjecting itself to the provisions of the Tender Document and Responses to Clarifications issued by the Procuring Entity if the Applicant considered such provisions to be ambiguous, especially since it obtained the Tender Document and had knowledge of the Responses to Clarifications issued by the Procuring Entity.

The Applicant in this instance; (i) already subjected itself to the provisions of the Tender Document and the Responses to Clarifications issued by the Procuring Entity, (ii) had a cause of action from 18<sup>th</sup> June 2020 which was the tender submission deadline and (iii) could have approached this Board within fourteen days from 18<sup>th</sup> June 2020 pursuant to section 167 (1) of the Act but failed to do so within the required statutory timelines when it learned of an alleged breach of duty by the Procuring Entity. The Applicant is now estopped from raising an issue with provisions the Tender Document and the Responses to Clarifications issued thereunder so late in the day after subjecting itself to provisions of the Tender Document and Responses to Clarifications after the lapse of the statutory period of 14 days specified in section 167 (1) of the Act. The Applicant was only motivated to challenge provisions of the Tender Document and Responses to Clarifications because its bid was found non-responsive.

The third scenario mentioned by the Applicant is that provisions of the Tender Document became ambiguous by the manner in which the Procuring Entity interpreted its provisions. The Board observes that, the Applicant makes reference to the reasons why its bid was found non-responsive to support its view that, its bid was not rightfully evaluated because the provisions of the Tender Document became ambiguous by the manner in which the Procuring Entity interpreted its provisions. This specific allegation has not been raised out of time, because the Board shall interrogate the manner in which the Procuring Entity evaluated the

Applicant's bid on the criteria under which its bid was declared non-responsive vis-à-vis the criteria outlined in the Tender Document and the Procuring Entity's Responses to Clarifications.

That notwithstanding, the Board finds that it lacks jurisdiction to address the question whether the Tender Document itself, issued before the tender submission deadline is ambiguous and whether the Tender Document became ambiguous after issuance of Responses to Clarifications dated 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020. The effect of this finding is that the Board shall not address the second issue framed for determination.

On the third issue for determination, the Applicant contends at paragraph 5 (b) of its Request for Review that the Procuring Entity's decision is unconstitutional and unlawful because it violates section 3 (i) and (j) of the Act requiring procuring entities to promote the local industry and citizen contractors. The Board studied the Applicant's Request for Review and Statement in Support of the Request for Review but did not find any specific averments made on how the Applicant believes the Procuring Entity has failed to promote the local industry and citizen contractors, thus violating section 3 (i) and (j) of the Act.

It is worth noting that a party to a case has an obligation to provide a basis for any allegation made against the other party so as to enable that other



party to defend its case against any allegations propounded against it. The Applicant merely made an allegation that the Procuring Entity has violated section 3 (i) and (j) of the Act, but did not specify how such violation was made in relation to the subject procurement process so as to enable the Procuring Entity to defend its case and for the Interested Party to respond to the said allegation either in support of the Applicant or the Procuring Entity. This leaves the Board with no information since the Applicant's allegation has not been supported by any statements of facts or by evidence. An allegation, in the Board's view ought to be supported by persuasive facts and/or evidence so as to assist a decision maker in arriving at a decision in favour of such party in accordance with the applicable law.

In the absence of any information in support of the Applicant's allegation that the Procuring Entity violated section 3 (i) and (j) of the Act, the Board finds that the said allegation has not been substantiated.

On the fourth issue for determination, the Board observes that the Applicant received a letter of notification of unsuccessful bid dated 26<sup>th</sup> August 2020 wherein one of the reasons why the Applicant was found non-responsive was outlined as follows: -

***"This is to inform you that KCAA has completed the evaluation process and your bid was unsuccessful because you did not meet the following tender requirements: -***

.....

- ***You were not eligible to bid since you are not a manufacturer of an ATM system. Under page 303 of your bid document, you indicated that the system manufacturer is M/s System Integration Air Traffic Management AB. However, the consortia bidding agreement section 3.1 page 308 attached stated that "the relationship of the parties is one of potential main contractor and sub-contractor in respect of the project. No relationship of agency, joint venture or partnership exist or shall be deemed to exist between the parties". This therefor means that the documents submitted by the other parties in the consortia bidding agreement could not be relied upon in evaluation of this bid"***

In order to determine whether the Applicant met the eligibility criteria in the subject tender, the Board takes cognizance of section 75 of the Act which states as follows: -

***"(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***

- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.**
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.**
- (4) The addendum shall be deemed to be part of the tender documents**

Pursuant to section 75 (4) of the Act, addenda that is issued by a procuring entity in response to clarifications sought by bidders are deemed to be part of the Tender Document. With that in mind, the Board studied provisions of the Tender Document and the Clarifications issued by the Procuring Entity and notes that Clause 2.1.1 of Section II. Instructions to Tenderers of the Tender Document provides as follows: -

***"This Invitation for Tenders is open to all tenderers eligible as described in the Appendix to Instructions to Tenderers. Successful tenderers shall complete the supply, installation and commissioning of the equipment by the intended completion date specified in the tender documents"***

Since the above provision refers to the Appendix to Instructions to Tenderers, the Board studied the same and notes that Clause 2.12 thereof provides as follows: -

***"A bidder must be a system manufacturer or a consortium of manufacturers."***

The Procuring Entity issued several clarifications wherein several clauses expounded on the eligibility criteria in the subject tender as follows: -

Clarification No. 101 of the Procuring Entity's Response to Clarifications dated 18<sup>th</sup> May 2020 provides that: -

<b>No</b>	<b>Requested clarification by bidders</b>	<b>Response by KCAA</b>
101	<p>Page 18 of 52, Item 2.12, Tenderers Eligibility and Qualifications</p> <p>A bidder must be a system manufacturer or consortium of manufacturers.</p> <p>We are in a consortium wherein we will be the Kenyan based lead bidders and will consort with 2 other overseas manufacturers. This has been necessitated by the current Covid-19 situation which will limited the 2 manufacturers' availability into the country hence our presence in Kenya allows immediacy to the whole consortium. Our role within the consortium will be clearly explained in the consortium agreement which will be presented with our bid. We seek your immediate opinion on whether such an arrangement is agreeable for purposes of the tender</p>	<p>A bidder must be a system manufacturer or a consortium of manufacturers. However, the lead partner must be a system manufacturer</p>

Clarifications No. 28 and No. 41 of the Procuring Entity's Response to Clarifications dated 27<sup>th</sup> May 2020 provide as follows: -

<b>No</b>	<b>Requested clarification by bidders</b>	<b>Response by KCAA</b>
28	We have our partners situated in Nairobi who are more than capable of handling the non-technical parts of the bid process. We request KCAA to allow them to act as lead bidders in this bidding process	They will be allowed to submit the bid on your behalf but as partners or members of joint venture with the requisite power of attorney. The lead partner must be a manufacturer of ATM system
41	We request KCAA to allow for any JV arrangement as long as one partner is a manufacturer of the desired solution. This will allow each partner to the JV to focus on their area of expertise to enable a competitive bid	A bidder shall be a duly registered experienced firm or a joint venture of duly registered experienced firms with an existing agreement or with the intent to enter into such an agreement supported by a letter of intent.  However, the lead bidder MUST be a manufacturer

Further, Clarifications No. 11, No. 13, No. 15 and No. 16 of the Procuring Entity's Response to Clarifications dated 10<sup>th</sup> June 2020 provide as follows:

