

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 74 & 77 OF 2020 (CONSOLIDATED)

BETWEEN

FCM TRAVEL SOLUTIONS T/A

CHARLESTON TRAVEL LIMITED.....1ST APPLICANT

KILINDINI TRAVEL CENTRE LIMITED.....2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

MAGICAL HOLIDAYS LIMITED.....1ST INTERESTED PARTY

REGAL TOURS & TRAVEL LIMITED.....2ND INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Ports Authority with respect to Tender No. KPA/111/2019-20/PSM, Contract for Provision of Air Travel Agency Services.

BOARD MEMBERS

- | | |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) inviting sealed bids from eligible bidders through advertised Tender No. KPA/111/2019-20/PSM, Contract for Provision of Air Travel Agency Services (hereinafter referred to as “the subject tender”), by placing an advertisement on MyGov Publication Website on 4th February 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 21 No. of bids by the bid submission deadline of 3rd March 2020. The same were opened shortly thereafter in the presence of bidders by a Tender Opening Committee who recorded the bids received as follows:-

No.	Name of Firm
1.	Boma Travel Services Limited
2.	Angani Tours and Travel
3.	Prime Time Travel Limited
4.	Marock Safaris Limited
5.	Satguru Travels & Tours Services Limited
6.	Thamani Concierge
7.	Primate Tours Limited
8.	Helinas Safaris Limited
9.	Greenbay Travel Limited
10.	African Touch Safaris Limited

No.	Name of Firm
11.	Dreamz World Group Company Limited
12.	Regal Tours & Travel Limited
13.	Premier Safaris (K) Limited
14.	Highlight Travel Limited TA BCD Travel
15.	FCM Travel Solutions/Charleston Travel Limited
16.	Basel Tours & Travel Limited
17.	Zaras Travel
18.	Pinnacle (K) Travels & Safaris Limited
19.	Kilindini Travel Centre Limited
20.	Magical Holidays Limited
21.	Koisan Safaris Limited

Evaluation of Bids

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

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

1. Detailed Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.21 of Section II. Instructions to Tenderers read together with Clause 2.15 & 2.16 of the Appendix to Instructions to Tenderers at pages 21 to 23 of the Document for Provision of Air Travel Agency Services (hereinafter referred to as "the Tender Document"). Out of the twenty-one bids received by the Procuring Entity, only 4 bids were found responsive as outlined in Table 1.1. below: -

Table 1.1

No.	Bidder No.	Name of Bidder
1.	4	M/s Marock Safaris Limited
2.	11	M/s Dreamz World Group Company Limited
3.	17	M/s Zaras Travel
4.	20	M/s Magical Holidays Limited.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.23 (ii) of the Appendix to Instructions to Tenderers at pages 24 to 25 of the Tender Document, which further required bidders to attain a minimum technical score of 75% to proceed to Financial Evaluation. The four bidders were subjected to Technical Evaluation, however, it is only two bidders who attained the minimum technical score required to proceed to Financial Evaluation as detailed Table 2.1 below: -

Table 2.1

No.	Bidder No.	Name of Bidder	Score Attained
1.	17	Zaras Travel	93
2.	20	Magical Holidays Limited.	100

3.1. Financial Opening

In letters dated 23rd March 2020, the Procuring Entity invited M/s Zaras Travel and M/s Magical Holidays for the opening of financial bids scheduled to take place on 26th March 2020 at the Procuring Entity's Procurement Conference Room located at New Service Area-Kapenguria. The bids of the

two bidders were opened on the date scheduled in the presence of their representatives.

3.2. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.23 (iii) of the Appendix to Instructions to Tenderers which required that the Evaluation Committee to establish the lowest evaluated bidder for award of the subject tender.

The Evaluation Committee recorded the prices quoted by the two remaining bidders as follows: -

No.	Name of Bidder	Service Charge for Domestic Air Travel	Service Charge for East Africa Air Travel	Service Charge Regional, Rest of Africa Travel	Service Charge for International Air Travel.
i.	Zaras Travel	490.00	600.00	650.00	700.00
ii.	Magical Holidays Limited	149.00	149.00	249.00	249.00

Recommendation

The Evaluation Committee recommended award of the subject tender to Magical Holidays Limited based on the basis of "as and when required" for a period of three (3) years.

