

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 159/2020 OF 29<sup>TH</sup> DECEMBER 2020**

**BETWEEN**

**WILLIS PROTOCOL AND**

**CONCIERGE SERVICES LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**CAPITAL INTERNATIONAL**

**CONCIERGE SERVICES LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**UMBATO SAFARIS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of Kenya Airports Authority with respect to Tender No. KAA/OT/JKIA/MBD/0022/2020-2021 For Provision of Meet and Assist Service, Jomo Kenyatta International Airport.

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa     | -Chairperson |
| 2. Mr. Nicholas Mruttu  | -Member      |
| 3. Mr. Alfred Keriolale | -Member      |
| 4. Mr. Ambrose Ngari    | -Member      |

5. Ms. Njeri Onyango

-Member

### **IN ATTENDANCE**

1. Mr. Philip Okumu

-Ag. Board Secretary

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

Kenya Airports Authority (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. KAA/OT/JKIA/MBD/0022/2020-2021 For Provision of Meet and Assist Service, Jomo Kenyatta International Airport (hereinafter referred to as "the subject tender") via an advertisement in MyGov pull-out newspaper on Tuesday, 25<sup>th</sup> August 2020 as well as publication in the Procuring Entity's website [www.kaa.go.ke/corporate/procurement/](http://www.kaa.go.ke/corporate/procurement/), <https://suppliers.kaa.go.ke/irj/portal> and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke).

#### **Bid Submission Deadline and Opening of bids**

Upon issuance of Addendum No. 1 on 8<sup>th</sup> September 2020, the bid submission deadline was extended to 16<sup>th</sup> September 2020. A total of ten (10) bidders/firms submitted bids in response to the subject tender which were opened on 16<sup>th</sup> September 2020 and recorded as follows: -

<b>NO</b>	<b>TENDERER'S NAME</b>	<b>Category</b>	<b>ADDRESS</b>	<b>BID PRICE/FINANCIAL COMPLIANCE (KES)</b>
<b>1</b>	Umbato Safaris Limited	Lot 1	P.O Box 6738-00100 Nairobi	2,000,000.00
<b>2</b>	Kenya Airways Limited	Lot 2	P.O Box 19002-00501 Nairobi	2,200,000.00
<b>3</b>	SwissPort Kenya Limited	Lot 2	P.O Box 1977-00501 Nairobi	2,000,000.00
<b>4</b>	Moto Gari Limited	Lot 2	P.O Box 60658-00200	2,000,000.00
<b>5</b>	Tradewinds Aviation Services Limited	Lot 2	P.O Box 42474-00100	4,000,000.00
<b>6</b>	Stac International Limited	Lot 2	P.O Box 59739-00100	2,040,000.00
<b>7</b>	Capital International Concierge Services Ltd	Lot 2	P.O Box 44251-00100	6,000,000.00
<b>8</b>	Willis Protocol Concierge Services Ltd	Lot 2	P.O Box 103100	2,000,000.00
<b>9</b>	Corporate Aviation Limited	Lot 2	P.O Box 19028-00501	2,100,000.00
<b>10</b>	Amicabre Travel Services Ltd	Lot 2	P.O Box 19055-00501	3,650,000.00

## **Evaluation of Proposals**

The evaluation process was conducted in three stages:

1. Preliminary/Mandatory Evaluation;
2. Technical Evaluation;
3. Financial Evaluation.

### **1. Preliminary Evaluation**

At this stage of evaluation, all bids submitted in response to Lot 1 and Lot 2 of the subject tender were evaluated against the preliminary mandatory requirements as follows: -

- a) All Tenderers shall fill in **ALL** the Standard Qualification Forms;
  - i) Form of Tender
  - ii) Statement of Financial Compliance
  - iii) Self - declaration Form
  - iv) Confidential Business Questionnaire
  - v) Tender Security for **Lot 2 General Categories**
  - vi) Tender Securing Declaration Form- For AGPO-**for Firms under AGPO Categories**
- b) Copy of Registration/incorporation certificate to show that the applicant is a registered company and legally authorized to do business
  - i) Tender security shall be of Kshs. 100,000.00 valid for a period of 150 days from the date of tender opening or Tender Securing Declaration Form- For AGPO-**for Firms under AGPO Categories**
- c) Copy of valid Tax Compliance Certificate
- d) Valid business permit for 2020
- e) Copy of CR12 and copies of Identification Cards of the list of Directors of the firm
- f) Attach a valid AGPO/YAGPO certificate from National Treasury for enterprises registered under the preferences and reservation

Scheme- Youth Group, Women Group or People Living With Disability Group Category.

- g) Copy of CR12 and copies of Identification Cards of the list of Directors of the firm. Provide copy of CR12 providing a list of directors and shareholding status. Where one or more of the shareholders is a company (Beneficial Ownership), the CR12 or equivalent from country of origin of such a company shall be provided. However, where the CR12 of the beneficial shareholders is not available as at the time of the tender submission, the successful bidder shall be required to submit it before execution of the contract. This requirement is not applicable to sole proprietorships and partnerships registered under Business Names.
- h) Access to Liquid Assets: Proof of access to liquid assets or capacity to have a minimum cash flow of **Kshs. 5,000 000.00**. Evidence by current bank letter of Credit specific to this tender, cash in hand demonstrated through a three calendar months' bank statements issued over the last three months or bank overdraft facilities of the equivalent amount.
- i) Relevant Experience: Firms MUST demonstrate AT LEAST 5 YEARS relevant experience in the provision of Meet and Assist services by indicating complete current business address, size of fleet and contracts. (*provide documentary evidence in the form of contracts, leases and licenses and also contact details*).