-

<b>No</b>	<b>Requested clarification by bidders</b>	<b>Response by KCAA</b>
11	In page 4 of your letter you mention that one can allow their partner through a power of attorney to submit a bid on behalf of the members of a joint venture. Then the clarification goes ahead to mention	As clarified in our 2 <sup>nd</sup> response dated 27 <sup>th</sup> May 2020 number 28, the lead partner shall

	<p>that the lead partner must be a manufacturer of ATM system</p> <p>Does this mean that within the provisions of the Tender Documents that the one submitting the bid (even if not a manufacturer) would be the tenderer thus the party entering a contract with the Authority upon successful bidding.</p>	<p>be a manufacturer and will sign a contract with KCAA</p>
13	<p>Section 50 (1) of the Public Procurement and Asset Disposal Act states that a procuring entity or procuring entities with common interest may enter into consortium buying for the purpose of procuring jointly in order to benefit from economies of scale. Our understanding of this provision is that designation of a lead partner is something left to the parties rather than the Authority</p>	<p>As clarified in our 2<sup>nd</sup> response dated 27<sup>th</sup> May 2020 number 28, the lead partner shall be a manufacturer</p>
15	<p>Our legal framework with our partners is through a Consortium Agreement rather than a Joint Venture. This is because the engagement is a one off bid. Your letter refers to a Joint Venture, is there any preference of a legal structure by the Authority in case of partnerships?</p>	<p>We have preference on the legal structure. However, you should demonstrate that the consortium meets the requirements of the tender and is eligible to bid</p>
16	<p>How will the authority handle legal obligations under a Consortium Agreement considering you want a manufacturer as a lead partner? If the consortium through power of attorney agrees to have one party bid for the Tender, will the Authority have the tenderer</p>	<p>The lead partner will sign the contract</p>

	as the one who executes the contract with the Authority	
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Having considered the provisions of the Tender Document and the Clarifications issued by the Procuring Entity, the Board observes that the eligibility criteria under the subject tender was as follows: -

- *The Procuring Entity considered a system manufacturer or consortium of manufacturers of an Air Traffic Management System to be eligible tenderers;*
- *The Procuring Entity greatly emphasized that the lead partner/bidder must be a manufacturer of the Air Traffic Management System. This lead partner would sign a contract with the Procuring Entity; and*
- *Partners in a Joint Venture, Consortium or any other contractual arrangement (noting that the Procuring Entity states it has no preference on the legal structure) were at liberty to elect the company that would submit a tender on behalf of the joint venture, consortium or members of other contractual arrangement by electing such company through a Power of Attorney.*

The Board studied the Applicant's original bid to establish whether it met the eligibility criteria in the Tender Document and proceeds to note the following: -

- ✓ *At page 12 of its original bid, a Business Permit issued on 3<sup>rd</sup> June 2020 by Nairobi City County to the Applicant (Bytewise Limited) to undertake Wholesale and Distribution of General Commodities;*
- ✓ *At page 21 of its original bid, a CR 12 extract as at 18<sup>th</sup> March 2020 issued by Companies Registry with particulars of directors and shareholders of the Applicant as follows: -*

<b>Total Shares</b>			<b>Ordinary: 1000</b>	
<b>Name</b>			<b>Description</b>	<b>Shares</b>
Rajesh	Chhotalal	C	Director/Shareholder	Ordinary: 200
Pabari				
Kaushik	Chhotalal	C	Director/Shareholder	Ordinary: 800
Pabari				

- ✓ *At page 301 of its original bid, a Power of Attorney dated 12<sup>th</sup> June 2020 whereby M/s System Integration Air Traffic Management AB, Si ATM designates M/s Bytewise Limited to do on its behalf (i.e. M/s System Integration Air Traffic Management AB, Si ATM) all or any of the acts deeds or things necessary or incidental to the bid for the tender for Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement) including submission of proposal, participation in conference, responding to queries, submission of information or documents and generally to represent them (M/s System Integration Air Traffic Management AB, Si ATM) in all dealings with Kenya Civil Aviation Authority or any of its affiliate organizations, ministries,*



- agencies or any authorized person in connection with the tendered project until culmination of the process of bidding and thereafter till the conclusion agreement is finalized with the Kenya Civil Aviation Authority*
- ✓ *At page 302 of its original bid, a Power of Attorney dated 18<sup>th</sup> June 2020 whereby M/s ACR Aviation Capacity Resources International AB, designates M/s Bytewise Limited to do on its behalf (i.e. M/s ACR Aviation Capacity Resources International AB) all or any of the acts deeds or things necessary or incidental to the bid for the tender for Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement) including submission of proposal, participation in conference, responding to queries, submission of information or documents and generally to represent them (M/s ACR Aviation Capacity Resources International AB) in all dealings with Kenya Civil Aviation Authority or any of its affiliate organizations, ministries, agencies or any authorized person in connection with the tendered project until culmination of the process of bidding and thereafter till the conclusion agreement is finalized with the Kenya Civil Aviation Authority*
  - ✓ *At page 304 of its original bid, a Consortia Bidding Agreement dated 18<sup>th</sup> May 2020, between Bytewise Limited (**Lead Bidder**), M/s System Integration Air Traffic Management AB (Project*

Manager) and M/s ACR Aviation Capacity Resources International AB (Project Consultant) with the following relevant clauses: -

**Clause 3.1. Relationship of the parties**

***"The relationship of the parties is one of potential main contractor and sub-contractor in respect of the project. No relationship of agency, joint venture or partnership exists or shall be deemed to exist between the parties. Except as specifically provided, no party shall have the authority to bind the other party without the latter's prior written approval"***

**Clause 5.0. Preparation and Submission of the Tender**

***"5.1. The parties will work together in good faith to prepare the tender so that it may be submitted to the customer by lead bidder by the submission date stated in the ITT (or as may be communicated by the bidder).***

***5.2. Each party shall have sole responsibility and liability in respect of its part of the tender and for ensuring its accuracy and adequacy of all information and data in its part of the tender***

***5.5. Neither party shall be liable to indemnify the other party for or in respect of the consequences of any***

***failure of the tender or any part thereof to result in the award of the contract***

- ✓ At page 334 of its original bid, a manufacturer's authorization letter dated 19<sup>th</sup> May 2020 on the letterhead of M/s System Integration Air Traffic Management AB addressed to the Director General of the Procuring Entity stating as follows: -

***"Whereas M/s System Integration Air Traffic Management AB who are established and reputable manufacturers or Air Traffic Management Systems and Solutions, having registered office at Landsvagen 39m SE-172 63 Sundbyberg, Sweden;***

***Do hereby authorize M/s Bytewise Limited to submit a tender and subsequently negotiate and sign the contract with you against Tender No. KCAA/057/2019-2020, for the above goods manufactured by us. We hereby extend our full guarantee as per the General Condition of Contract for the goods offered for supply by the above firm against this invitation for tenders"***

- ✓ At page 335 of its original bid, a manufacturer's authorization letter dated 19<sup>th</sup> May 2020 on the letterhead of M/s ACR Aviation Capacity Resources International AB addressed to the Director General of the Procuring Entity stating as follows:

***"Whereas M/s ACR Aviation Capacity Resources International AB who are established and reputable manufacturers or Air Traffic Management Systems and***

***Solutions, having registered office at Ostemalmmsgatan 87E, SE-114 59 Stockholm, Sweden;***

***Do hereby authorize M/s Bytewise Limited to submit a tender and subsequently negotiate and sign the contract with you against Tender No. KCAA/057/2019-2020, for the above goods manufactured by us. We hereby extend our full guarantee as per the General Condition of Contract for the goods offered for supply by the above firm against this invitation for tenders”***