Professional Opinion

In a professional opinion dated 14th May 2020, the Acting Head of Procurement and Supplies, reviewed the Evaluation Report whilst outlining the entire procurement process. He concurred with the recommendation by the Evaluation Committee and further opined that the subject procurement process met the requirements of Article 227 (1) of the Constitution and provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He therefore urged the Procuring Entity's Managing Director to award the subject tender as recommended by the Evaluation Committee. The said professional opinion was approved on 22nd May 2020.

Notification to Bidders

In letters dated 26th May 2020, the successful bidder and unsuccessful bidders were notified of the outcome of their bids.

REQUEST FOR REVIEW NO. 74 OF 2020

M/s FCM Travel Solutions t/a Charleston Travel Limited lodged a Request for Review dated 8th June 2020 and filed on 9th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders: -

- a) An order annulling and setting aside the Respondent's decision awarding Tender No: KPA/111/2019 – 20/ PSM – Contract for Provision of Air Travel Agency Services to the Interested Party;***
- b) An order annulling and setting aside the letter of Notification of Regret declaring the Applicant's bid as non-responsive be set aside and nullified;***
- c) Consequent to the orders above, an order directing the Respondents to admit the Applicant's bid and subject it to evaluation in accordance with the tender document and the Act;***
- d) An order directing the Respondent to pay the costs of and incidental to these proceedings; and***
- e) Such other or further relief or reliefs as this Board shall deem just and expedient.***

In response, the Respondents lodged a Response to the Request for Review dated 12th June 2020 and filed on 15th June 2020 together with an Affidavit in Support of the Response to the Request for Review sworn and filed on even date, through Addraya Dena Advocate while M/s Magical Holidays Limited lodged a Response to the Request for Review dated 16th June 2020 and filed on 17th June 2020.

REQUEST FOR REVIEW NO. 77 OF 2020

M/s Kilindini Travel Centre Limited lodged a Request for Review dated 9th June 2020 and filed on 10th June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, through the firm of Zed Achoki Hussein Advocates, LLP, seeking the following orders: -

- a) An order declaring the decision of the 2nd Respondent in awarding Tender No: KPA/111/2019 – 20/ PSM – Contract for Provision of Air Travel Agency Services to be discriminatory, prejudicial, null and void;***
- b) An order declaring the award made in Tender No: KPA/111/2019 – 20/ PSM to the Interested Party null and void of no legal effect;***
- c) An order directing the Procuring Entity to re-tender afresh the Tender for Contract for Provision of Air Travel Agency Services forthwith;***
- d) An order compelling the Respondents to pay the costs to the Applicant arising from/and incidental to this Application; and***
- e) The Board do make such and further orders as it deems fit to ensure that the ends of justice are met in the circumstances of this Request for Review.***

In response, the Respondents lodged a Response to the Request for Review dated 12th June 2020 and filed on 15th June 2020 together with an Affidavit in Support of the Response to the Request for Review sworn and filed on

even date, through Addraya Dena Advocate while M/s Magical Holidays Limited lodged a Response to the Request for Review dated 22nd June 2020 and filed on 23rd June 2020 and a List and Bundle of Authorities dated and filed on even date, through the firm of Muturi Mwangi Associates Advocates. M/s Regal Tours & Travel Limited lodged an Affidavit in Support of the Request for Review sworn on 18th June 2020 and filed on 19th June 2020 through the firm of Ameli Inyangu & Partners Advocates.

On 16th 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) 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 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. 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.

Accordingly, M/s FCM Travel Solutions t/a Charleston Travel Limited lodged Written Submissions dated and filed on 24th June 2020 with respect to Review No. 74/2020 while M/s Magical Holidays Limited lodged Written Submissions dated 22nd June 2020 and filed on 23rd June 2020 with respect to Review No. 77/2020.

CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS

Request for Review No. 74/2020 and Request for Review No. 77/2020 were both scheduled for deliberation before the Board on 24th June 2020. The Board, in its deliberation of the two Request for Review applications noted that they both relate to the same tender advertised by the same Procuring Entity. The Board further noted that where two Request for Review applications are filed relating to the same tender, it has discretion to exercise the power vested upon it under Regulation 82 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") 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"

Accordingly, the Board consolidated the two Request for Review applications pursuant to Regulation 82 of the 2006 Regulations, bearing in mind the fact

that any orders issued by the Board upon completing review of either of the two applications, must be taken up by the Accounting Officer who is the same in both applications, and this would affect both applicants in the two request for review applications since the tender under review before this Board is the same in both applications.

Pursuant to the said consolidation, the parties to the Request for Review shall be identified as follows: -

- M/s FCM Travel Solutions t/a Charleston Travel Limited -1st Applicant
- M/s Kilindini Travel Centre Limited -2nd Applicant
- The Accounting Officer of Kenya Ports Authority -1st Respondent
- Kenya Ports Authority -2nd Respondent
- M/s Magical Holidays Limited -1st Interested Party
- M/s Regal Tours & Travel Limited -2nd Interested Party

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 issue calls for determination: -

Whether the Procuring Entity fairly evaluated the 1st Applicant's bid and the 2nd Applicant's bid in accordance with the provisions of the Act and the Constitution

The 1st Applicant and the 2nd Applicant are among twenty-one (21) bidders who submitted their bids in response to the Procuring Entity's Advertisement Notice by the tender submission deadline of 3rd March 2020. The Procuring Entity conducted an evaluation and upon conclusion of the same, recommended award of the subject tender to the 1st Interested Party herein. Upon reviewing the professional opinion dated 14th May 2020, the 1st Respondent approved the same, thus awarded the subject tender to the 1st Interested Party. Thereafter, all bidders were notified of the outcome of their bids.

The Board having considered parties' written submissions in support and those in opposition of the Request for Review, proceeds to make the following findings: -

i. 1st Applicant

The 1st Applicant received a letter of notification of unsuccessful bid dated 26th May 2020 with 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 responsive because you did not Page Number the whole document as first page of the bid was not page numbered.

The successful bidder in regard to this tender is Magical Holidays Limited

Also attached herewith, kindly find your tender security of Kshs. 100,000.00 from M/s The Bank of Africa and your unopened financial proposal for your record..."

Paragraph 2 of Clause 2.15 & 2.16 of the Appendix to Instructions to Tenderers at page 22 of the Tender Document provides that: -

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

- 1.;***
- 2. Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments (MANDATORY)"***

In determining whether or not the Procuring Entity's decision on the 1st Applicant's bid was lawful, the Board first addressed its mind on the requirement of serialization and notes that: -

Section 74 (1) (I) of the Act provides that: -

"74 (1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) requirement of serialization of pages by the bidder for each bid submitted"

The Oxford English Dictionary, 7th Edition defines the word "series" as:-

"a number of things that come one after another"

The Cambridge English Dictionary, 7th Edition further defines the term "sequence" as:-

"a series of related things or events, or the order in which they follow each other"

From the two definitions above, the Board notes that in order for a series to be created when paginating a document, an author of a document chooses a particular series that he/she shall use when paginating a document. For example, if one chooses the numerical series where figures are used to paginate a document starting with "1", then the sequence taken in paginating the document will be "1", "2", "3", "4", "5" and so on, up to the last page. Therefore, the author of such document ought not introduce a different method of serialization (such as Roman numbers (i, ii, iii etc.)), in between the pages, since this will interfere with the sequence already created by using numerical figures.