- j)** A written power of Attorney authorizing the signatory of the tender to commit the Tenderer certified by a commissioner for oath.

Upon conclusion of Preliminary/Mandatory Evaluation, six (6) firms were found non-responsive to the mandatory requirements, including the Applicant, that is, M/s Willis Protocol and Concierge Services Limited whose bid was found non-responsive for the following reasons: -

- Did not provide a copy of Registration/Incorporation certificate;
- Did not attach copy of valid Tax Compliance Certificate;
- Did not provide a valid business permit for 2020;
- Did not provide a copy of CR12 and copies of Identification Cards of the list of Directors of the firm;
- Did not provide proof of access to liquid assets or capacity to have a minimum cash flow of Kshs. 5,000,000/-.

Four (4) firms were found responsive to the mandatory requirements hence considered for further evaluation, namely: -

1. Bidder Response No. 16232: M/s Umbato Safaris Limited;
2. Bidder Response No. 16225: M/s Kenya Airways Limited;
3. Bidder Response No. 16262: M/s Tradewinds Aviation Services Limited;
4. Bidder Response No. 16258: M/s Capital International Concierge Services Limited.

## 2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical requirements as provided in the tender document.

All the four (4) bidders who qualified for Technical Evaluation passed this stage of evaluation and qualified to proceed for Financial Evaluation.

## 3. Financial Evaluation

This stage of evaluation involved an analysis of the following: -

- **Annual concession fee;** Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher. Bidders to sign financial statement of compliance. The concession fees would be payable quarterly in arrears based on management accounts and reconciled at the end of the financial year based on the audited accounts;
- **Minimum annual guaranteed rental fee:** Bidders were required to propose an annual guarantee based on their projections. Minimum guarantee should not be less than **Kshs. 2,000,000.00;**
- **The minimum guarantee** would be payable quarterly in advance- Bidders were required to sign a financial statement of compliance,

Incomplete proposals would be considered as non-responsive. The tender would be awarded to the highest financial bidder in the respective category, that is, Lot 1 and Lot 2.

The results were as follows: -

No.	Financial Requirements	Umbato Safaris Limited Lot 1 AGPO	Kenya Airways Lot 2 General category	Trade winds Aviation Services Limited Lot 2 General category	Capital International Concierge Services Ltd Lot 2 General category
	<b>Annual concession fee;</b> Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher- Bidders to sign financial statement of compliance,	Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher-	Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher-	Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher-	Payment of a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher-
	<b>Minimum annual guaranteed rental fee;</b> Bidders to propose an annual guarantee based on their projections. Minimum guarantee should not be less than <b>Kshs. 2,000,000.00-</b> Proposed minimum annual guarantee	Kshs. <b>2,000,000.00</b>	Kshs. <b>2,200,000.00</b>	Kshs. <b>4,000,000.00</b>	Kshs. <b>6,000,000.00</b>
	<b>The minimum guarantee</b> shall be payable quarterly in advance-	Signed	Signed	Signed	Signed



	Bidders to sign financial statement of compliance,				
--	--	--	--	--	--

### **The Evaluation Committee’s Recommendation**

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Umbato Safaris Limited** being the highest evaluated bidder for Lot 1 AGPO at their total quoted concession fee of **Kshs. 2,000,000.00 (Two Million Shillings Only)** exclusive of applicable taxes and to **M/s Capital International Concierge Services Ltd** being the highest evaluated bidder for Lot 2, General Category be awarded at their total quoted concession fee of **Kshs. 6,000,000.00 (Six Million Shillings only)** exclusive of applicable taxes.

### **Due Diligence**

The Evaluation Committee conducted due diligence on both M/s Umbato Safaris Limited and M/s Capital International Concierge Services Limited on 5<sup>th</sup> November 2020 and based on the Evaluation Committee’s findings, recommended **M/s Umbato Safaris Limited** for award of the subject tender for Lot 1 AGPO at its total quoted concession price of **Kshs. 2,000,000.00 (Two Million Shillings Only)** exclusive of applicable taxes and **M/s Capital International Concierge Services Limited** for award of the subject tender for Lot 2, General Category and its total quoted concession price of **Kshs. 6,000,000.00 (Six Million Shillings only)** exclusive of applicable taxes.

## **Professional Opinion**

The General Manager, Procurement and Logistics reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion signed on 16<sup>th</sup> December 2020.

The Acting Managing Director/CEO of the Procuring Entity approved the Evaluation Committee's recommendation on 16<sup>th</sup> December 2020.

## **REQUEST FOR REVIEW NO. 159 OF 2020**

Willis Protocol and Concierge Services Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 29<sup>th</sup> December 2020 together with a Statement in Support of the Request for Review dated and filed on even date, a Further Statement in Support of the Request for Review dated and filed on 11<sup>th</sup> January 2021 and a Replying Affidavit dated 12<sup>th</sup> January 2021 and filed on 13<sup>th</sup> January 2021, through the firm of Chimei & Company Advocates, seeking the following orders: -

- i. An order nullifying the tender award to the interested parties;***
- ii. An order directing the Procuring Entity to evaluate the Applicant's bid among other successful bids in compliance with the Constitution;***

- iii. In the alternative, an order directing the Procuring Entity to terminate the procurement process and commence a new procurement process;***
- iv. An order awarding costs of the review to the Applicant;***
- v. Any other relief that the Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

In response, the Procuring Entity, acting in person, lodged a 'Reply by the Procuring Entity' dated and filed on 6<sup>th</sup> January 2021 and a Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021. The Procuring Entity also lodged a 'Further Reply by the Procuring Entity' dated 15<sup>th</sup> January 2021 on even date.