Having considered the documentation submitted by the Applicant, the Board observes that the Applicant is a member of a consortium, comprising of two manufacturers; ***M/s System Integration Air Traffic Management AB who is also the designated Project Manager and M/s ACR Aviation Capacity Resources International AB who is the designated Project Consultant***) and the Applicant identified as the Lead Bidder. The Board considered the meaning of the word “**Consortium**” and “**Consortium Bidding**”, which are explained in the Official Website of LexisNexis ([www.lexisnexis.com](http://www.lexisnexis.com)) as follows: -

***“A consortium is a group made up of two or more individuals, companies, or other type of institutions that work together to achieve a common objective. Consortium bidding is the term used to describe the situation where two or more economic operators come together to submit a bid for a contract in a public procurement process. This may either be***

***through an already established consortium or a group of bidders who come together for a specific contract. The latter will often bid under loose arrangements which become formalized structures (such as a special purpose vehicle (SPV) or subcontracting arrangement) after the award of a contract.”***

It is worth noting that the Applicant entered into what it refers to as a Consortia Bidding Agreement with two companies so as to work together in preparation, submission and implementation of the subject tender after award of the same. The Applicant is identified as the Lead Bidder in the Consortia Bidding Agreement dated 18<sup>th</sup> May 2020 and according to its Business Permit issued on 3<sup>rd</sup> June 2020, the Applicant undertakes the business of **Wholesale and Distribution of General Commodities** but is not a manufacturer of the Air Traffic Management System to be supplied to the Procuring Entity. Even though the Procuring Entity allowed bidders to elect a partner that would submit a bid on behalf of the consortium with the requisite Power of Attorney, as was the case with the Applicant herein, the Board observes that the Procuring Entity emphasized that the Lead Partner/Bidder must be a manufacturer of the Air Traffic Management (ATM) System. This means, consortium partners, joint venture partners or members of any other form of contractual arrangement were required to be mindful that even if they elect a Lead Partner/Bidder to submit a tender, such Lead Partner/Bidder must be an ATM System manufacturer.

It is also worth noting that, from the Applicant's CR 12 extract as at 18<sup>th</sup> March 2020, none of the two manufacturing companies have any controlling stake in the Applicant. This, in the Board's view demonstrates that, the relationship between the Applicant and its consortium partners only creates a Special Purpose Vehicle to enable the Applicant submit a tender on behalf of the Consortium. In essence, from the documentation in the Applicant's original bid, the Board is persuaded that the Applicant is not an Air Traffic Management System Manufacturer yet it was a Lead Partner/Bidder of its Consortium whereas the Tender Document expressly stated that the Lead Partner must be an ATM System manufacturer.

Accordingly, the Board finds that the Applicant failed to satisfy the eligibility criteria specified in Clause 2.1.1 of Section II. Instructions to Tenderers and Clause 2.12 of the Appendix to Instructions to Tenderers of the Tender Document read together with the Procuring Entity's Response to Clarifications issued on 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020.

On the fifth issue for determination, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> August 2020 cited other reasons why the Applicant's bid was found non-responsive as follows: -

- ***Did not provide evidence that you have previous experience in the supply and installation of Air Traffic Management Systems as the lead bidder as required in the Tender Document and clarifications issued.***

- ***Did not provide a duly signed sworn Anti-corruption affidavit signed by commissioner for oaths or equivalent from the country of origin. The anti-corruption affidavit submitted was from M/s ACR International and not M/s Bytewise.***
- ***Did not indicate that you will provide warranty for 3 years upon commissioning. The warranty provided from M/s SiATM states that the end user is M/s ATKP Makassar Indonesia and not KCAA***
- ***Provided a proposed service and maintenance agreement for the system from M/s SiATM instead of the bidder M/s Bytewise. The tender document stated that in case of a joint venture, the agreement would be signed with the lead bidder who is M/s Bytewise***

The Board considered parties' pleadings on the question whether the Applicant satisfied the criteria mentioned in its letter of notification of unsuccessful bid and hereby proceeds to make the following findings: -

- **Experience**

Clause (a) 13 of Section VI of the Tender Document provided as follows: -

***"Experience***

***The Bidders MUST have previous experience in the supply and installation of Air Traffic Management Systems (for the purposes of this tender ATM System refers to an automated system that enables an air traffic controller assist aircraft to***

***depart from an aerodrome, transit an airspace, land at a destination aerodrome, including air traffic services(ATS), airspace, air traffic flow and capacity management) of at least three projects each of a value of Kshs. 150 million or more within the last ten (10) years as follows: -***

- i. At least one project implemented in a country outside the state of manufacture of the ATM system***
- ii. At least one project must be complete and operational***
- iii. At least one of the projects should have been implemented within this region***
- iv. At least one must have been commissioned in the last five years or ongoing***
- v. Evidence of all previously and successfully accomplished integration services undertaken for an ATM System***

***Provide recommendation letters, Corresponding copies of contracts and Certificate of Completion for completed projects for the above stated projects. The letters must be on the letter heads of the respective client and include names, addresses, email and telephone contacts of the 3 companies who may be contacted for further information on these projects. "***



The Board observes that the Procuring Entity issued a Response to Clarifications dated 18<sup>th</sup> May 2020 explaining the said criteria as follows:

No	Requested Clarifications by bidders	Response by KCAA
103	<p><b>Experience</b>  <b>The Bidders MUST have previous experience in the supply and installation of Air Traffic Management Systems (for the purposes of this tender ATM System refers to an automated system that enables an air traffic controller assist aircraft to depart from an aerodrome, transit an airspace, land at a destination aerodrome, including air traffic services(ATS), airspace, air traffic flow and capacity management) of at least three projects each of a value of Kshs. 150 million or more within the last ten (10) years as follows: -</b></p> <p><b>(i.) At least one project implemented in a country outside the state of manufacture of the ATM system</b>  <b>(ii) .....</b>  <b>iii. At least one the projects should have been implemented within this region</b></p> <p><b>Please clarify....</b></p>	<p>Either complete or towards successful completion (over 80% complete)</p> <p>Region means ICAO AFI region</p>

Having studied the criterion outlined hereinbefore as clarified by Clarification No. 103 of the Procuring Entity's Response to Clarifications dated 18<sup>th</sup> May 2020, the Board observes that the Procuring Entity required bidders to demonstrate previous experience in the supply and installation of Air Traffic Management Systems of at least three projects (either complete or 80% complete) each of a value of Kshs. 150 million or more within the last ten (10) years. The Board observes that this criterion did not expressly provide guidance on the company that is required to demonstrate evidence of previous experience in cases where a bid is submitted by a

consortium, a joint venture or any other contractual arrangement entered into by companies participating in the subject tender.

The Applicant entered into a Consortia Bidding Agreement dated 18<sup>th</sup> May 2020 with two companies so as to work together in preparation, submission and implementation of the subject tender in the event the subject tender is awarded to the Applicant. On the other hand, the Tender Document did not prevent a lead bidder from relying on the experience of its consortium partners in response to the criterion under Clause (a) 13 of Section VI of the Tender Document as modified by Response to Clarification No. 103 dated 18<sup>th</sup> May 2020. This therefore means, nothing stopped the Applicant from relying on the previous experience of its consortium partners in response to this criterion. The Board studied the documents submitted by the Applicant to determine whether it satisfied the criterion under consideration and notes the following: -

### **Project 1**

- ✓ At page 59 of the Applicant's original bid, a letter dated 4<sup>th</sup> December 2008 on the letterhead of Zambia Air Services Training Institute, Lusaka International Airport for Delivery and Installation of an Air Traffic Control (Approach/Area Radar) Simulator, successful completed on 12<sup>th</sup> September 2008 by M/s System Integration Air Traffic Management AB, Si ATM at a facility in Lusaka, Zambia, but the project amount is not indicated.