The Board studied the 1st Applicant's original bid and notes that the 1st Applicant's bid is tape bound and the first page is a Cover Page containing a photograph. The said Cover Page bears the Procuring Entity's Official Stamp and the following details: -

"ORIGINAL

Kenya Ports Authority

Provision of Air Travel Agency Services

Tender No. KPA/111/2019-20/PSM

TECHNICAL PROPOSAL

March 2020

**FCM
Travel
Solutions"**

The next page is numbered "1" and contains a Confidentiality Statement. Thereafter, the 1st Applicant's original bid is numbered "2", "3", "4", "5" and so on, up to the last page which is numbered "191". In essence, the 1st Applicant's bid is numbered "1" (i.e. where the Confidentiality Statement can be found) up to "191" (i.e. where a section of a document known as "Financial Ratios" is found). However, the 1st Applicant did not allocate a page number to the Cover Page mentioned hereinbefore.

It is therefore important at this point to address our minds on the importance of a Cover Page and whether or not the same ought to be allocated a Page Number.

The Oxford Dictionary of English, 7th Edition, defines a Cover Page as:-

"a page of a book, article, dissertation and other literary writing or any other document bearing the title and usually the names of the author and publisher and the place and sometimes date of publication"

Joan Lambert in his Book **"The Use of Microsoft Word" (Oxford University Press, 2014)**, explains that: -

"You can configure the position, alignment, and format of page numbers, and whether the page number is shown on the first page. When a document has a cover page, it is standard practice to omit the page number from that cover page."

It is worth noting, in preparing documents, there are features provided in computer applications for formatting a document and one of these features include "Page Numbers". It is standard practice that a Cover Page is not given a page number. In the instant Request for Review, the 1st Applicant provided a Cover Page only for purposes of giving the Procuring Entity an overview of what the Applicant company is all about. This is one way that a Client (i.e. a procuring entity) can get a first impression of the kind of Supplier (i.e. a bidder) that such procuring entity is likely to get into business with. Thereafter, the 1st Applicant provided page numbers in a proper sequence of all documents required in the Tender Document.

In Judicial Review Miscellaneous Application No. 312 of 2018, Republic v. Public Procurement Administrative Review Board, Nairobi City Water & Sewerage Company Limited & Another (Interested Parties) Ex parte Fourway Construction (2019) eKLR, the Court explained the importance of serialization of bids and the main reason has been to ensure that the integrity of a procurement process is maintained, such that there is no opportunity for a bidder, or a procuring

entity in collusion with a bidder to engage in any corrupt practices when it held as follows:-

"For a purposive interpretation of the provisions of the law regarding serialization of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both under the Constitution and the Act. Article 227(1) of the Constitution in this regard provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Section 3 of the Act provides for the guiding principles of public procurement as follows..."

Two key principles and objectives come to play in the requirement for serialization of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment..."

Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests. In addition, the possibility of accepting non-conforming tenders as regards serialization of every page will require that discretion is given to procuring entities or

reviewing bodies to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain bidders...”

The Board observes that the 1st Applicant’s bid is intact, as the same is tape bound and there is no allegation that the 1st Applicant’s bid was ever tampered with either by removal of some pages from the 1st Applicant’s bid, or insertion of new pages into the 1st Applicant’s bid, by the Procuring Entity or by the Procuring Entity in collusion with the 1st Applicant, in order to give the 1st Applicant an unfair advantage over other bidders. In addition to this, the 1st Applicant never introduced a different method of serialization of its bid and was consistent in the manner in which it numbered its bid document to the end, therefore creating a proper sequence.

Assuming for a moment there was insertion of pages into the 1st Applicant’s bid, then it is likely that the sequence of pages, in the 1st Applicant’s bid would have been interfered with at whatever page such insertion has been done. This is also true for any pages that may have been removed as one would easily notice that there is a number or some numbers missing from the 1st Applicant’s original bid. Having studied the 1st Applicant’s bid in its entirety, there is no indication that pages were either removed from the 1st Applicant’s bid or inserted into the 1st Applicant’s bid.