M/s Umbato Safaris Limited (hereinafter referred to as "the 2<sup>nd</sup> Interested Party") lodged a Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021 and a '2<sup>nd</sup> Interested Party's Response' dated and filed on even date, through the firm of Nyaanga & Mugisha Advocates.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged written submissions dated 11<sup>th</sup> January 2021 on even date, the Procuring Entity lodged written submissions dated 14<sup>th</sup> January 2021 on 15<sup>th</sup> January 2021. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not file written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") including parties' written submissions.

The issues that arise for determination are as follows: -

- I. Whether the Request for Review Application was accompanied by a Statement in Support in accordance with Regulation 203 (2) (b) of the Public Procurement and Asset Disposal Regulations, 2020;**

Depending on the outcome of the first issue framed for determination: -

**II. Whether the Applicant's allegation that the Procuring Entity opened bids in the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the Public Procurement and Asset Disposal Regulations, 2020 was filed within the statutory period stipulated under section 167 (1) of the Act;**

Depending on the outcome of the second issue framed for determination: -

**III. Whether the Procuring Entity opened bids in the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the Public Procurement and Asset Disposal Regulations, 2020;**

**IV. Whether the Applicant is capable of challenging the 2<sup>nd</sup> Interested Party's award of Lot 1 of the subject tender;**

**V. Whether the Applicant submitted the following mandatory documents in response to the subject tender in accordance with Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document read together with Clause 2.14 and Clause 2.15 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document:**

*a) Copy of Registration/Incorporation Certificate;*

- b) Copy of Valid Tax Compliance Certificate;*
- c) Valid Business Permit for 2020;*
- d) Copy of CR12 and copies of Identification Cards of the list of Directors of the Firm;*
- e) Proof of access to liquid assets or capacity to have a minimum cash flow of Kshs 5,000,000/-.*

The Board will now proceed to address the first issue framed for determination as follows: -

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows: -

***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."***

The 2<sup>nd</sup> Interested Party lodged a Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021 seeking the dismissal of the Request for Review on grounds that the Applicant's Request for Review dated 29<sup>th</sup> December 2020 is not accompanied with a Statement in Support thereof contrary to Regulation 203 (2) (b) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'the 2020

Regulations') and is therefore fatally incompetent and should be dismissed forthwith.

In addressing this issue, the Board first considered what is a request for review?

The interpretation section of the Act defines an appeal filed before the Board as follows: -

***"appeal" means a request for administrative review or complaint filed with the Appeals Review Board pursuant to section 167 of this Act"***

An appeal filed before the Board can therefore be interpreted to mean a request for administrative review filed before the Board pursuant to section 167 of the Act.

The Board studied section 167 (1) of the Act which reads as follows: -

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."*** [Emphasis by the Board]

Accordingly, an aggrieved candidate or tenderer 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, in such manner as may be prescribed.

The manner in which an aggrieved candidate or tenderer may seek administrative review is prescribed under Regulation 203 (1), (2) (3) and (4) of the 2020 Regulations which reads as follows: -

**"(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourteenth Schedule of these Regulations.**

**(2) The request referred to in paragraph (1) shall-**

**(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;**

**(b) be accompanied by such statements as the applicant considers necessary in support of its request;**

**(c) .....**

**(i) .....**

**(ii) .....; or**

**(iii) .....**

**(d) .....**

**(e) .....**



(3) .....

(4) ..... "[Emphasis by the Board]

Accordingly, the above regulation stipulates that a request for review shall be made in Form RB 1 set out in the Fourteenth Schedule of the 2020 Regulations, shall state the reasons for the complaint, including any alleged breach of the Act and/or the 2020 Regulations and shall be accompanied by such statements as the applicant considers necessary in support of its request.

The Board considered the use of the word "shall" in the abovementioned regulation and studied the High Court's interpretation of the same in **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** where it observed as follows: -

***"The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.***

***Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:-***

*".... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negate this construction...[55] - Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

***The above being the clear prescriptions of what constitutes a form of Request for Review, it cannot be said by any stretch of imagination that the third Respondent's letter was a competent Request for Review. It is a requirement that a Request for Review must state the reasons for the complaint, including any alleged breach of the Act or the Regulations. It must be accompanied by such statements as the applicant considers necessary in support of its request. Such statements would in my view enable the opposite party to adequately respond to the claim. It will enable the Board to frame issues for determination. ....*** [Emphasis by the Board]

In the High Court's view as outlined hereinabove, the use of the word 'shall' in Regulation 203 (1) (2) (3) and (4) of the 2020 Regulations is to be construed as denoting a compulsory or mandatory obligation. In this regard therefore, it is a mandatory obligation for a request for review application to be accompanied by such statements as the applicant considers necessary in support of its request.

Having established that a request for review sets out the reasons or grounds for a review including any alleged breach of the Act or Regulations, the question that now arises is: -what is a statement in support of a request for review and what is its purpose?

The Board notes that a statement in support of a request for review is not defined under the Act or the 2020 Regulations. However, the Board considered the similarities between a request for review application and a notice of motion application.

The Board studied Order 51, rule 4 of the Civil Procedure Rules, 2010 which states as follows: -

***"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served"***

Accordingly, a notice of motion application sets out the grounds of the application, similar to a request for review application. The above

provision further demonstrates that a notice of motion application need only be supported by an affidavit where evidence is necessary to support the grounds stated in the notice of motion.

In this regard therefore, we see that an affidavit supports the grounds stated in a notice of motion application, and is the means through which evidence is introduced in a notice of motion application.