### **Project 2**

- ✓ At page 61 of the Applicant's original bid, a Final Site Acceptance Certificate dated 26<sup>th</sup> January 2015 on the letterhead of Croatia Control Ltd for the Supply and Installation of ATM Radar Emergency System-ARES undertaken by M/s System Integration Air Traffic Management AB, Si ATM;
- ✓ At pages 62 and 63 of the Applicant's original bid, an Excerpt of a Contract signed on 15<sup>th</sup> October 2012 by the client (i.e. Croatia Control Ltd) and on 16<sup>th</sup> October 2012 by M/s System Integration Air Traffic Management AB, Si ATM delivered on DAT Terms at Zagreb Airport, Croatia with project amount valued at €1,145,072.00.

### **Project 3**

- ✓ At pages 65 to 66 of the Applicant's original bid, a reference letter dated 2<sup>nd</sup> May 2011 on the letterhead of Kingdom of Bahrain Civil Aviation Affairs referencing a Contract for the Development and Installation of a Flight Data Processing System at Bahrain International Airport undertaken by M/s System Integration Air Traffic Management AB, Si ATM, which became operational in March 2005, but the project value is not indicated.

### **Project 4**

- ✓ At page 68 of the Applicant's original bid, a Site Acceptance Test Certificate dated 27<sup>th</sup> October 2017 citing the buyer as M/s Serbia & Montenegro Air Traffic Services, confirming that a Site Acceptance

Test was undertaken on 23<sup>rd</sup> to 27<sup>th</sup> October 2017 by M/s System Integration Air Traffic Management AB, Si ATM.

- ✓ At pages 69 to 70 of the Applicant's original bid, an Excerpt of a Contract, which excerpt is undated by stamped on 1<sup>st</sup> March 2016 showing the contract was between M/s Serbia & Montenegro Air Traffic Services and M/s System Integration Air Traffic Management AB, Si ATM for Provision and Delivery of Fallback ATM System on DAP locations of installation via Belgrade basis with project value at €2,486,889.00
- ✓ At page 71 of the Applicant's original bid, a Form of Confirmation-Reference List dated 20<sup>th</sup> September 2018 with the buyer cited as M/s Serbia & Montenegro Air Traffic Services confirming that M/s System Integration Air Traffic Management AB, Si ATM successfully implemented a Fall-back System that is operational.

### **Project 5**

- ✓ At page 73 of the Applicant's original bid, a Certificate of Successful Completion Site Acceptance Test issued on 23<sup>rd</sup> October 2017 on the letterhead of Pakistan Civil Aviation Authority certifying that the One Main and Hot Standby Air Traffic Management System at New Islamad International Airport Site successfully passed the Site Acceptance Test, referencing a contract between M/s System Integration Air Traffic Management AB, Si ATM and Pakistan Civil Aviation Authority;
- ✓ At pages 74 to 78 and pages 80 to 87 of the Applicant's original bid, a Contract dated 26<sup>th</sup> December 2016 between Pakistan Civil Aviation

Authority and M/s System Integration Air Traffic Management AB, Si ATM with a project value indicated as \$1,748,883.76 for undertaking a project known as One Main and Hot Standby Air Traffic Management System at New Islamabad International Airport Site;

- ✓ At page 79 of the Applicant's bid, a Reference letter dated 28<sup>th</sup> January 2020 on the letterhead of Pakistan Civil Aviation Authority confirming that it was supplied with an Air Traffic Management System by M/s System Integration Air Traffic Management AB, Si ATM showing that the System became operational in April 2018.

## **Project 6**

- ✓ At page 89 of the Applicant's original bid, an undated Reference Letter on the letterhead of Moldovian Air Traffic Services Authority confirming that a new Air Traffic Management System by M/s System Integration Air Traffic Management AB, Si ATM was delivered between 2012 and 2013;
- ✓ At pages 90 to 92 of the Applicant's original bid, an Addendum 2 to Contract SI K604.11.1/47 between Moldovian Air Traffic Services Authority and M/s System Integration Air Traffic Management AB, Si ATM executed on 15<sup>th</sup> September 2011 for the Supply of an ATM System at an adjusted total contractual price of € 2,575,778.00;
- ✓ At page 93 of the Applicant's original bid, a Reference Letter dated Chisinau, 25<sup>th</sup> June 2019 signed by the General Director of Moldovian Air Traffic Services Authority referencing delivery of a combined

Radar and Tower Simulator by M/s System Integration Air Traffic Management AB, Si ATM in April 2019.

## **Project 7**

- ✓ At page 95 of the Applicant's original bid, a Reference Letter dated 21<sup>st</sup> November 2017 on the letterhead of *Latvijas Gaisa Satiksme* referencing a project on the Supply of an Air Traffic Management System by M/s System Integration Air Traffic Management AB, Si ATM between 2011 to 2016 for the total contract sum of €7,732,427.00;
- ✓ At page 96 of the Applicant's original bid, a Reference Letter dated 1<sup>st</sup> September 2017 on the letterhead of *Latvijas Gaisa Satiksme* referencing a project for the Extension and Functional Upgrading of the Air Traffic Management System supplied by M/s System Integration Air Traffic Management AB, Si ATM for a total contract sum of €3,734,852 (i.e. for the extension and functional upgrading works);
- ✓ At page 97 of the Applicant's original bid, a Reference letter dated 16<sup>th</sup> January 2020 on the letterhead of *Latvijas Gaisa Satiksme* referencing a project of a Combined Radar and Tower Simulator (CSim) for the Riga FIR by M/s System Integration Air Traffic Management AB, Si ATM but does not specify when the project was undertaken and at how much;
- ✓ At page 98 to 99 of the Applicant's original bid, a Reference Letter dated 31<sup>st</sup> May 2013 on the letterhead of *Latvijas Gaisa Satiksme* referencing a project on Supply of an Arrival Manager

(AMAN) for Riga Airport by M/s System Integration Air Traffic Management AB, Si ATM but does not specify when the project was undertaken and at how much;

- ✓ At page 100 of the Applicant's original bid, a Reference Letter dated 5<sup>th</sup> December 2013 on the letterhead of *Latvijas Gaisa Satiksmē* referencing a project on Modernization of the Air Traffic Management System by M/s System Integration Air Traffic Management AB, Si ATM undertaken between October 2010 to June 2013 at a total contract sum of €3,997,575.00;
- ✓ At page 101 to 102 of the Applicant's original bid, a Reference Letter dated 28<sup>th</sup> June 2012 on the letterhead of *Latvijas Gaisa Satiksmē* referencing a project on Upgrade of the Air Traffic Management System by M/s System Integration Air Traffic Management AB, Si ATM completed by 2011 but the project amount is not indicated.

### **Project 8**

- ✓ At page 104 to 106 of the Applicant's bid, a Change to Purchase Order dated 27<sup>th</sup> April 2011 issued by Raytheon Network Centric Systems addressed to M/s System Integration Air Traffic Management AB, Si ATM for a total purchase order amount of \$1,154,018.00 for the Purchase of an Ultimate Fallback System (UFS)

From the foregoing documentation, the Board observes that Project 4 (Provision and Delivery of Fallback ATM System on DAP locations of

installation via Belgrade basis), Project 5 (One Main and Hot Standby Air Traffic Management System at New Islamad International Airport Site) and Project 6 (Provision of a new Air Traffic Management System for Moldovian Air Traffic Services Authority) fully satisfy the criterion under Clause a (13) of Section VI of the Tender Document as modified by Response to Clarification No. 103 dated 18<sup>th</sup> May 2020 especially if the minimum project value of Kshs. 150,000,000.00 and the period under which the said projects were undertaken and completed is considered. In addition to this, for the three aforementioned projects, the Applicant attached recommendation letters, contracts and certificates of completion of the said projects whereas for other projects, the Applicant did not attach all the three sets of documentation required in the Tender Document. The Board has established that the Tender Document required a minimum number of three projects undertaken within the last 10 years, which projects have been demonstrated from the documentation outlined hereinbefore, for Projects 4, 5 and 6.

Accordingly, the Board finds that the Applicant satisfied the criterion outlined in Clause (a) 13 of Section VI of the Tender Document as modified by Response to Clarification No. 103 dated 18<sup>th</sup> May 2020.

- **Duly signed sworn Anti-Corruption Affidavit**

Clause (a) 12 of Section VI of the Tender Document provided as follows: -



***"Duly signed sworn Anti-corruption affidavit signed by commissioner of oaths or equivalent from the country of origin"***

In addressing the question whether or not the Applicant satisfied this criterion, the Board observes that the Procuring Entity contended that the Applicant provided an Anti-Corruption Affidavit from M/s ACR Aviation Capacity Resources International AB, instead of providing an Anti-Corruption Affidavit from the Applicant itself. The Applicant on its part states that it submitted its bid on behalf of its consortium comprising of two other companies based in Sweden where the system to be supplied is manufactured.

Having considered parties' pleadings, the Board notes that the Tender Document did not expressly state that it is only a lead bidder who ought to submit a duly signed Anti-Corruption Affidavit, in case of a consortium, joint venture partnership or other contractual agreement between companies participating in the subject tender. In the absence of any express provision, the Board finds that the Tender Document did not expressly bar the Applicant from relying on documentation issued by its consortium partners.

In response to this criterion, the Board observes that at page 321 to 322 of its original bid, the Applicant attached an Affidavit sworn on 18<sup>th</sup> May 2020 by one Sajeesh Unnikrishnan, the Chief Executive Officer of M/s ACR

Aviation Capacity Resources International AB, signed by the said Sajeesh Unnikrishnan and stamped by a notary public known as Musili Benson Mzuka with the following details: -

- "(1) THAT, I am the Chief Executive Officer of M/s ACR Aviation Capacity Resources International AB which is a candidate in respect of Tender No. KCAA/057/2019-2020 to Supply goods, render services and/or carry out works for Kenya Civil Aviation Authority and duly authorized and competent to make this Affidavit.***
- (2) THAT, the aforesaid candidate has not been requested to pay any inducement to any member of the Board, management, staff and/or employees and/or agents of Kenya Civil Aviation Authority which is the Procuring Entity.***
- (3) THAT, the aforesaid candidate, M/s ACR Aviation Capacity Resources International AB, its servants and/or agents have not offered any inducement to any member of the Board, management, staff and/or employees and/or agents of Kenya Civil Aviation Authority.***
- (4) THAT the aforesaid candidate has not committed any offence under the Laws of Kenya or the procurement laws or been debarred from participating in any tenders by virtue of non-performance/poor performance or any***

***other legal reason and is not undergoing any adverse disciplinary action/claim before the Public Procurement and Disposal Authority.***

***(5) THAT the aforesaid candidate, its directors and shareholders have not been committed of corrupt or fraudulent practices in any court of competent jurisdiction within the Republic of Kenya.”***

It is worth noting that the Applicant provided an Affidavit duly sworn by the Chief Executive Officer of one of its consortium partners, i.e. M/s ACR Aviation Capacity Resources International AB, signed by the said Chief Executive Officer and stamped by a notary public. The said Affidavit satisfied the criterion of Clause (a) 12 of Section VI of the Tender Document which did not specify the partner in a consortium that ought to provide a duly signed sworn anti-corruption affidavit.

Accordingly, the Board finds that the Applicant satisfied the criterion outlined in Clause (a) 12 of Section VI of the Tender Document.

- **Warranty**

Clause (a) 23 of Section VI of the Tender Document provided as follows: -

**“Warranty for 3 years upon commissioning”**

In response to this criterion, the Applicant provided a Warranty Letter dated 11<sup>th</sup> June 2020 with the following details: -

***"To: Kenya Civil Aviation Authority***

***System in: Air Traffic Management System at Jomo Kenyatta International Airport, Tender No. KCAA/057/2019-2020***

***This is to confirm that SiATM AB will provide guarantee of the state-of-the-art technical support and after-sales service for the end-user ATK Makassar Indonesia for the duration of three (3) years after the Installation and Commissioning of the referred system as part of the warranty. This is also to confirm and warrant our spare parts to be available for 10 years after the warranty period, the same technical support and services are available for the end-user with an extension using a separate agreement."***

The Applicant contended that reference to ATKP Massakar Indonesia in the Warranty Letter dated 11<sup>th</sup> June 2020 is an error thus amounting to a minor deviation that ought not to have affected the responsiveness of its bid pursuant to section 79 (2) of the Act. In order to address the Applicant's contention, the Board observes that Andrew Smith in his Article, **"What does it take to be a responsive bidder? (2016)"**, published on Georgia Tech Enterprise Innovation Institute's Official Website ([www.gatech.edu](http://www.gatech.edu)), defines the term **"Minor Deviation"** as follows: -

***"Minor deviations are a matter of form and not of substance, or they pertain to some immaterial or inconsequential defect or variation from the exact requirement of the Bid Documents"***

On its part, section 79 of the Act states as follows: -

***"79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

***(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***

***(b) errors or oversights that can be corrected without affecting the substance of the tender."***

Section 79 (1) of the Act is instructive that a tender is responsive if it conforms to eligibility and mandatory requirements in the tender documents. To qualify as a minor deviation, section 79 (2) of the Act provides guidance that responsive tenders should not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents; or errors or oversights that can be corrected without affecting the substance of the tender. Having considered the

conditions for determining what qualifies as a minor deviation and the ordinary meaning of the word “**minor deviation**”, the Board observes that for an error to qualify as a minor deviation, the same should be inconsequential and should not affect the substance of the tender if corrected. In this instance, Clause 1.7 of Section VI of the Tender Document provides for the function that a warranty serves as follows: -

- "1.7.1. The Warranty Period will be three (3) years after successful commissioning of the system. Commissioning here means putting into operation the entire system at JKIA.***
- 1.7.2. The contractor shall replace or repair any items that fail during the warranty period at no additional cost. All the costs of such components, including transportation, duties and taxes shall be borne by the contractor.***
- 1.7.3. Any item that fails during the warranty period and shipped to the factory shall have a turnaround period of not more than forty-five (45) days.***
- 1.7.4. The contractor shall give a commitment in writing, that all system components (as spare parts) shall be available for 10 years after the end of the warranty period."***

Having considered the provision in Clause 1.7 outlined hereinbefore, it is the Board's considered view that a warranty ensures that a contractor (i.e. the successful tenderer implementing the project post-contract period) replaces or repairs any failed items at no additional costs during the warranty period. This cushions the client (i.e. Procuring Entity) against any additional costs that it may incur as a result of failure of the items that have been supplied by the successful tenderer. This means, a Warranty provided by a tenderer during the procurement process ought to specify the costs to be covered in the warranty and should be issued in favour of the Procuring Entity and not any other entity.

It is the Board's considered view that reference to M/s ATKP Massakar Indonesia shows that the Warranty has been made in favour of M/s ATKP Massakar Indonesia and not the Procuring Entity. This will leave the Procuring Entity with several risks related to replacement or repair of failed items including transportation, duties, taxes and/or any other costs incurred by it that ought to have been covered in a warranty submitted pursuant to Clause 1.7 of Section VI of the Tender Document. Reference to M/s ATKP Massakar Indonesia cannot be construed to be a minor deviation especially in this case where provision of a warranty was a mandatory requirement at the Preliminary Evaluation Stage. The question whether there can be deviations from mandatory requirements was addressed by the court in **Republic v. Public Procurement Administrative Review Board & 3 Others ex parte Roben Abdare (K) Ltd (2019) eKLR**

(hereinafter referred to as "the Roben Arberdare (K) Ltd Case") where it was held as follows: -

***"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required...Mandatory requirements in bid documents must be complied with. Deviations from mandatory bid requirements are not permissible"***

It is also expected that the Procuring Entity would apply a mandatory requirement uniformly to all bidders when evaluating their bids. The Applicant's warranty letter was made in favour of M/s ATKP Massakar Indonesia and not the Procuring Entity. The same cannot be construed to be a warranty for the Procuring Entity simply because the letterhead mentions the Procuring Entity, yet the body of the letter which outlines the conditions of the warranty show that the warranty will benefit M/s ATKP Massakar Indonesia.

Accordingly, the Board finds that the Applicant failed to satisfy the requirement outlined in Clause (a) 23 of Section VI of the Tender Document.

- **Proposed Service and Maintenance Agreement**



Clause (a) 25 of Section VI of the Tender Document outlined this criterion as follows: -

***"The bidders shall provide a proposed service and maintenance agreement for the system with a proposed commencing at the end of the three (3) year warranty period. This maintenance agreement should be for a five (5) years period and should be costed separately as appropriate. This costing shall be considered during the financial evaluation for comparison purposes but shall not be included in the bid price. The quoted maintenance price shall remain firm and fixed for the stated period"***

The Procuring Entity contended that the Applicant attached a proposed service and maintenance agreement from M/s System Integration Air Traffic Management AB, Si ATM and not from the Applicant itself given that it was the lead bidder in its consortium. Having considered this assertion, the Board observes that, again, the Tender Document and the several addenda issued by the Procuring Entity did not specify which company would provide evidence in response to this criterion in case of companies in a consortium, a joint venture or any other contractual arrangement. The Tender Document only stated that bidders ought to provide a Proposed Service and Maintenance Agreement that would last for a period of 5 years, after the warranty period of 3 years has lapsed. Thus, bidders were at liberty to provide a Proposed Service and Maintenance Agreement from any

of the partners of the consortium, joint venture or any other contractual arrangement.

In response to this criterion, the Applicant provided the following: -

- ✓ *At pages 604 to 612 of its original bid, a document referred to as Quotation Test & Development System for ATM – KCAA to KCAA dated 16<sup>th</sup> October 2019, version 1.0, First Issue for ATM Tender – OPTION, written on the letterhead of M/s System Integration Air Traffic Management AB, Si ATM with a total costs \$302,000.00 for Hardware, Software and Associated Services, but does not mentioned a proposed maintenance period.*
- ✓ *At pages 613 to 621 of its original bid, a document referred to as Quotation SLA for ATM – KCAA to KCAA dated 16<sup>th</sup> October 2019, version 1.0, First issue for ATM Tender on the letterhead of M/s System Integration Air Traffic Management AB, Si ATM which states that **"the Software Warranty and Hardware Warranty of KCAA will expire on TBD (a date to be determined)"** and that the software warranty shall be prolonged with 5 years from current expiration date, which expiration date has not been specified. Further, the Maintenance Service specified is for a period of 5 years and has been costed at \$136,000.00 per year.*

The Board observes that whereas both documents outlined hereinbefore specify the maintenance costs to be provided by the Applicant, the first

document attached at pages 604 to 612 of the Applicant's bid, does not mention a maintenance period. The second document at pages 613 to 621 of the Applicant's bid, mentions a maintenance service period of 5 years from an expiry date that is not specified. It is also worth noting that the Board has established the Applicant failed to provide a warranty as required in the Tender Document. This means, even if the Applicant were to state that the Maintenance period of 5 years will commence upon expiry of a warranty period of 3 years, the Procuring Entity will not have a document upon which to calculate the commencement date of the proposed service and maintenance agreement, given that there is no warranty provided by the Applicant that meets the mandatory requirement outlined in Clause (a) 23 of Section VI of the Tender Document.

It is the Board's considered view that the Applicant failed to provide a proposed Service and Maintenance Agreement for a period of 5 years commencing after the lapse of 3-year warranty period but instead, the Applicant provided a document which mentions a maintenance service period of 5 years from an expiry date that is not specified. In addition to this, the Applicant failed to provide a warranty of 3 years in favour of the Procuring Entity, upon which commencement period of the proposed Service and Maintenance Agreement (which should run for 5 years) ought to have been determined.

Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause (a) 25 of Section VI of the Tender Document.

The Board has established that the Applicant only satisfied the criteria outlined in Clause (a) 12 & Clause (a) 13 of Section VI of the Tender Document. However, all four criteria considered hereinbefore were all evaluated at the Preliminary Evaluation Stage, which comprised of mandatory requirements to be fully satisfied before a bidder is declared responsive and eligible to proceed to Technical Evaluation.

Section 79 (1) of the Act which was outlined hereinbefore states that a tender is responsive only if it meets the eligibility and mandatory requirements of the Tender Document. In **Roben Aberdare (K) Ltd Case** cited hereinbefore the court held that mandatory requirements in bid documents must be complied with. The Board would also like to note that an evaluation committee must evaluate bids against the eligibility and mandatory requirements using the criteria set out in the tender documents. This is emphasized in section 80 (2) of the Act which provides as follows: -

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"***

The Applicant failed to satisfy all the mandatory requirements at the Preliminary Evaluation Stage and the Evaluation Committee had no option but to declare the Applicant's bid non-responsive.

In totality of the fifth issue for determination, the Board finds that the Applicant failed to satisfy the mandatory requirements at the Preliminary Evaluation Stage, specifically in relation to Clause (a) 23 and Clause (a) 25 of Section VI of the Tender Document, thus could not proceed to Technical Evaluation.

On the last issue for determination, the Board observes that the Applicant challenged the eligibility of the Interested Party to bid in the subject tender. The Board already established the eligibility criteria hereinbefore and shall now study the documentation attached to the Interested Party's bid to determine whether it satisfied the eligibility criteria specified by the Procuring Entity. The said documentation is outlined hereinbelow as follows: -

- ✓ At page 24 of its original bid, a Single Business Permit issued on 18<sup>th</sup> February 2020 by Nairobi City County to Indra Limited for Consultancy;
- ✓ At page 22 of its original bid, a CR 12 Extract as at 11<sup>th</sup> June 2020 issued by the Companies Registry with the following details of directors and shareholders: -

Name	Description	Shares
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<b>Indra Soluciones Tecnologias de la Informacion, S.L.U</b>	<b>Shareholder</b>	<b>Ordinary Shares: 999</b>
Maria Elena Linaje Gomez	Director	
Fransisco Jose Jimenez Rodriguez	Director	
<b>Europraxis Atlante S.L</b>	<b>Shareholder</b>	<b>Ordinary: 1</b>

- ✓ At page 60 of its original bid, a Declaration related to Indra Limited (Kenya) Legal Status dated 26<sup>th</sup> May 2020 together with an Attachment listing several companies belonging to a group (among them being Indra Limited) at pages 61 to 62 of its original bid. The said Declaration states as the following details: -

***"SUBJECT: Tender No. KCAA/057/2019-2020- Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement)***

***Indra Sistemas S.A, Spanish Company having its registered office at Avda, de Bruselas 35, 28108 Alcobendas (Madrid), Spain, duly represented by Mr. Frederico Rueda Laorga, with Spanish ID Number 50.802.959-F, using the Power of Attorney signed in Madrid on 5<sup>th</sup> May 2020, grated by the illustrious notary Mr. Gerardo Von Wichman Rovira, with the number of its Protocol 1209, hereby:***

***DECLARES***

***1. INDRA LIMITED is a subsidiary of INDRA SYSTEMAS, S.A.***

- 2. *INDRA SISTEMAS, S.A. holds 100% of the shares of Indra Holding Tecnologias de La Informacion, S.L.U, a Spanish Company which holds the 100% of the shares of Indra Soluciones Tecnologias de la Informacion, S.L.U and the 100% of the shares of Indra Business Consulting, S.L.U, both companies also incorporated under the Laws of Spain, which own the 99.99% and 0.01% of the shares of Indra Limited, respectively.***
- 3. *INDRA SISTEMAS, S.A is a Leader Information Technology Company with a wide experience in Transport and Defence Systems.***
- 4. *INDRA SISTEMAS, S.A. and INDRA LIMITED meet the financial, technical and economical requirements required for the performance of the Project related to the above mentioned SUBJECT.***
- 5. *Therefore, INDRA SISTEMAS, S.A. is committed to fully support INDRA LIMITED from the technical point of view, fully contributing with all the know-how and experience for the successful performance of the Project ensuring that all required resources and processes, are applied in accordance with the terms and conditions of the Tender and agreed upon the contract for the project***

***IN WITNESS THEREOF the Company INDRA SISTEMAS, S.A., executes this statement through its Authorized attorney on the day and year first written above***

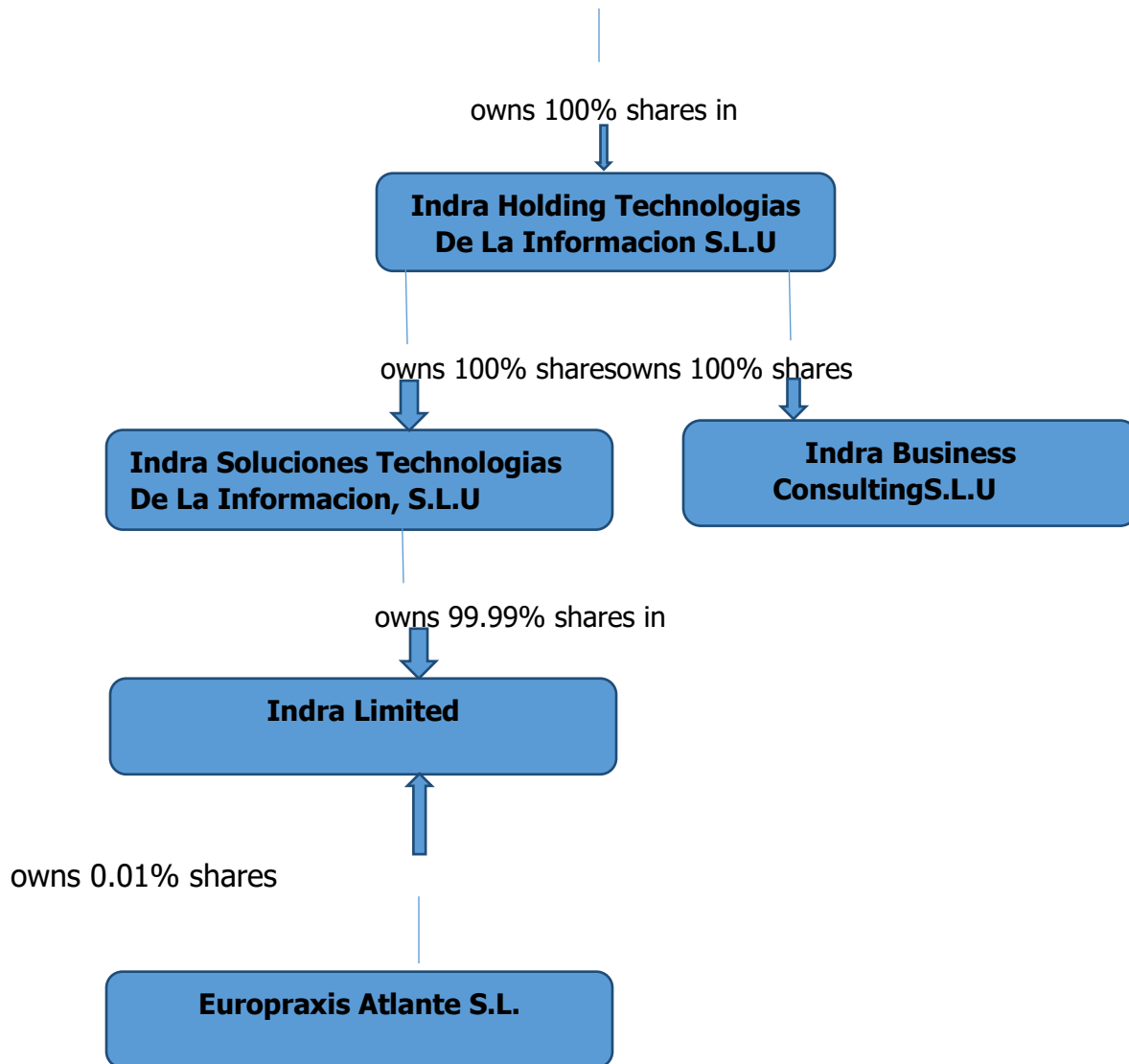
- ✓ At page 134 of its original bid, an undated Manufacturer's Authorization from Indra Sistemas S.A. addressed to the Director General of the Procuring Entity with the following details: -

***"Whereas Indra Sistemas S.A., who are established and reputable manufacturers of Air Traffic Management (ATM ) systems having factories at Carretera de Loeche 9, 28850-Torrejoin de Ardoz, Madrid, Spain de hereby authorized Indra Limited to submit a tender, and subsequently negotiate and sign a contract with you against Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement) for the above goods manufactured by us. We hereby extend our full guarantee and warranty as per the General Conditions of Contract for the goods offered for supply by the above firm against the Invitation for Tenders"***

Having considered the documentation attached to the Interested Party's original bid, the Board construes that the relationship of the companies mentioned hereinbefore can be demonstrated as follows: -

INDRA SISTEMAS S.A.  
(Manufacturer)





Having considered the documentation in the Interested Party’s original bid and the matrix outlined hereinbefore, the Board notes that M/s Indra Sistemas S.A is a manufacturer of an Air Traffic Management System. It is therefore important to determine the nature of the relationship between the manufacturer (M/s Indra Sistemas S.A) and the Interested Party (M/s Indra Limited), since the two companies belong to a group of companies. In **PPARB Application No. 82 of 2020, GE East Africa Services**

**Limited v. Kenyatta University Teaching and Referral Hospital & Another**(hereinafter referred to as “the GE East Africa Services Limited Case”), the Board addressed the question whether a bidder that is part of a conglomerate can rely on the technical expertise of its Parent/Holding company while making reference to the finding made in **PPARB Application No. 94 of 2019, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 3 Others**and held as follows: -

***“Section 3 of the Companies Act, No. 17 of 2015 (hereinafter referred to as “the Companies Act”) states that:***

-

*“wholly-owned subsidiary company” (of another company) means a company that has no members other than that other company and that other company’s wholly owned subsidiaries (or persons acting on behalf of that other company or its wholly-owned subsidiaries)”*

The Board in **PPARB Application No. 94 of 2019, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 3 Others** addressed the relationship between parent companies and their subsidiaries. In doing so, the Board cited with approval the decision by Lord Denning in the Court of Appeal of England in **DHN Food Distributors Ltd and Others v. London Borough of Tower Hamlets (1967) 3 ALL ER 462**and further held as follows: -

*"...We all know in many respects that a group of companies is treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: "there is evidence of general tendency to ignore the separate legal entities of various companies within a group" This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.*

*This group in my view is virtually a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point."*

*....The Board is persuaded that even though wholly-owned subsidiary companies may prepare their own individual financial statements, the law (as can be seen from the judicial precedents of the Courts of India and England cited hereinabove), permits a wholly-owned subsidiary to rely on the Financial Statements of the Parent Company as the two companies are treated as one concern (or a single economic entity) when preparing Consolidated Financial Statements of the Parent Company and its subsidiaries."*

***In the foregoing case, the Board addressed the question whether a wholly-owned subsidiary can rely on the financial***

***statements of its parent company for purposes of a tendering process. In the instance Request for Review, the Board notes that, GE Healthcare confirmed that it manufactures cyclotron equipment to be supplied by the Applicant (the indirect wholly owned subsidiary of General Electric Company), because GE Healthcare is the business segment and/or division of General Electric Company that deals with health care. The Applicant also obtained approval from the Pharmacy and Poisons Board to supply the cyclotron equipment manufactured by GE Healthcare.***

***It is the Board's considered finding that the Applicant being an indirect wholly owned subsidiary of General Electric Company (the Parent Company and conglomerate) can rely on the technical expertise of its parent company and in this case being an Original Equipment Manufacturer, by treating all the legal entities that form the General Electric Company conglomerate as one concern and not separate so as to be defeated on a technical point."***

Having considered the finding made in the GE East Africa Services Limited Case, the Board observes that in that case, it was necessary to lift the corporate veil of the applicant (i.e. GE East Africa Services Limited) to establish the companies behind the applicant so as to determine the applicant's ownership and control. The Board finds that the circumstances

in the GE East Africa Services Limited Case are closely related to the circumstances of the instant Request for Review and it was therefore justified for the Board to lift the corporate veil of the Interested Party to determine its ownership. From the matrix outlined hereinbefore, the Interested Party is a company that is **indirectly owned** by M/s Indra Sistemas S.A., the manufacturer of the ATM System to be supplied to the Procuring Entity, through 99.99% shares held by M/s Indra Soluciones Tecnologias De La Informacion, S.L.U and only 0.01% shares held by Europraxis Antlante S.L having compared the information in the Interested Party's CR 12 Extract as at 11<sup>th</sup> June 2020 and information contained in the Declaration Letter dated 26<sup>th</sup> May 2020. In essence, the Interested Party is an indirectly owned subsidiary of M/s Indra Sistemas S.A, the manufacturer of the ATM system to be supplied to the Procuring Entity and in the circumstances, the two companies ought to be treated as one concern so as not to be defeated on a technical point.

This in the Board's view means that the Interested Party is a manufacturer of the ATM System to supplied to the Procuring Entity by virtue of being an indirectly owned subsidiary company of M/s Indra Sistemas S.A, and thus, the Interested Party satisfied the eligibility criteria outlined in Clause 2.1.1 of Section II. Instructions to Tenderers and Clause 2.12 of the Appendix to Instructions to Tenderers of the Tender Document read together with the Procuring Entity's Response to Clarifications issued on 18<sup>th</sup> May 2020, 27<sup>th</sup> May 2020 and 10<sup>th</sup> June 2020.

At this juncture, it is important for the Board to address its mind on the options available to the Procuring Entity especially in this case where the Interested Party is part of a group of companies and is an indirectly owned subsidiary of another company, i.e. M/s Indra Sistemas S.A, thus making the Interested Party, a manufacturer of the ATM System to be supplied to the Procuring Entity. Section 135 (2) of the Act states as follows: -

**"Section 135 (1) .....**

***(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings***"

According to section 2 of the Act, the word "person" has the meaning assigned to it in Article 260 of the Constitution and includes sole proprietorship. Turning to Article 260 of the Constitution, the Board notes that a person includes: -

***"a company, association or other body of persons whether incorporated or unincorporated"***

Further to this, section 3 of the Companies Act, 2015 defines the term "Associated Company" as: -

- "(a) a subsidiary of the company;***
- (b) a holding company of the company; or***
- (c) a subsidiary of such a holding company"***

On its part, the term "holding company" is defined under Section 3 of the Companies Act as a company that—

- (a) controls the composition of that other company's board of directors;***
- (b) controls more than half of the voting rights in that other company;***
- (c) holds more than half of that other company's issued share capital; or***
- (d) is a holding company of a company that is that other company's holding company;"***

It is worth noting that the Interested Party can be referred to as an Associated Company of M/s Indra Sistemas S.A since the Interested Party is the indirect subsidiary of M/s Indra Sistemas S.A. As a result, associated companies such as the Interested Party that is indirectly owned by a holding company are "persons" within the meaning of section 135 (2) of

the Act. Section 135 (2) of the Act permits the Accounting Officer of the Procuring Entity to enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

Since the Interested Party is part of a group of companies and the Procuring Entity may have concerns of the person that would implement the subject tender, it is the Board's considered view that nothing stops the Procuring Entity from entering into a contract with the Interested Party and/or the Interested Party's parent company/designated Air Traffic Management System Manufacturer provided that the Procuring Entity specifies the obligations of the Interested Party and/or the parent company of the Interested Party/designated Air Traffic Management Manufacturer, M/s Indra Sistemas, S.A in the event of default by the Interested Party and/or the parent company of the Interested Party/designated Air Traffic Management System Manufacturer in performing the contract.

Martin Loosemore, John Raftery, Charles Reilly in their book on **"Risk Management in Projects (Taylor and Francis, 2006)"** explain that: -

***"The most common form of guarantee in construction projects is the parent company guarantee which is used on many projects to ensure that the obligation of a subsidiary company will be underwritten by its holding or parent***



***company in a financially stable group. Parent company guarantees are designed to provide the same cover as a performance bond with the advantage of having no apparent cost for the employer or limit which may not cover the employer's cost for non-performance."***

From the above excerpt, it is worth noting that a procuring entity may require a parent company to provide a parent company guarantee within the contract in the subject tender that binds such a parent company to the terms and conditions of a contract executed in the subject tender. The parent company will have an obligation to ensure that its subsidiary company implements the subject tender in accordance with the terms of the contract executed between the parent company, in this case, M/s Indra Sistemas S.A/designated Air Traffic Management System Manufacturer, the subsidiary (i.e. the Interested Party) and the Procuring Entity. In the event of non-performance by the Interested Party, M/s Indra Sistemas S.A will be under a legal obligation to ensure that the Procuring Entity recovers all losses and expenses incurred as a result of the Interested Party's non-performance of the contract.

In totality, the Request for Review is dismissed and the Board makes the following specific orders: -

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review: -

**1. The Request for Review filed by the Applicant herein on 8<sup>th</sup> September 2020 with respect to Tender No. KCAA/057/2019-2020 for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management System at Jomo Kenyatta International Airport (Re-advertisement), be and is hereby dismissed.**

**2. The Procuring Entity is at liberty to proceed with the subject procurement process to its logical conclusion, taking into consideration, the Board's findings in this case.**

**3. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 29<sup>th</sup> day of September 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**