The 1st Applicant serialized its bid document in a sequential manner up to the last page and there was no need for it to allocate a page number to the Cover Page of its bid.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the 1st Applicant's bid since all the pages containing the documents required by the Procuring Entity were numbered by the 1st Applicant in the correct sequence.

ii. 2nd Applicant

The 2nd Applicant received a letter of notification of unsuccessful bid dated 26th May 2020 with 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 responsive because you did not Page Number the whole document as the page with the Table of Contents was not page numbered

The successful bidder in regard to this tender is Magical Holidays Limited

Also attached herewith, kindly find your tender security of Kshs. 100,000.00 from M/s The Bank of Africa and your unopened financial proposal for your record..."

Paragraph 1 of Clause 2.15 & 2.16 of the Appendix to Instructions to Tenderers at page 22 of the Tender Document provides that: -

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

- 1. Shall have a table of contents page clearly indicating Sections and page numbers (Mandatory)***
- 2. Shall have pages in the whole document numbered in the correct sequence including all appendixes and attachments (MANDATORY)"***

It is worth noting that the 2nd Applicant provided a Table of Contents as required in Paragraph 1 of Clause 2.15 & 2.16 of the Appendix to Instructions to Tenderers at page 22 of the Tender Document. However, the issue in contention is that the 2nd Applicant did not provide a page number where the Table of Contents can be found. A thorough study of the 2nd Applicant's original bid reveals that the said bid is tape bound and the first page appearing thereof is a Cover Page with the logo of the 2nd Applicant, its physical and mailing address, the Procuring Entity's Official Stamp together with the following details: -

**ORIGINAL
TENDER
TECHNICAL SUBMISSION
CONTRACT FOR PROVISION OF AIR TRAVEL AGENCY
SERVICES
TENDER NO. KPA/11/2019-20/PSM
THE HEAD OF PROCUREMENT AND SUPPLIES
KENYA PORTS AUTHORITY
KIPEVU HEADQUARTERS 4TH FLOOR
FINANCE BLOCK III, DOOR BLK-3.4.3
KILINDINI MOMBASA**

The second page contains the Table of Contents wherein the 2nd Applicant refers to certain documents and the pages where the said documents can be found in its bid as follows: -

- 1. PARTICULARS OF TENDERING COMPANY (Pages 001-006)**
 - a) Company background (Pages 001-006)**
 - b) Posta, Physical Address (Page 007)**
 - c) Email Address (Page 008)**
 - d) Certificate of Incorporation (Page 009)**
 - e) Current Tax Compliance (Page 010)**
 - f) Current Business Permits (Pages 011-014)**
 - g) CR 12 Registrar of Companies (Page 015)**
 - h) National Identity of Directors (Page 016-017)**

- 2. TENDER SECURITY (Page 018)**
- 3. CONFIDENTIAL BUSINESS QUESTIONNAIRE (Pages 019-021)**
- 4. DECLARATION FORM (Page 022)**
- 5. ANTI CORRUPTION DECLARATION COMMITMENT (Page 023)**
- 6. ACCEPTANCE SERVICE LEVEL AGREEMENT (Page 024)**
- 7. LICENSES (Pages 025-028)**
 - a) IATA Certificate (Page 025)
 - b) KATA Certificate (Page 026-028)
- 8. LIST OF CLIENTS AND RECOMMENDATION LETTERS (Page 029-036)**
- 9. TABLE 1 (Pages 037-038)**
- 10. ORGANIZATION CHART & KEY TECHNICAL PERSONNEEL CVs (Pages 039-085)**
- 11. LETTER FROM BANK & AUDITED ACCOUNTS 2017, 2018 (Pages 086-132)**
- 12. CUSTOMER CARE POLICY (Pages 133-136)**
- 13. WRITTEN UNDERTAKING PREFERENTIAL SERVICE (Page 137)**
- 14. SIMILAR SERVICES OFFWRED 3 YEARS (Pages 138-174)**
- 15. LIST OF EQUIPMENTS (Pages 175)**
- 16. PIN CERTIFICATE (Page 176)**
- 17. TOURISM LICENCE (Page 177)**
- 18. CHAMBER OF COMMERCE CERTIFICATE (Page 178)**
- 19. NHIF CONTRIBUTIONS (Pages 179-180)**

20. NSSF CONTRIBUTIONS (Pages 181-182)

Thereafter, the 2nd Applicant placed a Divider, such that the next page after the Divider is numbered "001". The Board studied the 2nd Applicant's bid in its entirety and notes that the said bid was serialized as "001" (i.e. the page where the 2nd Applicant's Company Profile appears) up to "182" (i.e. the page where the 2nd Applicant's NSSF Contribution appears).