The High Court in the case of **Peter Onyango Onyiego v Kenya Ports Authority [2004] eKLR** considered the meaning and purpose of an affidavit and opined as follows: -

***"The concise Oxford Dictionary of Current English 8th Edition defines an affidavit as "a written statement confirmed by oath, for use as evidence in court". The Oxford Dictionary of Law 4th Edition defines affidavit as "A sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings". From these definitions it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation.....In the circumstances I hold that other than verifying affidavits which as I have stated must be sworn by plaintiffs themselves or their authorized agents all other affidavits filed and used in courts are not among the acts covered by Order 3 Rules 1 to 5. All other***

**affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on, that in the rules of evidence, would be admissible.”**

Accordingly, an affidavit is a sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings or proceedings before an adjudicating body. Further, an affidavit ought to be sworn and signed by an individual possessed of the facts or the information that is deponed in the said affidavit.

In view of the foregoing, the Board notes that a statement in support of a request for review, similar to an affidavit in support of a notice of motion application, provides the evidence necessary to support the grounds as raised in a request for review. Moreover, it ought to be signed by an individual possessed of the facts or the information that is made therein in support of a request for review.

Notably, Regulation 203 (2) (b) of the 2020 Regulations provides as follows: -

***(2) The request referred to in paragraph (1) shall-***

***(a) .....***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

Having established that the requirement to file a statement in support of a request for review is a mandatory obligation, it is the Board's view that the use of the word 'necessary' in the aforementioned regulation does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement or affidavit in support. It rather denotes that an applicant has the discretion to determine the contents of the statement or affidavit that it ought to file in support of a request for review application.

Turning to the circumstances of the case, the Board studied the Request for Review and notes that it is dated and filed on 29<sup>th</sup> December 2020 and outlines several grounds for review including five (5) orders that the Applicant is seeking from the Board. Further, the Board observes that the Request for Review Application is accompanied by a Statement in Support of the Request for Review signed by one Willis Otieno Ochola, the Applicant's Managing Director and is dated and filed on 29<sup>th</sup> December 2020, in accordance with Regulation 203 (2) (b) of the 2020 Regulations.

The Board observes that the Applicant filed before this Board an Affidavit of Service on 6<sup>th</sup> January 2021 sworn on even date by a registered process server, one Martin Ajega who avers in paragraph 2 thereof that he received in quadruplicate copies of the Request for Review and notification of appeal all dated 29<sup>th</sup> December 2020 from the Applicant's advocates and was instructed to serve *inter alia* the 2<sup>nd</sup> Interested Party. At paragraph 5 thereof he avers as follows: -

***"THAT on the same day (30<sup>th</sup> December 2020) at about 2pm I called Mrs Lucy Mbato through her phone number 0722324432 and informed her of important court documents. She informed me that she was out of town and sent me her email as [info@umbatosafaris.com](mailto:info@umbatosafaris.com) so that I could send her the documents. I immediately scanned the document and served her on her email."***

From the foregoing, it is evident that on 30<sup>th</sup> December 2020, the Applicant's process server, one Martin Ajega, served the 2<sup>nd</sup> Respondent's representative, one Mrs Lucy Mbato, via email, with a copy of the Request for Review and notification of appeal, both dated 29<sup>th</sup> December 2020.

It is therefore possible that although the 2<sup>nd</sup> Respondent was served with a copy of the Request for Review and notification of appeal both dated 29<sup>th</sup> December 2020, the 2<sup>nd</sup> Respondent was not served with a copy of the Applicant's Statement in Support of the Request for Review dated and filed on 29<sup>th</sup> December 2020. This notwithstanding, the Board has established that the Applicant did indeed file a Statement in Support of the Request for Review dated 29<sup>th</sup> September 2020 on even date.

The Board therefore finds that the Applicant lodged a Statement in Support of its Request for Review dated and filed on 29<sup>th</sup> September 2020 in accordance with Regulation 203 (2) (b) of the 2020 Regulations.

Accordingly, the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021 fails.

With respect to the second issue framed for determination, the Board notes, the Procuring Entity lodged a Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021 objecting to the Request for Review on the ground that the said application was filed out of time contrary to the provisions of section 167 (1) of the Act and Regulation 203 (2) (c) (i) of the 2020 Regulations.

In paragraph 4 of its Further Reply, the Procuring Entity contends that the grounds raised in paragraphs 6, 7, 8 and 9 of the Applicant's Further Statement have been filed out of time contrary to section 167 (1) of the Act and Regulation 203 (2) (c) (i) of the 2020 Regulations.

Section 167 (1) of the Act as cited hereinbefore provides that an aggrieved candidate or tenderer 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, in such manner as may be prescribed.

Further, Regulation 203 (2) (c) 2020 Regulations provides as follows: -

***"(1) .....***

***(2) The request referred to in paragraph (1) shall—***

***(a).....***



***(b).....;***

***(c) be made within fourteen days of—***

***i) the occurrence of the breach complained of, where the request is made before the making of an award;***

***ii) the notification under section 87 of the Act; or***

***iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.”***

The Board observes that section 167 (1) of the Act read together with Regulation 203 (2) (c) of the 2020 Regulations has three limbs within which a candidate or tenderer may file a request for review namely;

- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or**
- **Within fourteen days of notification of award; or**
- **Within fourteen days of the occurrence of the breach complained of, after an award has been made to the successful bidder.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a '***conjunction used to link alternatives.***'

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act read together with Regulation 203 (2) (c) of the 2020 Regulations connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of occurrence of an alleged breach from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process, prior to making of an award. The second option is to file a request for review within fourteen (14) days of notification of award and the third option is to file a request for review within fourteen (14) days of the occurrence of an alleged breach that occurs after an award has been made to a successful bidder.

The Board observes that the Applicant alleges as follows in paragraphs 15, 16 and 17 of its Request for Review Application:

***"15. Bidders were invited for the tender opening process on 16<sup>th</sup> September 2020 at 11:00 AM but the same was not conducted. Specifically, on the said date, the Applicant's Managing Director arrived at KAA's Conference Room, 1<sup>st</sup> Floor Kenya Airports Authority Headquarters Complex Building at 9:30AM and stayed there past 11:00AM and was specifically informed by an officer in the Procurement Office that the tenders would not be opened publicly***

***owing to the COVID-19 situation. He indicated that KAA would conduct the exercise internally.***

***16. At KAA's office on 16<sup>th</sup> September 2020, representatives of other bidders including one of the Interested Parties representative Mr. Mberia from CAPITAL INTERNATIONAL CONCIERGE SERVICES LIMITED was present and together with the Applicant's Managing Director was informed that the tender's would not be opened due to COVID-19.***

***17. On 16<sup>th</sup> September 2020 at 16:07 PM, the Applicant received an email from KAA [Tenders2@kaa.go.ke](mailto:Tenders2@kaa.go.ke) of an alleged tender register of even date signed by certain persons, not indicating whom they represent and the time the same was signed."***

From an examination of the Applicant's Request for Review, its Statement in Support of the Request for Review and its Further Statement in Support of the Request for Review the Board observes that one of the grounds for review is an allegation by the Applicant that the Procuring Entity opened bids in the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the 2020 Regulations.

To establish the time the Applicant learnt of this alleged breach by the Procuring Entity, the Board observes from the above excerpt of its Request for Review Application, that the Applicant avers it was invited to

the tender opening on 16<sup>th</sup> September 2020 and on the said date, the Applicant's Managing Director arrived at the Procuring Entity's conference room where he was informed by a procurement officer of the Procuring Entity that tenders would not be opened publicly owing to the COVID-19 situation and that the tender opening exercise would be conducted internally. Further, at 4:07pm on the said date, the Applicant avers that it received an email from the Procuring Entity of a signed tender opening register dated 16<sup>th</sup> September 2020.

From the foregoing averments, it is evident that the Applicant became aware that the Procuring Entity allegedly opened bids received in response to the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the 2020 Regulations on 16<sup>th</sup> September 2020, when the Applicant's Managing Director was allegedly informed that bids would not be opened publicly owing to the COVID-19 situation and further, when the Applicant received an email from the Procuring Entity of a signed tender opening register of even date.

This therefore means, the alleged breach of duty by the Procuring Entity could only occur as at 16<sup>th</sup> September 2020 and the Applicant learnt of the alleged breach of duty on 16<sup>th</sup> September 2020. Accordingly, the Applicant had fourteen (14) days from the 16<sup>th</sup> September 2020 to file its request for review with respect to the said alleged breach of duty by the Procuring Entity.

The question that the Board must now address is when was the fourteenth day by which the Applicant was required to lodge the Request for Review with respect to the said alleged breach of duty by the Procuring Entity.

The Board notes that in the computation of time in this instance, the fourteen-day period imposed under section 167 (1) of the Act read together with Regulation 203 (2) (c) of the 2020 Regulations started running a day after 16<sup>th</sup> September 2020, this being 17<sup>th</sup> September 2020. In this regard therefore, the Board observes that the Applicant's right to approach this Board lapsed on 30<sup>th</sup> September 2020 which is fourteen (14) days after 16<sup>th</sup> September 2020.

Noting that the Applicant filed the Request for Review on 29<sup>th</sup> December 2020, the Board finds that the Applicant did not file the Request for Review with respect to the said alleged breach of duty by the Procuring Entity within the statutory period as provided under section 167 (1) of the Act read together with Regulation 203 (2) (c) of the 2020 Regulations.

The Board therefore finds that the Applicant's allegation that the Procuring Entity opened bids in the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the 2020 Regulations was filed outside the timelines stipulated under section 167 (1) of the Act.

Accordingly, the Procuring Entity's Notice of Preliminary Objection dated and filed on 12<sup>th</sup> January 2021 succeeds in so far as it concerns the time of filing of the Request for Review with respect to the Applicant's allegation that the Procuring Entity opened bids in the subject tender in the absence of invited bidders' representatives who chose to attend contrary to Regulation 57 (7) of the 2020 Regulations.

In view of this finding, it therefore follows that the Board has no jurisdiction to entertain the third substantive issue as framed for determination.

With respect to the fourth issue framed for determination, the Board notes, section 167 (1) of the Act states as follows: -

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."***

Accordingly, 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 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.

This means that a person seeking administrative review before this Board should either be a “candidate” or a “tenderer” and further, ought to demonstrate that it has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

The Board observes that the 2<sup>nd</sup> Interested Party in paragraph 7 of its response to the Request for Review contends that the Applicant did not submit a bid with respect to Lot 1 of the subject tender and is therefore not an aggrieved party or a tenderer capable of challenging the 2<sup>nd</sup> Interested Party’s award with respect to Lot 1. It therefore behoves upon this Board to determine whether the Applicant is capable of challenging the 2<sup>nd</sup> Interested Party’s award of Lot 1 of the subject tender.

The interpretation section of the Act defines the terms “candidate” or “tenderer” as follows:

***“candidate” means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;”***

***“tenderer” means a person who submitted a tender pursuant to an invitation by a public entity;”***

From this definition it is clear that a candidate in a tender process is a person who, in response to an invitation to tender, obtains tender documents from a procuring entity; while a tenderer is a person who,

having obtained tender documents, submits a tender to the procuring entity.

The Board studied the Procuring Entity's Tender Document to establish who the Procuring Entity considered to be a 'candidate' or a 'tenderer' and observes on the cover page of the Tender Document, the name and title of the subject tender which reads as follows: -

***"Provision of Meet and Assist Service, Jomo Kenyatta International Airport***

***Tender No: KAA/OT/JKIA/MBD/0022/2020-2021***

***LOT 1 – Reserved for Special Groups (AGPO, YAGPO, AND PWD)***

***LOT 2 – General Category"***

Notably, the subject tender which is a procurement for the 'Provision of Meet and Assist Service' was divided into two categories, that is, Lot 1, Reserved for Special Groups (AGPO, YAGPO and PWD) and Lot 2, General Category.

Further, Clause 1.1 and 1.2 of Section I Invitation to Tender on page 3 of the Tender Document states as follows: -

***"1.1 The Kenya Airports Authority invites sealed bids for Provision of Meet and Assist Services, JKIA, through an open tendering process.***



***1.2 A complete set of tender documents are available for downloading from the KAA supplier login screen using the link <https://suppliers.kaa.go.ke/irl/portal> or KAA website <https/kaa.go.ke/corporate/procurement/> or Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) . upon accessing the tender documents, interested bidders shall respond to the tender online using the following link <https://suppliers.kaa.go.ke/irj/portal>.”***

From the foregoing excerpts, the Board observes that the Procuring Entity invited interested bidders to submit sealed bids in response to the subject tender, which has two categories, that is, Lot 1, Reserved for Special Groups and Lot 2, General Category.

In this regard therefore, a candidate in the subject procurement process in line with section 2 of the Act read together with the Procuring Entity's Invitation to Tender dated 25<sup>th</sup> August 2020, is a person who, pursuant to the Procuring Entity's Invitation to Tender obtained, via download, tender documents with respect to the subject tender from the Procuring Entity's supplier login screen, the Procuring Entity's website or the Public Procurement Information Portal.

Furthermore, a tenderer in the subject procurement process is a person who obtained tender documents via download from the Procuring Entity's supplier login screen, the Procuring Entity's website or the Public Procurement Information Portal pursuant to the Procuring Entity's

Invitation to Tender dated 25<sup>th</sup> August 2020 and subsequently submitted a completed tender document online in response to the subject tender, with respect to Lot 1, Reserved for Special Groups or Lot 2, General Category, to the Procuring Entity by the tender submission deadline of 16<sup>th</sup> September 2020.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes on page 8 of the Evaluation Report signed on 15<sup>th</sup> October 2020, that the Applicant submitted a tender in response to the subject tender with respect to Lot 2: General Category whereas the 2<sup>nd</sup> Interested Party, that is, M/s Umbato Safaris Limited submitted a tender in response to the subject tender with respect to Lot 1: Reserved for Special Groups. In fact, the Board observes that the 2<sup>nd</sup> Interested Party was the only bidder who submitted a bid in response to the subject tender with respect to Lot 1: Reserved for Special Groups.

In this regard therefore, it is evident that the Applicant was not a tenderer in the subject tender with respect to Lot 1, Reserved for Special Groups, in line with section 2 of the Act since the Applicant did not submit a tender document online in response to the subject tender with respect to the said Lot, pursuant to the Procuring Entity's Invitation to Tender dated 25<sup>th</sup> August 2020.

Further, the Board perused the Request for Review Application and notes that the Applicant did not allege any breach of duty by the

Procuring Entity or demonstrate any loss or damage it has suffered or risks suffering as a result of the Procuring Entity's alleged breach of duty with respect to Lot 1 of the subject tender in accordance with section 167 (1) of the Act.

As was stated by the Honourable Justice Odunga in **Miscellaneous Application 637 of 2016 Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR**: -

***"....I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore, it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act...."***

Further, the High Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a "candidate" (and tenderer) under section 2 of the Act had this to say:

-

***"Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to mean "a person who submitted a tender pursuant to an invitation by a public entity".***

***This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer.***

**[Emphasis by the Board]**

Pursuant to section 167 (1) of the Act, administrative review is available only to the candidates and tenderers in a procurement process and as such, only candidates or tenderers should be permitted to challenge procurement processes through the procedure provided for under the Act.

Having established that the Applicant did not submit a bid in response to Lot 1 of the subject tender, it therefore follows that the Applicant is restricted from challenging the decision of the Procuring Entity or alleging any breach on the part of the Procuring Entity with respect to

Lot 1 of the subject tender as it was not a tenderer with respect to the said Lot.

In view of the foregoing, it is therefore the finding of this Board that the Applicant is not capable of challenging the 2<sup>nd</sup> Interested Party's award of Lot 1 of the subject tender.

For the avoidance of doubt, the Board will like to point out that the procurement proceedings in Lot 1, Reserved for Special Groups (AGPO, YAGPO and PWD) is not affected by the subject review proceedings and should proceed as awarded.

With respect to the fifth issue for determination, the Board observes, Clause 1.3 of Section 1 Invitation to Tender on page 3 of the Tender Document provides as follows: -

***"Interested bidders who are not in the KAA system and therefore do not have login credentials should contact KAA procurement through email [tenders@kaa.go.ke](mailto:tenders@kaa.go.ke) for login credentials early enough and not later than one (1) day before tender closing date. All relevant submission documents must be attached on the login screen (Technical Proposal on Cfolder under technical Rfx Response system will lead you to the second screen (Cfolder) where the system creates a folder specific to you for uploading your response documents. Do not click and attach your documents on collaboration folder, click on***

***"Technical Bid" the system will allow you to create a document, click "create" button and attach the documents and Financial Proposal on Price Submission Screen). A step by step manual/guide is available for downloading using the [link](https://www.kaa.go.ke/corporate/procurment/manuals/)***

Further, Clause 2.14 and 2.15 of Appendix to Instructions to Tenderers on page 18 of the Tender Document provides as follows: -

***"2.14 Format and Signing of Tender***

***The original tender document shall be scanned and attached/uploaded online under Technical response on C folder under technical Rfx Response.***

***2.15 Sealing and Marking of Tenders***

***The tender shall be submitted online. Completed tender documents and its attachments shall be submitted online before the closing date. All the relevant submission documents must be attached on the login screen (Technical response on C folder under technical Rfx Response and financial response on price submission screen."***

In view of the foregoing provision, the Board observes that with respect to the subject tender, interested bidders who were not previously

registered in the Procuring Entity's system were required to obtain login credentials from the Procuring Entity no later than one day from the tender submission deadline. All completed tender documents and relevant attachments were to be scanned and submitted online and bidders were required to attach their bid documents on the login screen, that is, under Technical Response on C folder under technical Rfx Response and Financial Response on the price submission screen.

In paragraph 10 of its Request for Review, the Applicant submits that vide a letter of notification of unsuccessful bid dated 18<sup>th</sup> December 2020 which it received on 21<sup>st</sup> December 2020, the Procuring Entity notified the Applicant that its bid was unsuccessful for the following reasons: -

***"The evaluation process for the subject tender has been finalized and we regret to inform you that your bid was unsuccessful.***

***It was noted that you:***

- ***Did not provide a copy of Registration/Incorporation Certificate***
- ***Did not attach a copy of Valid Tax Compliance Certificate***
- ***Did not provide a valid business permit for 2020***
- ***Did not provide a copy of CR12 and copies of identification cards of the list of Directors of the firm;***

- ***Did not provide proof of access to liquid assets or capacity to have a minimum cash flow of Kshs. 5,000,000/-."***

Aggrieved, the Applicant moved the Board through the instant Request for Review.

According to the Applicant, it submitted all the mandatory documents online, in the required format and in the prescribed sequence as required in the Tender Document, which documents it avers are still visible on the Procuring Entity's portal. The Applicant contends in paragraph 13 of its Request for Review that it would not have been possible to obtain the login credentials to access the Tender Document and submit its bid through the Procuring Entity's online platform without submission of its mandatory documents. It is therefore the Applicant's submission that the Procuring Entity failed to evaluate its bid in accordance with Article 227 (1) of the Constitution.

On its part, the Procuring Entity submits that the Applicant did not attach the following mandatory documents in the Technical Rfx Response folder as required in the Tender Document: -

- a) Copy of Registration/Incorporation Certificate;
- b) Copy of Valid Tax Compliance Certificate;
- c) Valid Business Permit for 2020;
- d) Copy of CR12 and copies of Identification Cards of the list of Directors of the Firm;



- e) Proof of access to liquid assets or capacity to have a minimum cash flow of Kshs 5,000,000/-.

The Procuring Entity contends, although the Applicant attached the necessary mandatory documents during registration, this did not amount to submission of its bid as specified under Clause 1.3 of Section I Invitation to Tender, as registration by bidders was for purposes of enabling new bidders obtain login credentials to participate in the procurement proceedings. It is therefore the Procuring Entity's submission that the Applicant did not follow the instructions for submission of bids as specified in the Tender Document or seek clarification on the same from the Procuring Entity thus its bid was rightfully found non-responsive.

To begin with, section 2 of the Act assigns the following meaning to the term 'procurement': -

***"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"***

Further, the interpretation section of the 2020 Regulations defines an e-procurement system as follows: -

***"e-procurement system means a system or technology that can be used to automate the internal and external processes associated with supply chain management including strategic sourcing, purchasing and inventory management of goods, works and services"***

E-Procurement is therefore *interalia* the purchase of services through an electronic system or technology as is the case in the subject tender and thus the Board notes, the subject tender is an e-procurement.

With this in mind, the Board studied Clause 1.3 of Section 1 Invitation to Tender on page 3 of the Tender Document as cited hereinbefore and observes that in order to submit a bid in response to the subject tender, a bidder required to be registered in the Procuring Entity's system. Bidders who were not previously registered in the Procuring Entity's system, such as the Applicant in this instance, were required to register and then proceed to submit their bids in response to the subject tender.

The process of registration of new bidders in the Procuring Entity's system as outlined under Clause 1.3 of Section 1 Invitation to Tender on page 3 of the Tender Document as cited hereinbefore involved contacting the Procuring Entity's procurement department through its email *tenders@kaa.go.ke* in order to obtain login credentials not later than one (1) day prior to the tender closing date. Once a new bidder obtained login credentials, the said bidder was then required to register in the Procuring Entity's system, which process required the said bidder

to upload certain mandatory documents and then proceed to submit its Technical proposal and Financial proposal accordingly.

In order to aid bidders in the process of registration, the Procuring Entity referred bidders to manuals/guides which were available for download using the link as provided for in Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document as cited hereinbefore.

The Board studied the manual/guide titled 'User Manual: Supplier Registration for Pre-Qualifications' and observes on page 2 thereof that bidders were *interalia* instructed to attach the following documents as part of the self-registration process: -

- 1. PIN: Tax compliance and PIN Certificate (Mandatory)***
- 2. REG: Certificate of Incorporation/ Registration (Mandatory)***
- 3. CR12: Registrar of companies – List of directors (Mandatory)***
- 4. AGPO: Special Group certificates (Required only if they are registering under special groups)***
- 5. RAC: Regulatory authority certificates (Mandatory for Works)***
- 6. FIN: Audited Financial Statements for current 2 years or Current 3 months Bank statements (Mandatory)***
- 7. IDC: Scan copy of Original National ID or Passport of each director (Mandatory)***

## ***8. OTH: Any other relevant document***

Upon successful completion of the registration process, a bidder's application for registration would then be routed for internal approval by the Procuring Entity as stated on page 10 of the said manual. Following approval from the Procuring Entity, the said bidder would receive two separate emails consisting of a User ID and Password.

To establish the next steps a bidder was required to take after registration on the Procuring Entity's system, the Board examined the manual titled 'User Manual: Online RFXs Response Process/Steps, April 2018' which is also available for download via the link provided in Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document and observes that bidders were required to log-in using the credentials received via email from the Procuring Entity either through the Procuring Entity's website or directly using the link <https://suppliers.kaa.go.ke/irj/portal>. As stated in Clause 2.14 and 2.15 of the Appendix to Instructions to Tenderers on page 17 and 18 of the Tender Document, bidders were required to attach their technical proposal under 'Technical Response on C folder under technical Rfx Response' and Financial Proposal on the price submission screen, which process was explained step by step in the said manual.

From the foregoing, it is evident that the process of registration (as a new bidder) and submission of bids in the Procuring Entity's system was clearly provided in the Tender Document, that is under, Clause 1.3 of

Section I Invitation to Tender on page 3 of the Tender Document read together with Clause 2.14 and 2.15 of Appendix to Instructions to Tenderers on page 18 of the Tender Document. Further, a step by step guide on how to register as a new bidder and also how to submit a bid on the Procuring Entity's system was also provided by the Procuring Entity in the manuals/guides available for download via a link provided in Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document. It is therefore the Board's considered view that the instructions provided by the Procuring Entity for registration by new bidders and subsequent submission of bids was not ambiguous or vague as alleged by the Applicant in paragraph 18 and 19 of its written submissions.

From the foregoing, the Board notes, the process of registration for new bidders in the Procuring Entity's system which includes submission of certain mandatory documents is clearly distinguishable from the process of submission of bids by bidders.

In the Board's considered view, since the registration process only applied to new bidders who were not registered as suppliers/vendors on the Procuring Entity's system, this process of registration did not only apply to the subject tender but also to any upcoming tenders that may be floated by the Procuring Entity.

This means that the information/documents submitted by bidders at the point of bid submission are the documents to be considered by the

Procuring Entity's Evaluation Committee with respect to the subject tender and not necessarily the documents submitted by bidders at the point of registration in the Procuring Entity's system, noting that some bidders may have registered in the Procuring Entity's system previously, in the process of applying for other tenders.

In this regard therefore, the submission of mandatory documents during the registration process by new bidders does not amount to submission of bid documents in response to the subject tender.

In the instant case, the Applicant contends in paragraph 15 of its written submissions that it submitted the said mandatory documents thrice, that is, at the point of obtaining the log-in credentials, in the technical bid and in the folder titled as 'Vendor Additional Data'.

It is not disputed that the Applicant submitted the necessary mandatory documents at the point of registration in the Procuring Entity's system, which the Board has established is clearly distinguishable from the process of submission of bids by bidders and further, does not amount to submission of bid documents in response to the subject tender.

In order to establish which documents the Applicant submitted as part of its bid document after registration in the Procuring Entity's system, the Board examined the Procuring Entity's original file submitted to the Board in accordance with section 67 (3) (e) of the Act, which was

provided to the Board in soft copy, noting that the subject procurement is an e-procurement.

The Board examined the documents submitted by the Applicant as part of its bid document and observes that the following mandatory documents were not part of the documents submitted by the Applicant at the point of bid submission:

- a) Copy of Registration/Incorporation Certificate;
- b) Copy of Valid Tax Compliance Certificate;
- c) Valid Business Permit for 2020;
- d) Copy of CR12 and copies of Identification Cards of the list of Directors of the Firm;
- e) Proof of access to liquid assets or capacity to have a minimum cash flow of Kshs 5,000,000/-.

The Board is cognizant of section 79 (1) of the Act which provides as follows: -

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

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. In this regard therefore, a bidder is required to satisfy all mandatory requirements in order to qualify to proceed for further evaluation.

As stated by the Honourable Justice Mativo on pages 4 and 5 of **Miscellaneous Application 122 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR** as cited by the Procuring Entity in its written submissions: -

**"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration. Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first**



**evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.**

**20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."**

Responsiveness to mandatory requirements as stipulated in a procuring entity's tender document is an important first hurdle that bidders must overcome and a bid only qualifies as a responsive bid if it meets with all the mandatory requirements as set out in the bid document. A bidder's failure to comply with all the mandatory requirements in a tender document would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and would amount to unfairness if some bidders were allowed to circumvent tender conditions contrary to the public procurement principle of fairness as espoused under Article 227 (1) of the Constitution.

In light of the foregoing and in the absence of any evidence to the contrary, the Board finds that the Applicant did not provide the following five (5) mandatory documents in response to the subject tender in accordance with Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document read together with Clause 2.15 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document: -

- a) Copy of Registration/Incorporation Certificate;
- b) Copy of Valid Tax Compliance Certificate;
- c) Valid Business Permit for 2020;
- d) Copy of CR12 and copies of Identification Cards of the list of Directors of the Firm;
- e) Proof of access to liquid assets or capacity to have a minimum cash flow of Kshs 5,000,000/-.

Further, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with the provisions of the Tender Document read together with section 80 (2) of the Act and rightfully found the Applicant's bid non-responsive in accordance with section 79 (1) of the Act.

Accordingly, the Board finds that the Request for Review lacks merit and the same is hereby dismissed.

### **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 dated and filed on 29<sup>th</sup> December 2020 with respect to Tender No. KAA/OT/JKIA/MBD/0022/2020-2021 For Provision of Meet and Assist Service, Jomo Kenyatta International Airport, be and is hereby dismissed.**

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

**Dated at Nairobi, this 19<sup>th</sup> Day of January 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**