Having considered the manner in which the 2nd Applicant paginated its bid, the Board deems it necessary to address its mind on the importance of a "Table of Contents" and whether the same ought to be allocated a page number.

The Oxford English Dictionary, 7th Edition, provides two definitions to the word "table of contents" as follows: -

- "1. a list of divisions (chapters or articles) and the pages on which they start or appear.***
- 2. A list of titles of the parts of a book or document, organized in the order in which the parts appear."***

The Cambridge English Dictionary further describes a "table of contents" as follows: -

"A table of contents, usually headed simply "Contents" and abbreviated informally as TOC, is a list of the parts of a book or document organized in the order in which the parts appear. The contents usually include; the titles or descriptions of the first-level headers, such as chapter titles in longer works, and often includes second-level or section titles within the chapters as well, and occasionally even third-level titles. The depth of detail in tables of contents depends on the length of the work, with longer works having less. Formal reports also have a table of contents. Within an English-language book, the table of contents usually appears after the title page, copyright notices, and, in technical journals, the abstract; and before any lists of tables or figures, the foreword, and the preface. Printed tables of contents indicate the page numbers where each details in that table of contents can be found, while digital ones offer links to go to each part. The format and location of the page numbers is a matter of style for the publisher. If the page numbers appear after the heading text, they might be preceded by characters called leaders, usually dots or periods, that run from the chapter or section titles on the opposite side of the page, or the page numbers might remain closer to the titles. In some cases, the page number appears before the text."

Having considered the above description of a Table of Contents, it is important to note that a Table of Contents provides details of the items in a book or any other document and the pages where such items can be found. For example, the 2nd Applicant's Table of Contents outlined hereinbefore specified the pages where one can find certain documents such as "Company Background" (Pages 001-006), "Posta, Physical Address" (Page 007) and so on.

It is also worth noting that, the items contained in a Table of Contents usually do not include an item called "Table of Contents" so that the author of a document then proceeds to allocated a page number to the part known as "table of contents". This explains why it is not necessary to allocate a page number to the Table of Contents, because one is likely to cite a wrong page number, i.e. citing a page number which actually belongs to another item.

In the Board's view, the mischief that the legislature intended to cure by section 74 (i) of the Act is to avoid instances where documents are inserted into a bidder's bid or removed from such bidders bid, either by the bidder or by the bidder in collusion with a procuring entity. Such a bidder and a procuring entity would collude in order to give the bidder an unfair advantage to the detriment of other bidders who participated in the procurement process.

Article 227 (1) of the Constitution requires all State organs and other public entities to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. The 2nd Applicant never introduced a different method of serialization of its bid and was consistent in the manner in which it numbered its bid document to the end (i.e. 001, 002, 003 and so on, up to 182), therefore creating a proper sequence. The Board further notes that there is no allegation that the 2nd Applicant's bid was ever tampered with, either by removal of some pages from the 2nd Applicant's bid, or insertion of new pages into the 2nd Applicant's bid, by the Procuring Entity or by the Procuring Entity in collusion with the 2nd Applicant, in order to give the 2nd Applicant an unfair advantage over other bidders.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the 2nd Applicant's bid since the 2nd Applicant correctly numbered its original bid in the correct sequence and it was not necessary for it to allocate a page number to the Table of Contents.

The Board further studied the original bid of the 1st Interested Party and notes that the 1st Interested Party started paginating its bid from the Cover Page as "1". The next page thereof contains a Document headed "**Notices of Proprietary and Confidential Information**" and is numbered "2". The third document is a section of the 1st Interested Party's Table of Contents and is numbered "4". Thereafter, the preliminary parts of the 1st Interested Party's Table of Contents are found on the next document which is numbered

"3". Thereafter, one comes across a document termed as "**Executive Summary/Company Background/Profile**", which is numbered "5". In essence, the 1st Interested Party's serialization was as follows: -

"1", "2", "4", "3", "5" and so on, up to "165" which is the last page thereof.

Even though the 1st Interested Party only applied one mode of serialization to the last page of its bid, it placed the second section of its Table of Contents serialized as "4" before the one containing the preliminary parts of the said Table of Contents serialized as "3". As a result, instead of the numbers following each other as "1, 2, 3, 4, 5", the same follow each other as "1", "2", "4", "3", "5". However, one can easily peruse the pages in the 1st Interested Party's bid to the end since the same was tape bound and there is no indication of insertion or removal of any of the pages in the 1st Interested Party's original bid.

It is the Board's considered view that it would be absurd for the Procuring Entity to excuse the sequence used by the 1st Interested Party when serializing its bid but disqualify the 1st Applicant (who applied a proper mode of serialization throughout its bid) on the basis that it did not paginate its Cover Page which in any case, should not be allocated a page number and to also disqualify the 2nd Applicant (who applied a proper mode of serialization throughout its bid) on the basis that it did not paginate its Table of Contents, which should not be allocated a page number. This in the

Board's view amounts to giving the 1st Interested Party favourable treatment to the detriment of the 1st Applicant and the 2nd Applicant.

The Board studied the Evaluation Report dated 21st April 2020 and notes that out of the 21 bidders subjected to Preliminary Evaluation, 12 bidders were found non-responsive on the issue of pagination of their respective bid documents, in addition to other various reasons for non-responsiveness.

However, M/s Satguru Travels & Tours Services Limited and M/s Helina Safaris Limited (in addition to the two Applicants in the Request for Review) were the only bidders who did not have additional reasons for non-responsiveness. M/s Satguru Travels & Tours Services Limited was found non-responsive because it did not allocate a Page Number to its Cover Page, whereas M/s Helina Safaris Limited was found non-responsive for failure to paginate its Table of Contents. However, these two bidders serialized their bid documents in a proper sequence up to the last page where documents required by the Procuring Entity can be found.

It is important for the Procuring Entity herein to understand the rationale behind serialization of bid documents and that is, to avoid any corrupt practices between it and bidders, but not to disqualify bidders simply because their Cover Pages and Table of Contents were not allocated page numbers yet such bidders already serialized their bids in a proper sequence up to the last page.

In totality of the issue under consideration, the Board finds that the Procuring Entity unfairly evaluated the 1st Applicant's bid and the 2nd Applicant's bid therefore failed to adhere to the principle of fairness under Article 227 (1) of the Constitution.

In summary of the foregoing, the Request for Review is hereby allowed in terms of 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 Request for Review: -

- 1. The Procuring Entity's Letter of Notification of Unsuccessful Bid dated 26th May 2020 addressed to M/s FCM Travel Solutions t/a Charleston Travel Limited, that is, the 1st Applicant herein with respect to Tender No. KPA/111/2019-20/PSM, Contract for Provision of Air Travel Agency Services, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Unsuccessful Bid dated 26th May 2020 addressed to M/s Kilindini Travel Centre Limited, that is, the 2nd Applicant herein with respect to the subject tender, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Letter of Notification of Award dated 26th May 2020 addressed to M/s Magical Holidays Limited,**

that is, the 1st Interested Party herein with respect to the subject tender, be and is hereby cancelled and set aside.

- 4. The Procuring Entity is hereby directed to re-admit the 1st Applicant's bid and the 2nd Applicant's bid together with all other bidders disqualified as a result of serialization of their bid documents at the Preliminary Evaluation stage and conduct a re-evaluation at the Preliminary Evaluation Stage with respect to the criterion provided under Clause 2.15 & 2.16 (1) and (2) at page 22 of the Tender Document and the Constitution.**
- 5. Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision taking into consideration the Board's findings in this Request for Review.**
- 6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 30th day of June 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB