

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 103/2020 OF 16TH JULY 2020

BETWEEN

FLOORING AND INTERIORS LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

THE MANAGING DIRECTOR,

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

CHINA JIANGXI INTERNATIONAL

ECONOMIC AND TECHNICAL

COOPERATION CO. LTD.....INTERESTED PARTY

Review against the decision of the Kenya Airports Authority with respect to Tender No. KAA/OT/JKIA/0092/2019-2020 for Proposed Refurbishment of Terminals 1B and 1C at Jomo Kenyatta International Airport - Nairobi

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Steven Oundo | -Member |
| 3. Mr. Ambrose Ngare | -Member |

IN ATTENDANCE

BACKGROUND TO THE DECISION

The Bidding Process

The Kenya Airports Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KAA/OT/JKIA/0092/2019-2020 for Proposed Refurbishment of Terminals 1B and 1C at Jomo Kenyatta International Airport – Nairobi (hereinafter referred to as "the subject tender"), in the MyGov newspaper and print media on 17th March 2020.

Addendums to the Tender Document

Four addendums were issued by the Procuring Entity as follows:

i. **Addendum No. 1 (24th March 2020)**

Extended the tender closing date to 7th May 2020.

ii. **Addendum No. 2 (28th April 2020)**

Extended the tender closing date to 15th May 2020.

iii. **Addendum No. 3 (12th May 2020)**

Extended the tender closing date to 22nd May 2020.

iv. **Addendum No. 4 (20th May 2020)**

Extended the tender closing date to 29th May 2020 and amended the Appendix to Instructions to Tenderers from Clause 1.2 to 1.10.

v. Addendum No. 5 (20th May 2020)

Replaced the bill of quantities in its entirety.

Site Visits

Site visits were held between 4th to 8th May 2020.

Bid Submission Deadline and Opening of bids

A total of fifteen (15) firms/bidders submitted bids and the same were opened on 29th May 2020 in the presence of bidders and their representatives who chose to attend, which bids were recorded as follows:

Bidder No.	Bidder Name
1.	M/s China Jiangxi International Economic and Technical Cooperation Limited
2.	M/s China Wu Yi Company Limited
3.	M/s China Overseas Engineering Group Company Limited
4.	M/s Meera Construction Limited
5.	M/s Seyani Brothers & Co. Limited
6.	M/s China Communications Construction Com. Limited
7.	M/s Pinnie Agency Limited
8.	M/s Sifteagleam Enterprises
9.	M.s Flooring & Interiors Limited

Bidder No.	Bidder Name
10.	M/s China Gezhouba Group Company Limited
11.	M/s China Civil Eng. Construction Corp.
12.	China Young Tai Engineering Company Limited
13.	China Machinery Engineering Corporation
14.	Shaanxi Water Resources & Hydropower Eng
15.	Superman Limited

Evaluation of Bids

The Evaluation Committee conducted evaluation of bids in the following three stages: -

- Mandatory Qualification Requirement Stage;
- Technical Evaluation Stage;
- Financial Evaluation Stage.

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were evaluated to determine their full responsiveness to the mandatory requirements as follows: -

No	Requirement	Compliance
1	All Tenderers shall fill and sign in ALL the Standard Qualification Forms contained in the Tender Document	Must meet
	(a) Form of Tender,	Must meet
	(b) Form of Tender Security,	Must meet
	(c) Qualification information,	Must meet
	(d) Tender Questionnaire,	Must meet
	(e) Confidential Business Questionnaire,	Must meet
	(f) Safety Questionnaire,	Must meet
	(g) Self-declaration and	Must meet
	(h) Details of Sub-contractors.	Must meet

No	Requirement	Compliance
	(i) In case of a joint venture, all the partners of the lead firm shall be required to provide the Qualification Information, Tender Questionnaire, Confidential Business Questionnaire and the Self-declaration form.	Must meet
2	Submission of a valid registration certificate issued by the National Construction Authority (NCA) or its equivalent from the country of origin; Tendering firms not meeting this criteria on their own are allowed either to propose sub-contractors meeting this criteria or may form joint ventures/collaborations, associations e.t.c to meet this criteria	Must meet
	NCA 1 only for general building works or its equivalent from the country of origin; And Must be accompanied by a Valid NCA practicing license or its equivalent from the country of origin.	Must meet
	NCA 2 for Electrical Works or its equivalent from the country of origin; And must be accompanied by a Valid NCA practicing license or its equivalent from the country of origin.	Must meet
	NCA 2 for Mechanical Works or its equivalent from the country of origin. The registration certificates Must be accompanied by a Valid NCA practicing license or its equivalent from the country of origin.	Must meet
3	Copy of Registration/incorporation certificate to show that the applicant is a registered company and legally authorized to do business in Kenya) or the country of origin. In case of a joint venture, both parties shall be required to provide a copy of certificate or its equivalent in the country of origin.	Must meet
4	Copy of CR 12. 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. In case of a joint venture, both parties shall be required to provide a copy of certificate or its equivalent in the country of origin	Must meet
5	A valid and current tax compliance certificate (TTC) issued by KRA or its equivalent in the country of origin. In case of a joint venture, both parties shall be required to provide a copy of certificate or its equivalent in the country of origin	Must meet
6	Proof of access to finances of not less than Kshs.300 Million to be evidenced as follows:	Must meet

No	Requirement	Compliance
	Current bank statements for the three (3) months indicating cash in hand.	
	Letters of Credit or bank overdraft facilities to be provided specific to this	
	A combination of either	
7	Submission of Tender security of Kshs 10,000,000/- (150 days validity from date of Tender opening) in the prescribed format contained in the Tender Document. You will be required to submit your original tender security/ Bid Bond physically in the office of the General Manager, Procurement and Logistics Department, 2nd Floor KAA Headquarters, JKIA on or before the closing/opening date and time. A scanned copy of the same should be submitted online with the tender.	Must meet
8	A written power of Attorney authorizing the signatory of the tender to commit the Tenderer witnessed by a Commissioner for Oaths or the equivalent in the country of origin. This does not apply to Sole Proprietorships.	Must meet
9	Copy of valid County Business permit or its equivalent in the country of origin;	Must meet
10	All foreign tenderers participating in this tenders must demonstrate that they will source at least forty percent of their supplies from citizen contractors prior to submitting the tender. These bidders shall be required to list where they will apply this preference in this bidding process and the amount.	Must meet
	NOTE: Tenderers who will not meet ANY of the above mandatory requirements will not be evaluated further.	

The following eight (8) tenderers were eliminated from further evaluation as they did not meet the entire mandatory requirements for the following reasons: -

Bid No.	Bidder Name	Reasons for failure
3	CHINA OVERSEAS ENGINEERING GROUP CO LTD	1. Did not provide a valid business permit, but instead submitted one that expired on 31 st December, 2019
4	MEERA CONSTRUCTION LTD	1. The submitted NCA for the mechanical works subcontractor is 3 instead of 2 or above.

Bid No.	Bidder Name	Reasons for failure
5	SEYANI BROTHERS & CO. (K) LTD	<ol style="list-style-type: none"> 1. Did not provide the registration certificate and practicing license for the Electrical Engineer; 2. The TCC submitted was not valid on the date of submission of the tender but instead expired on 13th May, 2020 3. Letter of credit submitted is not specific to the project
8	SIFTEAGLEAM ENTERPRISES	Did not provide any documents in the online portal
12	CHINA YOUNG TAI ENGINEERING COMPANY LTD	Did not submit the hard copy of the tender security as required
13	CHINA MACHINERY ENGINEERING CORPORATION	Did not submit NCA registration certificate for Mechanical Works
14	SHAANXI WATER RESOURCES & HYDROPOWER ENG	<ul style="list-style-type: none"> • Did not submit NCA registration certificates or equivalent for Building works, Electrical works and Mechanical works • Did not provide proof of access to finances of not less than Kshs.300 million • Did not demonstrate that they will source at least 40% of their supplies from citizen contractors.
15	SUPERMAN LIMITED	Did not provide any documents in the online portal

Seven (7) tenderers, that is, Bidders No. 1, 2, 6, 7, 9, 10 and 11 satisfied all the mandatory requirements and thus qualified for technical evaluation.

2. Technical Evaluation

At this stage of evaluation, the seven (7) responsive tenderers were evaluated against the technical requirements as indicated below: -

No	Requirement	Mandatory
1	Qualifications and technical experience of site personnel to manage and execute the works on the site (submit copies of Curriculum Vitae and copies of academic and professional certificates).	
(a)	<p>Project Manager – Bachelor's Degree in any of the following: Architecture, Quantity Surveying, Construction Project Management/Building Construction or Structural Engineering field with a minimum of 10 years' relevant experience in construction of building works and</p> <p>-Must submit a copy of current practicing certificate or its equivalent from the country of origin.</p>	Must meet
(b)	<p>Architect – Bachelor's Degree in Architecture with a minimum of 10 years relevant post graduate experience in construction of building works and registered by Board of Registration of Architects and Quantity Surveyors in Kenya.</p> <p>-Must submit a copy of current practicing certificate or its equivalent from the country of origin.</p>	Must meet
(c)	<p>Interior Designer– Bachelor's Degree in Interior Design or related course with a minimum of 10 years' relevant postgraduate experience in interior design.</p>	Must meet
(d)	<p>Civil/Structural Engineer – Bachelor's Degree in Bsc in Civil/Structural Engineering a minimum of 10 years' relevant post graduate experience in construction of building services and registered by Engineers Board of Kenya.</p> <p>-Must submit a copy of current practicing certificate or its equivalent from the country of origin.</p>	Must meet
(e)	<p>Quantity Surveyor – Bachelor's Degree in Building Economics or Quantity Surveying University with a minimum of 10 years post graduate relevant experience in construction of building works and registered by Board of Registration of Architects and Quantity Surveyors in Kenya.</p> <p>-Must submit a copy of current practicing certificate or its</p>	Must meet

No	Requirement	Mandatory
	equivalent from the country of origin.	
(f)	Electrical Engineer – Bachelor's Degree in Electrical Engineering from a recognized University with a minimum of 10 years post graduate relevant experience in construction of building works and registered by the Engineers Board of Kenya. -Must submit a copy of current practicing certificate or its equivalent from the country of origin.	Must meet
(g)	Mechanical Engineer – Bachelor's Degree in Mechanical Engineering from a recognized University with a minimum of 10 years post graduate relevant experience in construction of building works and registered by the Engineers Board of Kenya. -Must submit a copy of current practicing certificate or its equivalent from the country of origin.	Must meet
(h)	Site Foreman – Diploma in Construction/Building Management with at least 15 years' experience in construction of building works.	Must meet
(I)	Technician - Diploma in Mechanical Engineering with at least five (5) years' experience.	Must meet
(j)	Technician -Diploma in Electrical/Electronic engineering with at least five (5) years' experience	Must meet
2.	This has been amended as follows;- Average annual turnover of not less than Kshs.750 million for the last three consecutive years as demonstrated by the submitted Audited Accounts for the years (2015, 2016 and 2017) or (2016, 2017 and 2018)	Must meet
3.	Company past works experience in the last 5 years	Must meet
(a)	Proof of similar works and at least one of them in an operational and live environment (in Demolition & alteration works; New Floor, Wall and Ceiling Finishes; Aluminum Partitions with specialized glass fitments; Washrooms refurbishments; Walkways; associated Electrical and Mechanical works –especially fire suppression works), with a cumulative cost of not less than Kshs.600 million on previously undertaken in the last five years (2015 to date)	Must meet
(b)	Bidder shall attach copies of the following: Letters of Award or Signed Contract and Completion Certificate for the respective projects, or if project is ongoing it must be at least 50% complete. Bidder to attach copies of interim payment certificates.	Must meet
4	Equipment and Machinery	Must meet

No	Requirement	Mandatory
	<p>Must demonstrate access to the following key minimum equipment (invoices, receipts, leased or hire agreement) necessary to undertake the work;</p> <p>Note</p> <p>If owned, must provide clear copies of log book or proof of ownership;</p> <p>If equipment is hired or leased, provide a certified copy of a written agreement to lease between lessee and lessor indicating list of equipment and their corresponding log books or proof of ownership by lessor.</p> <ul style="list-style-type: none"> • The equipment listed shall be available on site when required. • If to be leased from a government department a letter written to KAA Managing Director/ CEO indicating that the department shall avail the equipment upon award of the tender. 	
(a)	Scaffolding (at least 15 meters high)- 4 No	Must meet
(b)	Transportation (Lorries, tippers, pick-ups)- 5 No.	Must meet
(c)	Welding equipment- 10 No.	Must meet
(d)	Debris chutes -2 No.	Must meet
5	Work methodology and work plan	Must meet
(a)	Detailed work methodology including sequencing. (relevant)	Must meet
(b)	Work program in the form of a bar chart (relevant)	Must meet

Tenderers who did not meet the above technical requirements did not qualify for further evaluation.

The following three (3) firms qualified for Financial Evaluation:

Bid No.	Bidder Name
1	CHINA JIANGXI INTERNATIONAL ECONOMIC AND TECHNICAL COOPERATION LTD
7	PINNIE AGENCY LIMITED
9	FLOORING & INTERIORS LTD

4. Financial Evaluation

This stage of evaluation involved evaluation of the following:

- i. Duly completed Form of Tender in the prescribed format
- ii. Priced Bill of Quantities (BQs)

Financial evaluation was based on the lowest evaluated price.

The tenderers' priced BQs were verified as per the table below:

Project	TENDER EVALUATION REPORT FOR THE PROPOSED REFURBISHMENT OF TERMINALS 1B AND 1C AT JOMO KENYATTA INTERNATIONAL AIRPORT – NAIROBI		
Contract No.	TENDER NO. KAA/OT/JKIA/0092/2019-2020		
Description	Bidder No. 1	Bidder No. 7	Bidder No. 9
Builders Works	768,374,430.00	985,162,820.00	939,719,040.00
Add 10% Contingency	76,837,433.00	98,516,282.00	93,971,904.00
Subtotal	845,211,873.00	1,083,679,102.00	1,033,690,944.00
Add 14% VAT	118,329,662.22	151,715,074.28	144,716,732.16
Total Price as per Price Schedule	963,541,535.22	1,235,394,176.28	1,178,407,696.16
Total Price as per the Form of Tender	963,541,535.22	1,499,826,018.20	1,178,407,696.16

Application of Margin of Preference

The Evaluation Committee observed that Clause 5.1 of the Tender Document provides as follows: -

"firms incorporated in Kenya where indigenous Kenyans own 51% or more of the share capital shall be allowed a 10% preferential bias provided that they do not sub-contract work valued at more than 50% of the Contract Price excluding Provisional Sums to a non-indigenous sub-contractor"

To establish that a firm is indigenous Kenyan, the Evaluation Committee reviewed the CR 12 for each of the three qualifying firms and established the shareholdings of each bidder with its associated joint venture members where applicable as follows:

Company Shareholding

No.	Details	China Jiangxi International Economic and Technical Cooperation Ltd	Flooring and Interior Limited JV			Pinney Agency Limited
			Flooring and Interior Limited	Elsan Mechanical Engineering Ltd	Raerex East Africa Limited	
1	Country of Registration	China	Kenya	Kenya	Kenya	Kenya
2	Shareholders	Zhang Jian	Wahome Gitonga	Antony Gitahi	Edward Kiama	Abdirizak Sheikh
		Wang Junqiang	Njeri Gitonga	Amalia Kiogora	Ryan Kariuki	Musa Yarrow
3	Shareholding	0: 0	51: 2	99:1	99:1	50:50
4	Citizenship	Chinese	Kenyan	Kenyan	Kenyan	Kenyan
5	Citizen Contractor	No	Yes	Yes	Yes	Yes

Financial Evaluation and Comparison table:

Project	TENDER EVALUATION REPORT FOR THE PROPOSED REFURBISHMENT OF TERMINALS 1B AND 1C AT JOMO KENYATTA INTERNATIONAL AIRPORT – NAIROBI		
Contract No.	TENDER NO. KAA/OT/JKIA/0092/2019-2020		
Bidder No.	1	7	9
Total Price as per the Form of Tender	963,541,535.22	1,499,826,018.20	1,178,407,696.16
Local shareholdings of the Company/ Joint Venture Partners	0 %	100%	100%
Application of Margin Preference @ 10%	0	(149,982,601.82)	(117,840,769.62)
Tender Price after application of the margin of preference for purpose of determination of the lowest evaluated bidder	963,541,535.22	1,349,843,416.38	1,060,566,926.54
Ranking	1	3	2

Observations

Pursuant to section 48 (4) (b) of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Evaluation Committee received professional advice from Mr. Fred Mulaku, the Quantity surveyor, on the pricing of each of the three qualifying bidders. A photostat copy of the report is attached to the evaluation report.

The Evaluation Committee Members observed that the bill of quantities for each of the three qualifying bidders had varying errors ranging from summation errors, extension errors to arithmetic errors. However, none

of those errors could be corrected by the Evaluation Committee pursuant to section 82 of the Act, which provides that

"the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity".

With respect to Bidder No. I who was the lowest evaluated bidder, it was noted that the bid was well balanced in terms of pricing and with no arithmetic errors. Nonetheless, failure to price for the baggage weighing scales coupled with the low rates, the Evaluation Committee observed that the bidder may be able to perform but with minimal or no profits.

The Evaluation Committee observed that this risk may compromise some areas of work and thus there was a need to ensure that a Contract Implementation Team is established to monitor the performance of the contractor and ensure that all delivery and performance obligations are met or appropriate action taken in the event of those obligations not being met.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s China Jiangxi International Economic and Technical Cooperation Co. Limited** at their quoted tender sum of **Nine Hundred and Sixty Three Million**

Five Hundred and Forty One Thousand Five Hundred and Thirty Five Shillings and Twenty Two Cents (Kshs 963,541,535.22/-) only inclusive of all applicable taxes subject to carrying out due diligence on the qualifications of the tenderer being the lowest evaluated tender.

Due Diligence

M/s China Jiangxi International Economic and Technical Cooperation Co. Limited being the lowest evaluated tenderer was subjected to due diligence on the following qualification criteria:

- I. Performance and confirmation of having undertaken similar works in an operational and live environment (in Demolition & alteration works; New Floor, Wall and Ceiling Finishes; Aluminium Partitions with specialized glass fitments; Washrooms refurbishments; Walkways; associated Electrical and Mechanical works-especially fire suppression works) with a cumulative value of not less than Kshs.600 million undertaken within the last five years (2015 to date) as evidenced by copies of completion certificates or interim certificates.
- II. The contractor had provided in its bid copies of letters of award as evidence of having undertaken contracts of similar nature as follows: -

- a) Parliamentary Service Commission amounting to Kshs. 5,893,646,849.67,
- b) Konza Technopolis Development Authority amounting to Kshs. 1,554,206,273.20,
- c) Kenyatta University Teaching, Referral and Research Hospital amounting to RMB Yuan 744,560,000.00 and
- d) Ministry of Transport, Works, Supply and Communications-Lusaka Airport for USD. 360,000,000.

III. Further in consideration of the supervisory role of the State Department of Public Works, a letter was also written to the Ministry of Transport, Infrastructure, Housing and Urban Development to confirm whether the Contractor had fulfilled its obligations in its contract with the Parliamentary Service Commission.

IV. The Authority requested the four clients for information as to whether or not the contractor had met their contractual obligations as to the provisions of the general conditions and special conditions of the contract in respect to quality compliance, timely performance, execution of the contracts within the contract sum and whether there has been any breach of fair wages clause with respect to the projects. Photostast copies of the letters are attached herein.

The following is a summary of the responses from the four clients:

Requirement	Clients				Ministry	Ministry
	PSC	KoTDA	KUTRRH	Zambia Airports	Public Works-Kenya	Supplies Unit-Zambia
Quality Performance	No Comment	Met	Met	Met	Met	No
Timely performance	Not Met	Met	Met	Met	Met	No
Financial Performance	No Comment	Met	Met	Met	Met	No
Breach of fair wages	No Comment	Met	Met	Met	Met	No
Overall	Negative	Affirmative	Affirmative	Affirmative	Affirmative	None

However, as at the time of preparation of the due diligence report, the Ministry of Transport, Works, Supply and Communications- Lusaka Airport had not responded and the Due Diligence team was of the view that there was no need of delaying the process any further, having already received the response from Zambia Airports Corporation Limited.

The Due Diligence team made the following observations: -

- One (1) out of the five (5) references raised issues on the successful bidder. However, the Project Supervisor did not raise any issue but instead gave an affirmative response. The Due Diligence team observed that non-performance of a contractor may be attributed to issues arising from the client which in the instant case had not been clarified.
- A negative determination should result in rejection of the Tenderer's tender, in which event the Procuring Entity should

proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily. The Due Diligence team observed that indeed the challenges raised by the Parliamentary Service Commission (PSC) arose largely from the nature of the contract that was entered into which required the client to nominate specialist and nominated sub-contractors, however this was not the case for the subject tender.

- During the due diligence process, two of the four clients i.e. Parliamentary Service Commission (PSC) and Konza Technopolis Development Authority (KoTDA) indicated in their responses that the company they contracted was China Jiangxi International Kenya Limited instead of China Jiangxi International Economic and Technical Cooperation Co. Ltd. However, the tenderer meets the minimum threshold of having undertaken similar works in an operational and live environment (in Demolition & alteration works; New Floor, Wall and Ceiling Finishes; Aluminium Partitions with specialized glass fitments; Washrooms refurbishments; Walkways; associated Electrical and Mechanical works-especially fire suppression works) with a cumulative value of not less than Kshs. 600 million within the last five years (2015 to date) as evidenced by copies of completion certificates or interim certificates of the Ministry of Transport, Works, Supply and Communications- Lusaka Airport for USD. 360,000,000 and the Kenyatta University Teaching, Referral and Research Hospital amounting to RMB Yuan 744,560,000.00. Further, the tenderer's

qualification documents were in the name of China Jiangxi International Economic and Technical Cooperation Co. Ltd.

From the foregoing due diligence exercise based on confidential references from persons with whom the tenderer had prior engagement, the Due Diligence team recommended that the Authority proceed to award the contract for the subject tender to **M/s China Jiangxi International Economic and Technical Cooperation Co. Limited**

Professional Opinion

The Head of Supply Chain Management concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer.

REQUEST FOR REVIEW NO. 103 OF 2020

M/s Flooring and Interiors Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 16th July 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review signed and filed on even date (hereinafter referred to as "the Applicant's Affidavit"), through the firm of Mbiriri Ngugi & Company Advocates. The Applicant further lodged a Further Statement in Support of the Request for Review signed and filed on 28th July 2020.

In response, the Procuring Entity, acting in person, lodged a Reply to the Request for Review dated and filed on 23rd July 2020 (hereinafter referred to as "the Procuring Entity's Reply"). The Procuring Entity further filed Annexures as referred to in the Procuring Entity's Response on 24th July 2020.

M/s China Jiangxi International Economic and Technical Cooperation Co. Limited, (hereinafter referred to as "the Interested Party") lodged a Replying Affidavit (hereinafter referred to as "the Interested Party's Affidavit") sworn on 23rd July 2020 and filed on 30th July 2020. The Interested Party further filed a Notice of Preliminary Objection dated 31st July 2020 and filed on 3rd August 2020 and a Supplementary Notice of Preliminary Objection dated 3rd August 2020 and filed on 4th August 2020.

The Applicant sought for the following orders in the Request for Review:

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- i. An order directing the Respondent to provide the Board and the Applicant with such bid documents submitted by the winning bidder, sufficient to ascertain the real identity of and experience of having done similar works by the company that placed the bid and the one that eventually got the award of tender;***
- ii. An order directing the Respondent to provide the Applicant and the tribunal with all the due diligence reports received from referees given by M/s China***

Jiangxi International Economic and Technical Cooperation to demonstrate that the entity had performed contracts of a similar nature as required in the Tender Document;

- iii. An order directing the Respondent to serve the Applicant with its technical and financial evaluation results and those of the winning bidder M/s China Jiangxi International Economic and Technical Cooperation to ascertain that the law and evaluation criteria was followed and the preference accorded to it by law was given;***
- iv. An order declaring that the award of Tender No. KAA/OT/JKIA/0092/2019-2020 to M/s China Jiangxi International Economic and Technical Cooperation is irregular, unfair and in contravention of the Constitution, the Laws of Kenya and evaluation criteria set out in the Tender Document;***
- v. An order revoking the award of Tender No. KAA/OT/JKIA/0092/2019-2020 to M/s China Jiangxi International Economic and Technical Cooperation to ensure fairness and open competition required by the law is upheld.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in

recognition of the challenges posed by the COVID-19 pandemic and 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.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the 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").

Accordingly, the Applicant lodged Written Submissions dated 29th July 2020 on even date. The Applicant further filed '*Submissions on the Preliminary Objection dated 31st July 2020*' dated 4th August 2020 on 5th August 2020. Moreover, the Applicant filed a Letter addressed to the Board Secretary with respect to the Request for Review Application dated 5th August 2020 on even date

The Procuring Entity lodged Written Submissions dated 3rd August 2020 on 4th August 2020 whereas the Interested Party filed Written Submissions dated 31st July 2020 on 3rd August 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including 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' submissions.

The issues that arise for determination are as follows: -

- I. Whether the Applicant has the requisite locus standi under section 2 read together with section 167 (1) of the Act to invoke the jurisdiction of this Board;**

Depending on the determination of the first issue: -

- II. Whether the Request for Review filed by the Applicant on 16th July 2020 is fatally incompetent by virtue of section 167 (1) of the Act and Regulation 73 (2) (b) of the Public Procurement Disposal Regulations, 2006;**

Depending on the determination of the second issue: -

- III. Whether the Further Statement filed by the Applicant on 28th July 2020 introduced a new cause of action outside the statutory period of fourteen days required under**

section 167 (1) of the Act thus ousting the jurisdiction of this Board;

Depending on the determination of the third issue: -

- IV. Whether the Interested Party's Supplementary Notice of Preliminary Objection dated 3rd August 2020 and filed on 4th August 2020 was filed within the timelines stipulated in Regulation 206 of the 2020 Regulations and the Board's Circular dated 24th March 2020;**

Depending on the determination of the fourth issue: -

- V. Whether the Applicant's Request for Review filed on 16th July 2020 and Further Statement filed on 28th July 2020 are fatally incompetent by virtue of section 167 (2) of the Act and Regulation 2013 (1) of the Public Procurement and Asset Disposal Regulations, 2020;**

Depending on the determination of the fifth issue: -

- VI. Whether the Interested Party participated in the subject tender;**
- VII. Whether the Interested Party satisfied the technical requirement under Clause 1.4 (c) of Section II Instructions to Tenderers on page 9 of the Tender Document read together with Item No. 3 Technical Evaluation Criteria of the Appendix to Instructions to Tenderers on page 24 of the Tender Document;**

- VIII. Whether the Procuring Entity applied a margin of preference in favour of the Applicant's bid;**
- IX. Whether the Applicant is entitled to be furnished with confidential documents with respect to the subject tender.**

Before the Board addresses the foregoing issues for determination, the Board would like to make the following observation: -

China Jiangxi International Economic and Technical Cooperation Co. Limited, the Interested Party herein, lodged before this Board a Certificate of Urgency for a Chamber Summons Application dated 23rd July 2020 on 27th July 2020 seeking to be joined as a party to the Request for Review application, through the firm of Mwaniki Gachuba Advocates.

The Board Secretariat considered the same and in its letter addressed to the Interested Party's advocates dated 28th July 2020, the Board Secretary advised on the practice of this Board with respect to interim applications and informed the Interested Party's advocates that its client was duly notified of the existence of the instant Request for Review Application on 28th July 2020 where the Interested Party was advised to put in a response within three days, noting that the Board is required to deliver a decision in the said application on or before 6th August 2020.

The Board observes, the Interested Party was able to file its response within three days of service of the request for review application on 30th July 2020.

The Board will now proceed to determine the issues framed for determination as follows:

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of

the matter for without jurisdiction the Court cannot entertain any proceedings."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which states as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at

any stage of the procurement process, or disposal process as in such manner as may be prescribed."

Accordingly, a party seeking to lodge a request for review application before this Board should either be a "candidate" or a "tenderer".

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 observes in paragraph 31 of the Interested Party's Affidavit its allegation that the Applicant had no locus before the Board as the Joint Venture Agreement dated 29th May 2020 lapsed on 6th July 2020 by virtue of Clause 1 (b) thereof.

The Board studied the Tender Document to establish who the Procuring Entity considered to be a 'candidate' or a 'tenderer' and notes Clause 1.3 of Section I. Invitation for Tenders of the Tender Document states as follows: -

"Interested eligible candidates may obtain further information and inspect tender documents at the office of the General Manager (Procurement and Logistics). 2nd Floor, Kenya Airports Authority Headquarters complex, P.O. Box 19002-00501 Nairobi during normal working hours.

Further to this, Clause 1.4 and Clause 1.5 of Section I. Invitation for Tenders of the Tender Document provides as follows: -

"1.4 A complete set of tender documents are downloadable from the KAA supplier login screen using the link <https://suppliers.kaa.go.ke/irj/portal>.

1.5 Upon accessing the tender documents, interested bidders shall respond to the tender online using the following link <https://suppliers.kaa.go.ke/irj/portal>. For 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 for login credentials early enough and not later than three days before tender closing date. All prices quoted should be inclusive of all costs and taxes and must be in Kenya

Shillings and shall remain valid for 120 days from the closing date of the tender."

From the foregoing, the Board observes, the Procuring Entity instructed prospective bidders to either obtain the tender document from the office of the Procuring Entity's General Manager (Procurement and Logistics) or download the tender document using the link provided in the Procuring Entity's Tender Notice and obtain the necessary login credentials in the event they are not recognised in the Procuring Entity's system by contacting their procurement office.

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 17th March 2020, is a person who, pursuant to the Procuring Entity's Invitation to Tender obtains the tender document from the office of the Procuring Entity's General Manager (Procurement and Logistics) or downloads the tender document using the link provided by the Procuring Entity in its Invitation to Tender.

Furthermore, a tenderer in the subject procurement process is a person who either obtained a tender document from the Procuring Entity or downloaded the tender document using the link provided in the Procuring Entity's Invitation to Tender, pursuant to the Procuring Entity's Tender Notice dated 17th March 2020 and subsequently submitted a completed tender document to the Procuring Entity by the tender submission deadline of 9th April 2020.

Further to this, the Board notes, Clause 1.8 Section II Instructions to Tenderers which provides as follows: -

"Each tenderer shall submit only one tender, either individually or as a partner in a joint venture. A tenderer who submits or participates in more than one tender (other than as a sub-contractor or in cases of alternatives that have been permitted or requested) will cause all the proposals with the tenderer's participation to be disqualified"

The Board observes that according to the Tender Document, the Procuring Entity considered eligible tenderers to be either a Joint Venture or Individual Tenderers, who would submit only one tender as an individual or as a partner in a joint venture.

The Board examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and observes on page 1 of the Procuring Entity's Tender/Quotation Register that the Procuring Entity received fifteen (15) bids in response to the subject tender, including from the Applicant herein.

The Procuring Entity furnished the Board with fifteen (15) original bids submitted in the subject tender which forms part of the Procuring Entity's confidential file and the Board observes that the Applicant submitted a bid in response to the subject tender.

The Board then studied the Applicant's original bid and notes that it provided at page 00005 to page 00011 of its original bid, a document titled '**Pre-bidding Joint Venture Agreement**' dated 27th May 2020 between Flooring & Interiors Limited (the Applicant), Raerex (EA) Limited and Elsan Mechanical Engineering Limited.

The Board observes Clause 1 of the Agreement which asserts as follows:

"The parties hereby constitute themselves a joint venture (hereinafter the "Joint Venture") for the sole purpose of submitting a bid for the performance of a contract and if the contract is awarded to the Joint Venture, of performing the Contract. The Joint Venture and this agreement shall terminate:

a) If the parties do not agree on the terms of the bid;

b) If the contract is not awarded to the Joint Venture;

c) or when the performance of the contract has been completed as the case may be, and when the accounts are settled between the parties in accordance with the terms hereof"

Accordingly, the Joint Venture would be constituted for the sole purpose of submitting a bid for the performance of a contract and if awarded the contract, of performing the contract. However, it constituted three provisos; that the joint venture agreement would terminate if the parties do not agree on the terms of the bid, the contract is not awarded to the

Joint Venture or upon completion of performance of the contract and when accounts are settled between the parties to the Joint Venture.

From the foregoing, the Board notes, the Applicant duly submitted a bid in response to the subject tender as a partner in a Joint Venture, pursuant to the Procuring Entity's Invitation to Tender by the tender submission deadline of 9th April 2020. In this regard therefore, the Applicant is for all intents and purposes a tenderer in the subject procurement process irrespective of whether the Applicant's joint venture agreement terminated due to the fact that the Applicant was not awarded the subject tender.

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...."

Accordingly, 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.

It is therefore the finding of this Board that the Applicant is a tenderer in the subject procurement process in accordance with section 2 of the Act read together with section 167 (1) of the Act and that the preliminary issue raised in paragraph 31 of the Interested Party's Affidavit fails.

Moving forward, the Board observes that the Interested Party lodged a Notice of Preliminary Objection dated 31st July 2020 and filed on 3rd August 2020.

In its Notice of Preliminary Objection filed on 3rd August 2020 the Interested Party alleges as follows: -

- "1. The Request for Review dated 6th July 2020 and the Further Statement in Support of the Request for Review dated 28th July 2020 are fatally incompetent by virtue of section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations, 2006;***
- 2. The Annexures to the Request for Review and in the Further Statement have no probative value;***

- 3. The Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Disposal Regulations, 2006 do not provide for Further Statement whatsoever;***
- 4. The Further Statement amplified new complaints that constitute a new cause of action;***
- 5. The Further Statement amplified new complaints out of time;***
- 6. The Further Statement was filed without the leave of the Board."***

The Board having considered submissions by parties will now address the second issue 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 Interested Party submitted that the Applicant irregularly annexed evidence to its Request for Review application and contended that evidence can only be annexed to an affidavit in accordance with Order

53 Rule 2 (a) of the Civil Procedure Rules, 2010. In this regard therefore the evidence annexed to the Request for Review has no probative value and ought to be struck out.

In support of its submission, the Interested Party referred the Board to its decision in **PPARB Application No. 82 of 2018 Samno Company Limited v. Ministry of Defence & Another** where the Interested Party submitted that the Board held that evidence adduced before it can only be introduced by way of an affidavit and proceeded to strike out the request for review application.

In response, the Applicant contended that there are no provisions in the Act or in the regulations that require a party to file an affidavit in support of a request for review application. The Applicant submitted that the Board is a specialized statutory tribunal guided only by the Constitution of Kenya, the Act and the regulations made thereunder. It was therefore the Applicant's submission that the instant request for review application related purely to matters procurement and thus the provisions of the Act and its attendant regulations prevail over the provisions of the Civil Procedure Rules as cited by the Interested Party.

Upon considering parties' submissions, the Board observes that the Interested Party through its Preliminary Objection filed on 3rd August 2020 is challenging the Applicant's Request for Review application on the basis of section 167 (1) of the Act and Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations").

Notably, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") came into operation on 2nd July 2020 pursuant to Gazette Notice No. 4957 dated 9th July 2020 and in effect revoked the 2006 regulations as captured under Regulation 224 of the 2020 Regulations which reads as follows: -

"The Public Procurement and Disposal Regulations, 2006 are hereby revoked"

The Board observes that at the time of filing the Request for Review, the 2006 Regulations had been revoked, noting that the Request for Review was filed on 16th July 2020.

In any event, the Board notes, the interpretation section of the Act defines an appeal filed with the Review 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"

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 of the 2020 Regulations which reads as follows: -

“(1) A request for review under section 167 (1) of the Act shall be made in Form 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)

(d) ”

(3).....;

(4)..... ”

[Emphasis by the Board]

Accordingly, the above regulation stipulates that a request for review shall be made in Form set out in the Fourteenth Schedule of these Regulations, shall state the reasons for the complaint, including any alleged breach of the Act and/or the 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 hereinbefore, the use of the word 'shall' in Regulation 73 (1) (2) (3) and (4) of the 2006 Regulations (now captured under Regulation 203 of the 2020 Regulations) is to be construed as denoting a compulsory or mandatory obligation. In this

regard therefore, it was a mandatory obligation for a request for review application to state the reasons for the complaint, including any alleged breach of the Act and/or the Regulations. Further, 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.

The Board notes that a statement in support of a request for review is not defined under the Act or its attendant regulations. However, the Board in its decision in **PPARB Application No. 82 of 2018 Samno Company Limited v. Ministry of Defence & Another** considered the similarities between a request for review application and a notice of motion application and stated as follows: -

"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 view of the foregoing, the Board notes that a statement or an affidavit 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 sworn and signed by an individual

possessed of the facts or the information that is deposed in the said statement or affidavit in support of a request for review."

From the foregoing, the Board notes that a statement in support of a request for review application provides the evidence necessary to support the grounds raised in a request for review. The Board further explained that an applicant before this Board may introduce evidence before it through a statement in support of a request for review or an affidavit in support of a request for review.

It is important to note that the Board did not state that evidence can only be introduced before this Board through an affidavit, but clearly determined that evidence may be introduced before the Board through either a statement in support of a request for review or an affidavit in support of a request for review.

Notably, the Board is not bound by rules of evidence in the administrative review of procurement and disposal proceedings as captured under Regulation 218 of the 2020 Regulations which reads as follows: -

"The Review Board shall not be bound to observe the rules of evidence in the hearing of a request for review under these regulations."

Turning to the circumstances in the instant case, the Board examined the Applicant's Request for Review Application filed on 16th July 2020

and observes annexed to the said application, a Statement in Support of the Request for Review Application dated and filed on 16th July 2020.

In view of the foregoing, the Board finds that the Applicant's Request for Review Application was filed in accordance with section 167 (1) of the Act and Regulation 203 (1) and (2) (a) and (b) of the 2020 Regulations and thus the Interested Party's Preliminary Objection with respect to the second issue fails.

The Board will now proceed to the third issue for determination: -

The Interested Party submitted that the Applicant's Further Statement in Support of the Request for Review filed on 28th July 2020 amplified new complaints and grounds that constitute a new cause of action. The Interested Party contended that the Applicant's Further Statement introduced a new ground of 20% preference under section 86 (2) of the Act and four distinct prayers in addition to the ones sought in the instant Request for Review, which in effect altered the trajectory of the Request for Review.

It was the Interested Party's submission that the Applicant's Further Statement which in its view amplified the new complaint and new prayers was filed out of time, noting that the Applicant received its notification on 6th July 2020 and the fourteenth day being the last day of filing the complaint raised in the Further Statement was 20th July 2020.

Having considered parties' submissions, the Board examined the Request for Review filed on 16th July 2020 and observes paragraph 1 (b) therein which read as follows: -

"That in total disregard of its tender requirements, the procuring entity in evaluation of the tenders failed to apply or give due regard to the tender requirement that firms incorporated in Kenya, where indigenous Kenyans own 51% or more of the share capital, shall be allowed a 10% preferential bias"

Further, paragraph 19 therein stated as follows: -

"Further and without prejudice to the above, section 89 & 155 of the Act provide for some preferences to be enjoyed by locally owned companies when competing for a tender with international firms. The tender provided for 10% preference to be offered to locally owned entities and the applicant states that it ought to have benefitted from that preference."

Accordingly, it was the Applicant's contention that it ought to have benefitted from the margin of preference of 10% as provided under section 89 and 155 of the Act and that the Procuring Entity failed to apply the same in its favour.

The Board examined the Applicant's Further Statement filed on 28th July 2020 and observes paragraph 5 therein which reads as follows: -

"Having now ascertained that the winning bidder, its shareholders and directors are all foreigners, the Applicant

contends that in light of this information from the procuring entity, the preferential bias that was to be applied in its favour should have been 20% and not 10% which was applied in evaluation of the tender."

Further, paragraph 6 and 7 of the Further Statement stated as follows: -

"6. The above contention is based on advice given by the Applicant's counsel that Section 86 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter the Act) provides the criteria for determination of the successful tender and states in part that:

86(2) For the avoidance of doubt, citizen contractors or those entities in which Kenyan citizens own at least fifty -one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

7. Under paragraph 5 of its Response to the Request, the procuring entity confirms that only 3 firms were successful in both the mandatory and technical evaluation stages and the applicant was one of these three firms and then proceeded to the financial evaluation stage. Having met the threshold in technical evaluation and allowed to proceed to financial evaluation, the Applicant a citizen contractor was entitled to benefit from the 20% preference purely by operation of the law."

From the above excerpts of the Applicant's Further Statement, we observe the Applicant's contention that the margin of preference to be applied in its favour ought to have been 20% and not 10% in the evaluation of its bid, which the Procuring Entity did not apply in its favour.

From the foregoing, it is evident that the Applicant in its Further Statement introduced a 'new' alleged breach of duty on the part of the Procuring Entity with respect to section 86 (2) of the Act, in that the Procuring Entity ought to have applied a preference of 20% in its favour, which the Board observes was not stated in the Applicant's Request for Review Application, even though the Applicant was in full knowledge of section 86 (2) of the Act at the time of the filing of the Request for Review Application.

Further, the Board observes that the Applicant in the conclusion of its Further Statement stated as follows: -

"...The Applicant urges the Board to make the following declarations and orders in addition to the declarations sought in the application for review dated 16th July 2020:

- a. That being a citizen contractor competing for the same tender with a foreign state owned entity, the Applicant was and is entitled to a 20% preference on its bid as provided under section 86 (2) of the Public Procurement and Asset Disposal Act, 2015;***
- b. That by failing to afford the Applicant the benefit of 20% accorded to it by law and instead of applying a***

10% preference as provided in its tender document, the procuring entity violated the provisions of Article 227 of the Constitution of Kenya and Section 86 (2) of the Public Procurement and Asset Disposal Act, 2015;

c. That an order do issue compelling the procuring entity to re-do the financial evaluation of bids while applying a 20% preference on the bid by the Flooring & Interiors Limited and thereafter issue the tender to the lowest evaluated bidder as required by the tender document and the law.

d. That the application for review filed herein be allowed in full and costs be awarded to the Applicant. "

From the foregoing, the Board observes that the orders sought by the Applicant in its Further Statement were not captured in the Applicant's Request for Review.

In this regard therefore, it is evident that the Applicant's Further Statement filed on 28th July 2020 amounted to a new cause of action, having established that it introduced a 'new' alleged breach of duty on the part of the Procuring Entity with respect to section 86 (2) of the Act and that the Applicant sought for four orders therein, which were not captured in its Request for Review filed on 16th July 2020.

Having found that the Applicant's Further Statement filed on 28th July 2020 amounted to a new cause of action, the question that the Board must now answer is when did the alleged breach of duty provided for

therein occur for the fourteen-day period under section 167 (1) of the Act to start running.

The Board observes that the Procuring Entity's decision to award the subject tender was communicated to all bidders via letters dated 3rd July 2020.

This decision became known to the Applicant when it received its letter of notification of unsuccessful bid on 6th July 2020 as stated by the Applicant in paragraph 9 of its Request for Review Application. This therefore means an alleged breach of duty could only occur as at this date when the Applicant was notified that its tender was not successful and an award had been made, thereby necessitating the Applicant to lodge its Request for Review within fourteen (14) days from notification of award.

Given that the Applicant's Further Statement was filed on 28th July 2020, which was twenty-two days after the date the Applicant received its letter of notification of the outcome of its bid from the Procuring Entity, the Board finds that the Applicant's new cause of action contained in the Further Statement was filed outside the statutory period of fourteen (14) days as provided for under section 167 (1) of the Act.

Furthermore, due to the late filing of the Applicant's Further Statement, parties to the Request for Review were denied the opportunity to respond to the Applicant's new cause of action contained therein and if the said application had been considered by the Board, this would have

denied parties a fair hearing in accordance with Article 50 (1) (c) of the Constitution, noting that the Board is required to deliver its decision in the Request for Review Application on or before 6th August 2020.

The Board therefore holds that it lacks the jurisdiction to entertain the substantive issues raised in the Applicant's Further Statement in Support of the Request for Review filed on 28th July 2020.

It is therefore the finding of this Board that the Interested Party's Preliminary Objection with respect to the third issue for determination succeeds and the Applicant's Further Statement in Support of the Request for Review filed on 28th July 2020 is struck out forthwith.

With respect to the fourth issue for determination, the Board observes that the Interested Party filed a Supplementary Notice of Preliminary Objection dated 3rd August 2020 and filed on 4th August 2020.

The Board observes that on 24th March 2020, it issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate the COVID-19 pandemic.

Through this circular, the Board dispensed with physical hearings and directed *inter alia* that upon notification and service of a request for review, an interested party shall file and submit to the Board's Secretary his/her memorandum of response and/or preliminary objection to the request for review within three (3) days of such service together with all

relevant documentation with respect to the procurement or asset disposal proceedings in issue.

This directive is in line with Regulation 209 of the 2020 Regulations which stipulates that: -

"A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification" [Emphasis by the Board]

The Board notes, the Interested Party was notified of the existence of the Request for Review on 28th July 2020 and three days within which to file a preliminary objection to the Request for Review in accordance with Regulation 206 of the 2020 Regulations and the Board's Circular dated 24th March 2020, lapsed on 31st July 2020.

Noting that 31st of July 2020 was declared as a public holiday by the Cabinet Secretary for Interior and Coordination of National Government vide Gazette Notice No. 5277 dated 29th July 2020, the Board notes, the Interested Party had up to the 3rd of August 2020 to file a preliminary objection to the Request for Review.

Notably, the Interested Party filed its Replying Affidavit on 30th July 2020 and a Notice of Preliminary Objection on 3rd August 2020.

However, the Interested Party further filed its Supplementary Notice of Preliminary Objection on 4th August 2020, after the lapse of the three-day period within which to file a preliminary objection as provided for under Regulation 206 of the 2020 Regulations and the Board's Circular dated 24th March 2020.

The Board observes that this late filing by the Interested Party denies parties to the Request for Review, more so the Applicant, the opportunity to respond to the Interested Party's Supplementary Notice of Preliminary Objection, if they elect to do so, and more importantly denies parties the opportunity for a fair hearing in line with Article 50 (2) (c) of the Constitution which provides as follows:

(1) Every accused person has the right to a fair trial, which includes the right—

(a)

(b)

(c) to have adequate time and facilities to prepare a defence;

Further, the Board is cognizant of section 171 of the Act which provides as follows: -

"The Review Board shall complete its review within twenty-one days after receiving the request for the review"

Accordingly, the Board is required to make a determination in this matter within twenty-one days of filing of the Request for Review Application, which period lapses on 6th August 2020, two days after the Interested Party filed its Supplementary Notice of Preliminary Objection and consequently straining the already limited time available to the Board to make a determination with respect to the Request for Review Application.

In view of the foregoing, the Board finds, the Interested Party's Supplementary Notice of Preliminary Objection was filed out of time contrary to Regulation 206 of the 2020 Regulations and the Board's Circular dated 24th March 2020 and would constitute an injustice to the Applicant and the other parties to the Request for Review if the Board is to consider its merits noting that the Applicant has not had an opportunity to file its response to the same.

Consequently, the Board strikes out the Interested Party's Supplementary Notice of Preliminary Objection dated 3rd August 2020 and filed on 4th August 2020. The upshot of this finding is that the Board will not consider the fifth issue framed for determination.

Having dispensed with all the preliminary issues and the preliminary objections raised with respect to the Request for Review, the Board finds that it has the requisite jurisdiction to entertain the substantive issues raised in the Request for Review.

With respect to the sixth issue framed for determination, the Applicant submitted that on 6th July 2020, it received via an email from the Procuring Entity its letter of notification of the outcome of its bid dated 3rd July 2020, which letter read as follows: -

"Reference is made to your bid submitted on 29th May 2020 in response to the above tender.

The evaluation process for the subject tender has been finalized and we regret to inform you that your bid was unsuccessful on account of your bid price.

The bidder who was determined to be the lowest evaluated and therefore the successful tenderer is M/s China Jiangxi International Economic and Technical Cooperation at Kshs 963,541,535.22 inclusive of VAT.

We wish to thank you for the interest shown in our organization and look forward to doing business with you in future...."

The Applicant submitted that from the contents of its letter of notification, the subject tender had been awarded to M/s China Jiangxi International Economic and Technical Cooperation at Kshs 963,541,535.22 inclusive of VAT, an entity which in its view was not captured in the Procuring Entity's Tender Opening Register as having submitted a bid in response to the subject tender.

However, the Applicant submitted that there was an entity with an almost similar name, that is, China Jiangxi International Economic who submitted a bid as captured in the Procuring Entity's Tender Opening Register at a sum of Kshs 963,41,535.22.

It was therefore the Applicant's submission that the two entities, that is, the entity that submitted the bid and the entity that was awarded the subject tender, were separate and distinct legal entities. In this regard therefore, the Procuring Entity awarded the subject tender to an entity that did not submit a bid in response to the subject tender in violation of the provisions of the Act and the Constitution.

In response, the Procuring Entity submitted that the winning bidder of the subject tender was M/s China Jiangxi International Economic and Technical Cooperation Co. Limited. However, it inadvertently addressed the notification of intention to enter into a contract to M/s China Jiangxi International Economic and Technical Cooperation instead of M/s China Jiangxi International Economic and Technical Cooperation Co. Limited which it admitted was an error on its part, which submission was reiterated by the Interested Party in its pleadings before the Board.

In its determination of this issue, the Board first considered the manner in which a notification of award or intention to enter into a contract ought to be made.

The Board studied section 87 of the Act which states as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."[Emphasis by Board]

Section 87 of the Act is instructive on the manner in which notification ought to be carried out. A procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a procuring entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Section 87 (3) of the Act further requires a procuring entity to disclose the identity of the successful bidder in a tender, in order to afford the unsuccessful bidders, the opportunity to establish if the successful bidder satisfied the eligibility criteria as set out in the tender document, that is, whether the successful bidder was qualified to participate in the subject tender and challenge the same if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution which 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."* [Emphasis by the Board]**

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

In the instant case, the Board examined the Procuring Entity's Tender/Quotation Register dated 29th May 2020 and observes that the Procuring Entity's Tender Opening Committee received fifteen (15) bids in response to the subject tender, one of which was from an entity whose details were captured as follows: -

"Bidder's Name - China Jiangxi International Economic

Technical Opening – 963,41,535.22

Tender Surety – Provided Sidian Bank (hard and soft copy)"

The Board then examined the Procuring Entity's Tender Opening Minutes dated 26th May 2020 and observes the following remarks made by the Procuring Entity's Tender Opening Committee: -

"While preparing the Minutes, it was also noted that the bid price Kshs 963,41,535.22 for M/s China Jiangxi was erroneously captured as Kshs 963,41,535.22 instead of Kshs 963,541,535.22 the digit 5 was not captured before 4 (see attached form of tender)"

Accordingly, the Procuring Entity's Tender Opening Committee acknowledged the error in capturing the bid price of the bid submitted by the Interested Party and further indicated what in its view was the correct price as provided in the said entity's form of tender.

Upon examining the Interested Party's original bid, the Board observes, from its form of tender on page 4 to page 5 of its original bid that the full name of the Interested Party as appears therein is China Jiangxi International Economic and Technical Cooperation Co. Limited.

Moreover, the bid price indicated in the form of tender is Kshs 963,541,535.22.

The Board studied the Procuring Entity's Evaluation Report dated 18th June 2020 and Due Diligence Report dated 3rd July 2020 and observes that the Procuring Entity's Evaluation Committee and Due Diligence Team respectively recommended award of the tender to M/s China Jiangxi International Economic and Technical Cooperation Co. Limited at

its tender sum of Kshs 963,541,535.22. The Board observes that this recommendation was duly approved by the Procuring Entity's Accounting Officer following review of the same by the Procuring Entity's Head of Procurement Function.

In this regard therefore, it is evident that the Procuring Entity awarded the subject tender to one M/s China Jiangxi International Economic and Technical Cooperation Co. Limited, that is the Interested Party herein, at its tender sum of Kshs 963,541,535.22 and that the Procuring Entity erroneously indicated in the Applicant's letter of notification dated 3rd July 2020 that the subject tender was awarded to one M/s China Jiangxi International Economic and Technical Cooperation. However, the Board notes that the Procuring Entity indicated the correct tender sum that is Kshs 963,541,535.22 in the Applicant's letter of notification dated 3rd July 2020.

In view of its observations, the Board examined the Applicant's Request for Review Application, and observes a document annexed to it marked as Annexure 'WG4' and observes that the said document is a copy of the Procuring Entity's Tender/Quotation Register dated 29th May 2020, which as we have established hereinbefore erroneously captured the name and amount at tender opening of the Interested Party's bid. However, the Board notes, the Applicant did not annex a copy of the Procuring Entity's Tender Opening Minutes, which explained the error made in the Tender/Quotation Register.

In view of the foregoing, the Board finds the successful bidder, that is, the Interested Party herein, participated in the subject tender.

However, noting the error made by the Procuring Entity, the Board finds it necessary to direct the Procuring Entity to issue a new letter of notification to enter into a contract to the successful bidder and new letters of notification of unsuccessful bids to all unsuccessful bidders indicating the correct name of the successful bidder, in accordance with section 87 of the Act.

The Board will now proceed to the seventh issue framed for determination: -

Clause 1.4 (c) of the Section II Instructions to Tenderers on page 9 of the Tender Document reads as follows: -

"All tenderers shall include the following information and documents with their tenders: -

a);

b);

c) Experience in works of a similar nature and size for each of the last five years, and details of work under way or contractually committed; and names and addresses of clients who may be contacted for further information on these contracts."

Accordingly, all bidders were required to provide in their tender documents information demonstrating a bidder's experience in works of

a similar nature and size for each of the last five years, and details of work under way or contractually committed; and names and addresses of clients who may be contacted for further information on these contracts.

The Board observes that this requirement was further captured in the Technical Evaluation Criteria under Item No. 3 on page 24 of the Procuring Entity's Tender Document which provided as follows: -

"Company past works experience in the last 5 years

Proof of at least two (2) similar works and at least one of them in an operational and life environment (in Demolition & alteration works; New Floor, Wall and Ceiling Finishes; Aluminum Partitions with specialized glass fitments; Washrooms refurbishments; Walkways; associated Electrical and Mechanical Works – especially fire suppression works), costing not less than Kshs 400 million on average previously undertaken in the last five years (2015 to date). Bidder shall attach copies of the following:

Letters of Award or Signed Contract and Completion Certificate for the respective projects, or if project is ongoing it must be at least 50% complete.

Bidder to attach copies of interim payment certificates"

From the above criterion, we observe, bidders were required to provide at least two (2) similar works and at least one of them must be in an operational and live environment.

Further, the similar works provided must cost not less than Kshs 400 million on average and must be undertaken within the last five years (2015 to date). Finally, as evidence of similar works, bidders were required to attach copies of either Letters of Award or Signed Contract and Completion Certificate for the respective works, or if a project was ongoing it must be at least 50% complete.

The Board examined the Interested Party's original bid and observes that the Interested Party, in response to this criterion, provided the following: -

No	Project Name	Name of Client	Type of Work Performed	Value of Contract	Evidence Provided
1.	Ongoing Similar Project (Completed 80%) Proposed Contract for the Design and Construction of the Infrastructure Upgrade at Kenneth Kaunda International Airport, Lusaka	Ministry of Transport, Works, Supply and Communications	Design and Construction of Airport Infrastructure at Kenneth Kaunda International Airport Year of Completion : Estimated the end of 2020; now completed 80%	USD 360,000,000.00	-Letter of Contract Award dated 7 th January 2013 addressed to M/s China Jiangxi Cooperation for International Economic and Technical Cooperation at USD 385,809,637.00 -Contract No. NOMTWSC/RFP/AIU/O1/12 dated 5 th September 2013 between Ministry of Transport, Works, Supply and Communications and /s China Jiangxi Cooperation for International Economic and Technical Cooperation -KKIA Progress Report dated 4 th November 2019 for contract for Design and Construction of

					<p>Airport Infrastructure at Kenneth Kaunda International Airport</p> <p>-Interim Payment Certificate dated 23rd January 2018 authorizing payment of USD 22,720,000.00 to China Jiangxi Cooperation for International Economic and Technical Cooperation for Main Work of New Terminal for Construction of Airport Infrastructure at Kenneth Kaunda International Airport</p> <p>-Interim Payment Certificate dated 17th August 2018 for payment of USD 4,490,000.00 to China Jiangxi Cooperation for International Economic and Technical Cooperation for Foundation Work for the New Airport Complex Building and Main Work for the New Airport Complex Building</p> <p>-Interim Payment Certificate dated 30th April 2019 for payment of USD 6,640,000.00 to China Jiangxi Cooperation for International Economic and Technical Cooperation for Road Pavement Work for Apron for Aircraft Movement Area Project</p> <p>-Interim Payment Certificate dated 12th December 2019 for payment of USD 10,910,000.00 to China Jiangxi Cooperation for International Economic and Technical Cooperation for Finishing Work for New Terminal</p>
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2.	Completed Similar Project The Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University	Kenyatta University	Design, Construction, Equipment for the 600 Bed Capacity Hospital Year of Completion : Infrastructure Works completed on 18 th May 2018. Other parts hand over at 24 th May 2019	CNY 744,560,000.00 Equivalent to USD 108,820,000	- letter of Recommendation dated 19 th May 2020 issued by Kenyatta University stating that China Jiangxi Cooperation for International Economic and Technical Cooperation who is the main contract has completed works for Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University -Letter of Award dated 21 st December 2009 issued by Kenyatta University and addressed to China Jiangxi Cooperation for International Economic and Technical Cooperation for the Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University -Letter dated 2 nd December 2009 issued by the Economic and Commercial Office, Embassy of the People's Republic of China to the Procurement Manager of Kenyatta University attesting that China Jiangxi Cooperation for International Economic and Technical Cooperation has the capacity to undertake the Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University -Contract dated 12 th August 2010 between the Government of the Republic of Kenya acting through Kenyatta
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					<p>University and China Jiangxi Cooperation for International Economic and Technical Cooperation for Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University</p> <p>-Completion Certificate bearing a stamp issued by Kenyatta University showing that China Jiangxi Cooperation for International Economic and Technical Cooperation completed the Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University on 18th May 2018</p> <p>-Interim Payment Certificate for Completion of Works for Construction and Development of a Modern Teaching Research and Referral Hospital at Kenyatta University</p>
3.	<p>Ongoing Similar Project (Completed 85%) Multi-Storey Office Block for Kenya National Assembly</p>	Parliamentary Service Commission	<p>The project covers an area of 2000 square meters, a total construction area of about 48000 square metres, building main body for the reinforced concrete frame structure. Decoration works and etc</p> <p>Year of Completion :</p>	<p>Kshs 5,893,646,849.67</p>	<p>-Letter of Award dated 26th August 2013 issued by Parliamentary Service Commission to China Jiangxi Cooperation for International Economic and Technical Cooperation for the Proposed Multi-Storey Office Block at Kshs. 5,893,646,849.67</p> <p>-Contract dated 23rd September 2013 between Parliamentary Service Commission and China Jiangxi Cooperation for International Economic and Technical Cooperation for the Proposed Multi-Storey Office Block at Kshs. 5,893,646,849.67</p>

			Now completed around 85%; Estimated completion around Dec 2020		<p>-Interim Payment Certificate No. 50 dated 17th October 2019 for total works done by China Jiangxi Cooperation for International Economic and Technical Cooperation worth Kshs. 4,819,332,480.53 for the for the Proposed Multi-Storey Office Block</p> <p>-Recommendation Letter dated 20th September 2016 issued by Parliamentary Service Commission confirming that China Jiangxi Cooperation for International Economic and Technical Cooperation are the main contractors in the Proposed Multi-Storey Officer Block Project and are satisfied with the works so far undertaken by the contractor</p>
4.	Completed similar project The construction of the proposed KOTDA office complex main works	Konza Technopolis Development Authority	<p>Waterproofing of basement and exterior wall roofing, fine decoration of the interior and exterior walls of the building and simple outdoor decoration, environment protective works</p> <p>Year of Completion : 31st May 2019</p>	Kshs 1,554,206,275.20	<p>-Letter of Award dated 8th June 2016 issued by Konza Technopolis Development Authority to China Jiangxi Cooperation for International Economic and Technical Cooperation for the Construction of the proposed KOTDA office complex main works at Kshs. 1,544,206,275.20</p> <p>-Agreement dated 29th June 2016 between Development Authority and China Jiangxi Cooperation for International Economic and Technical Cooperation for the Construction of the proposed KOTDA office complex main works at Kshs. 1,544,206,275.20</p> <p>-Certificate of Practical Completion dated 31st</p>

					<p>May 2019 issued by the Architectural Association of Kenya to Authority to China Jiangxi Cooperation for International Economic and Technical Cooperation showing that Construction of the proposed KOTDA office complex main works has been completed and is satisfactory</p> <p>-Interim Payment Certificate No. (1 up to 17) with respect to the contract dated 29th June 2016 for Electrical Installations, Mechanical Installations and HVAC Installations and other works undertaken by China Jiangxi Cooperation for International Economic and Technical Cooperation</p>
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From the summary hereinabove the Board notes, the Interested Party duly complied with Item No. 3 Technical Evaluation Criteria on page 24 of the Procuring Entity's Tender Document, in all the four listed works as can be seen in the table hereinabove.

The Board then examined the Procuring Entity's Evaluation Report dated 18th June 2020 and observes on page 21 that the Evaluation Committee indicated in the affirmative (Yes) that the Interested Party complied with Item No. 3 of the Technical Evaluation Criteria.

In its examination of the Procuring Entity's confidential file with respect to the subject tender, the Board observes a Due Diligence Report dated

3rd July 2020. In the said report, we observe that the Evaluation Committee conducted due diligence on the Interested Party and in doing so, contacted four referees with respect to the four projects that the Interested Party indicated in its bid. Further, the Procuring Entity contacted the Ministry of Public Works in Kenya, which ministry gave a positive response with respect to the Parliamentary Service Commission Project and Ministry of Transport, Works, Supply and Communications, Zambia with respect to Lusaka Airport Project.

The Board observes from the Due Diligence report that the Evaluation Committee requested the four clients identified in the Interested Party's bid whether or not the Interested Party had met its contractual obligations. The Evaluation Committee stated in its report that the clients responded with the exception of the Ministry of Transport, Works, Supply and Communications – Lusaka Airport.

The Evaluation Committee on page 3 of the due diligence report noted that one of the clients, the Parliamentary Service Commission gave a negative review of the Interested Party and the Evaluation Committee remarked as follows: -

"A negative determination should result in rejection of the Tenderer's tender, in which event the Procuring entity should proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily. The Committee appreciates that indeed the challenges raised by the Parliamentary Service Commission (PSC) arose largely

from the nature of the contract that was entered into which required the client to nominate specialist and nominated sub-contractors, however this is not the case for the subject tender.

During the due diligence process, two of the four clients i.e. Parliamentary Service Commission (PSC) and Konza Technopolis Development Authority (KoTDA) have indicated in their responses that the company they contracted was China Jiangxi International Kenya Limited instead of China Jiangxi International Economic and Technical Cooperation Co. Ltd. However the tenderer meets the minimum threshold of having undertaken similar works in an operational and live environment (in Demolition & alteration works; New Floor, Wall and Ceiling Finishes; Aluminium Partitions with specialized glass fitments; Washrooms refurbishments; Walkways; associated Electrical and Mechanical works-especially fire suppression works) with a cumulative value of not less than Kshs.600 million within the last five years (2015 to date) as evidenced by copies of completion certificates or interim certificates of the Ministry of Transport ,Works , Supply and Communications- Lusaka Airport for USD.360,000,000 and the Kenyatta University Teaching, Referral and Research Hospital amounting to RMB Yuan 744,560,000.00. Further, the tender's qualification documents were in the name of China Jiangxi

International Economic and Technical Cooperation Co. Ltd."

From the above excerpt, we note the Evaluation Committee observed that only one client, that is the Parliamentary Service Commission, gave a negative review of the Interested Party with respect to timeline performance only. However, the Committee distinguished the works done with respect to the Parliamentary Service Commission project and the subject tender, and concluded that the same challenges would not apply with respect to the subject tender. The Evaluation Committee therefore concluded, in view of the feedback from the Interested Party's references that the Interested Party met the minimum threshold of having undertaken similar works in an operational and live environment.

In view of the foregoing, the Board finds that the Applicant duly satisfied the technical requirement under Clause 1.4 (c) of Section II Instructions to Tenderers on page 9 of the Tender Document read together with Item No. 3 Technical Evaluation Criteria of the Appendix to Instructions to Tenderers on page 24 of the Tender Document.

On the eighth issue for determination, the Board observes, Article 227 (2) (a) of the Constitution provides as follows: -

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts..."

The law contemplated under Article 227 (2) (a) is the Act, which provides for several preference and reservation schemes depending on the circumstances.

To establish the preference and reservation scheme applicable in this case, the Board examined the Procuring Entity's Invitation to Tender and observes that the Procuring Entity invited sealed tenders from interested bidders for the Proposed Refurbishment of Terminals 1B and 1C at the Jomo Kenyatta International Airport, Nairobi.

It is undisputed that foreign bidders would participate in the subject tender as long as they met the requirements contained in the Tender Document.

The Board observes section 89 (f) of the Act, which provides as follows:

-

(1) If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—

(a).....;

(b);

(c).....;

(d).....;

(e).....;

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155."

Accordingly, where local or citizen contractors participate, they shall be entitled to preferences and reservations as set out in section 155.

Moreover, with regards to preferences and reservations in international tenders, section 157 (9) of the Act, specifies that: -

"...for the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender."

The Board has studied the provisions on preference and reservations under section 155 of the Act which provides that: -

155. Requirement for preferences and reservations

(1)

(2)

(3) Despite the provisions of subsection (1), preference shall be given to—

(a); or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

(5)"

Accordingly, the Procuring Entity had an obligation to apply a preferential treatment to firms where Kenyans are shareholders as required by section 155 (3) (b) read together with section 155 (4) of the Act setting a 51% and above threshold of Kenyan shareholding.

The question that the Board must now answer is what percentage of preference was the Procuring Entity to apply under the Act if the 51% threshold was met by firms where Kenyans are shareholders.

Section 157 (8) (b) (ii) of the Act provides as follows: -

8. In applying the preferences and reservations under this section –

a.-

b. a prescribed margin of preference shall be given-

i.; or

ii. works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

Under Part (b) of section 157 (8) of the Act, Regulations ought to be made in order to determine the scale of margin of preference applicable.

With respect to the subject tender, section 157 (8) (b) (ii) of the Act recommends Regulations to prescribe a margin of preference for: -

"works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed. "

The Board has considered the 2020 Regulations and observes Regulation 164 (c) which provides as follows: -

"For the purposes of section 157 (8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be-

(a);

(b); and

(c) ten percent of the evaluated price of tender, where the percentage of shareholding of the Kenyan citizens is more than fifty percent.

It is important to point out the above regulation makes reference to application of a margin of preference of 10% on the evaluated price of tender, where the percentage of the shareholding of the Kenyan citizens is more than fifty (50) percent.

However, the Board notes, at the time the Procuring Entity's Evaluation Committee was conducting evaluation, Regulations 2020 were not yet in force. This is because, the evaluation report is dated 18th June 2020 which confirms that evaluation was completed by 18th June 2020 whilst the 2020 Regulations came into operation on 2nd July 2020.

Accordingly, the 2020 Regulations were not applicable in so far as evaluation of bids are concerned in the subject tender.

The Board notes that the Procuring Entity's Evaluation Committee would only rely on Regulation 28 (2) (b) of the 2006 Regulations and Regulation 15 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 (hereinafter referred to as the "2011 Regulations") which were made pursuant to the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the 2005 Act") in evaluating bids in the subject tender. The said regulations provided as follows: -

Regulation 28 (2) (b) of the 2006 Regulations reads: -

"(1)....."

(2) The margin of preference-

(a)

(b) for the purposes of section 39 (8) (b) (ii) of the Act, shall be-

(i) six percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than twenty percent; and

(ii) eight percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than fifty-one percent but above twenty percent"

Further to this, Regulation 15 of the 2011 Regulations provide as follows: -

"For the purposes of section 39 (8) (b) (ii) of the Act, the margin of preference shall be: -

(a) six percent of the evaluated price of the tender where the percentage of shareholding of the Kenyan Citizens is less than twenty percent;

(b) eight percent of the evaluated price of the tender where the percentage of shareholding of Kenya Citizens is less than fifty-one percent but above twenty percent; and

(c) ten percent of the evaluated price of the tender where the percentage of shareholding of Kenyan Citizen is more than fifty percent.:

The Board notes that both Regulation 28 (2) (b) of the 2006 Regulations and Regulation 15 of the 2011 Regulations make reference to section 39 (8) (b) (ii) of the 2005 Act. It is worth noting, that section 39 (8) (b) (ii) of the 2005 Act is similar to section 157 (8) (b) (ii) of the Act stated hereinabove.

It is important to point out Regulation 15 (c) of the 2011 Regulations provides for an application of a margin of a preference of 10% of the

evaluated price of tender where the percentage of shareholding of the Kenyan Citizens is more than 50%.

The Board examined the Tender Document and observed Clause 5.12 of Section II Instructions to Tenderers on page 16 of the Tender Document reads as follows: -

"Firms incorporated in Kenya where indigenous Kenyans own 51% or more of the share capital shall be allowed at 10% preferential bias provided that they do not sub-contract work valued at more than 50% of the Contract Price excluding Provisional Sums to an indigenous sub-contractor."

Accordingly, the Procuring Entity was required to apply a 10% margin of preference to firms incorporated in Kenya where indigenous Kenyans own more than 51% of the share capital provided they do not sub-contract for work valued at more than 50% of the contract price excluding Provisional Sums to an indigenous sub-contractor.

The Board in its determination of this issue considered the provisions of section 86 (2) of the Act which states as follows: -

"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."

A plain interpretation of this provision reveals that 20% of the total score in evaluation shall be available to citizen contractors, or entities in which Kenyan citizens own at least 51% shares, with a condition that such entities or contractors attain the minimum technical score.

The Board has considered the manner in which evaluation is conducted in open tenders, where a request for proposals method is not used and notes that, ordinarily, scores are awarded at the Technical Evaluation Stage whereas ranking of bidders' quoted amount is made at the Financial Evaluation stage to recommend an award on the criterion for lowest evaluated tender price pursuant to section 86 (1) (a) of the Act.

In the instant case, the Board observes that the subject tender did not have any scoring at any stage of evaluation. At Technical Evaluation Stage, bidders were evaluated in the Affirmative or Negative as to whether or not they met the technical requirements in the Tender Document. Moreover, at Financial Evaluation Stage, bids were ranked according to their tender sums.

The Board would also like to point out that unlike section 157 (8) (b) (ii) as cited hereinbefore, there is no reference of a margin of preference under section 86 (2) of the Act neither is there a reference to evaluated price. The 20% referred to in section 86 (2) of the Act is an entitlement on the total scores in evaluation of a citizen contractor's bid. Accordingly, having noted the subject tender had no criteria for scoring at either stage of evaluation, it is the Board's considered view that section 86 (2) is not applicable in the subject tender.

After analysing the provisions of the Tender Document, the Act and the 2011 Regulations, it is the Board's considered view that the Applicant as a citizen contractor was entitled to a margin of preference of 10% on its evaluated tender price.

The question that now arises is what is an evaluated tender price?

The Act defines a "tender" under section 2 in the following terms: -

"tender" means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

Further, section 82 of the Act states that: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

Having compared the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant***

to an invitation to tender, request for quotation or proposal by a procuring entity.

In that offer, bidders quote a tender sum, i.e. the price at which they undertake to execute or implement the tender if found successful. Pursuant to section 82 of the Act, this tender sum, that is quoted in a bidder's Form of Tender is absolute and final and is not subject to any correction, adjustment or amendment.

In this regard therefore, an 'evaluated tender price' or 'evaluated tender sum' is the price of a tender that has been successful at all stages of evaluation, that is, at preliminary/mandatory evaluation stage, technical evaluation stage, and financial evaluation stage.

A margin of preference of 10% is therefore applied to this evaluated tender price or tender sum.

The Board observes, the Procuring Entity in its submissions, contended that it applied the 10% preferential bias to the firms that met the technical requirements, including the Applicant's tender price.

The Board examined the Procuring Entity's Evaluation Report dated 18th June 2020 and observes therein that the Applicant's bid qualified for financial evaluation having been found responsive at both preliminary and technical evaluation.

On page 42 of the Report, the Board observes that the Procuring Entity first reviewed the CR 12 documents for each of the three qualifying firms, including the Applicant in order to establish the shareholdings of each bidder with its associated joint venture members where applicable.

From the Applicant's CR12 document, Wahome Gitonga's and Grace Elizabeth Njeri Wahome's citizenship is not indicated because the column titled 'Country' was left blank as at 29th January 2020. However, the said names are commonly known to be Kenyan names and since their citizenship has not been challenged, the Board finds that in the circumstances, they are Kenyan Citizens and the only shareholders of the Applicant.

Secondly, the Applicant's Joint Venture Partners namely, Raerex East Africa Limited and Elsan Mechanical Engineering Limited are citizen contractors by virtue of all their respective shareholders being Kenyans as can be seen from their CR12 document as at 27th May 2020 and 20th April 2020 respectively.

Accordingly, it is the Board's finding that the Applicant was entitled to an application of a 10% margin of preference of its evaluated price in line with Clause 5.12 of Section II Instructions to Tenderers on page 16 of the Tender Document and Regulation 15 of the 2011 Regulations.

The Procuring Entity furnished evidence of having applied a margin of preference in its evaluation report dated 18th June 2020 as follows: -

Project	TENDER EVALUATION REPORT FOR THE PROPOSED REFURBISHMENT OF TERMINALS 1B AND 1C AT JOMO KENYATTA INTERNATIONAL AIRPORT – NAIROBI		
Contract No.	TENDER NO. KAA/OT/JKIA/0092/2019-2020		
Bidder No.	1	7	9
Total Price as per the Form of Tender	963,541,535.22	1,499,826,018.20	1,178,407,696.16
Local shareholdings of the Company/ Joint Venture Partners	0 %	100%	100%
Application of Margin Preference @ 10%	0	(149,982,601.82)	(117,840,769.62)
Tender Price after application of the margin of preference for purpose of determination of the lowest evaluated bidder	963,541,535.22	1,349,843,416.38	1,060,566,926.54
Ranking	1	3	2

From the above excerpt of the evaluation report, the Board observes, that the Applicant quoted a tender sum of Kshs 1,178,407,696.16/- in its bid, which the Board confirmed upon examination of its Form of Tender in its original bid. However, following the application of a margin of preference of 10% the Applicant's tender sum came to a sum of Kshs 1,060,566,926.54/-.

Notably, the Applicant's tender sum was still higher than the Interested Party's tender sum at Kshs 963,541,535.22/- and as a result the Interested Party's bid was ranked No. 1 and the Interested Party was found to be the lowest evaluated bidder with the lowest evaluated bid price.

The Board notes, the Applicant's contention that the Interested Party is a state backed corporation and that the Interested Party would enjoy a VAT waiver in law. In this regard therefore, the Applicant argued that as a local company that is required to pay VAT at the rate of 14%, the Procuring Entity ought to have applied a margin of preference of 10% on its tender sum exclusive of VAT, which would reduce the Applicant's bid sum to Kshs 912,087,558 which is a more competitive price than the Interested party's tender sum.

The Board notes, the Applicant herein did not give a legal basis or justification in support of its submission.

As explained hereinbefore, section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment. In this regard therefore the Procuring Entity is prohibited from altering the tender sum in any way.

Any margin of preference applied to a bidder's evaluated price can only be based on a bidder's tender sum as quoted in its Form of Tender as contained in its bid document.

The Board finds that the Procuring Entity rightfully applied a 10% margin of preference of the Applicant's evaluated tender price.

The Board will now proceed to the final issue for determination: -

The Applicant contended that the Procuring Entity ought to be directed to furnish the Applicant with the bid documents of the Interested Party, due diligence report and technical and financial results of the evaluation process in order to ascertain the Interested Party's real identity, experience of having done similar works as required under the Tender Document and that the evaluation criteria was followed and preference accorded to the Applicant in accordance with the law.

In support of its submission, the Applicant referred the Board to section 67 (3) (c) (d) and (e) of the Act which provides as follows: -

"(3) This section does not prevent the disclosure of information if any of the following apply—

(a).....;

(b).....;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act."

The Board examined section 67 of the Act and observes that section 67 (3) (c) allows for disclosure of information with respect to procurement proceedings. However, we note, this disclosure is limited by section 67 (4) read together with section 68 (2) (d) (iii) which provides as follows: -

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

Further; -

68 (2) (d) (ii) The records for a procurement shall include—

(a);

(b);

(c);

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

(i);

(ii); and

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

Accordingly, the disclosure of information to an applicant seeking review of procurement proceedings shall be limited to a summary of the proceedings of the opening of tenders, summary of evaluation and comparison of tenders, including the evaluation criteria used as prescribed.

With this in mind, it is the Board's considered view that, disclosure of the Interested Party's Bid would prejudice legitimate commercial interests and inhibit fair competition if the Board were to exercise its powers under section 173 of the Act and order for a re-tender, since the Applicant would have knowledge of the Interested Party's completed tender document thus limiting fair competition.

In any event, the Procuring Entity submitted its confidential file to the Board in accordance with section 67 (3) (e) of the Act, which included all the documents requested for by the Applicant. The Board has considered the same in its determination in this matter.

The Board would also like to point out that in paragraph 5 and 6 of the Procuring Entity's Reply, the Procuring Entity submitted that the Applicant was duly found responsive at Preliminary Evaluation Stage and at the Technical Evaluation Stage and was only found unsuccessful at the Financial Evaluation Stage because its bid price was ranked second and was therefore not the lowest evaluated bid.

The Applicant was duly served with the Procuring Entity's Reply, thus the Board finds, there is no need for the Applicant to be furnished with the technical and financial results, noting that they are duly informed of and are aware of the results of the evaluation.

In conclusion, the Board finds that the Request for Review fails on all grounds with respect to all issues framed for determination, save for the sixth issue framed for determination where the Board deems it

necessary to direct the Accounting Officer of the Procuring Entity to issue a new letter of notification of intention to enter into a contract to the successful bidder and new letters of notification of unsuccessful bid to all unsuccessful bidders, noting to refer to the correct name of the successful bidder, in accordance with section 87 of the Act.

Accordingly, the Board issues the following specific orders: -

FINAL ORDERS

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

- 1. The Procuring Entity's Letter of Notification of Award of Tender No. KAA/OT/JKIA/0092/2019-2020 for Proposed Refurbishment of Terminals 1B and 1C at Jomo Kenyatta International Airport – Nairobi dated 3rd July 2020 and addressed to M/s China Jiangxi International Economic and Technical Cooperation be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letters of Notification of Unsuccessful bid with respect to Tender No. KAA/OT/JKIA/0092/2019-2020 for Proposed Refurbishment of Terminals 1B and 1C at Jomo Kenyatta International Airport – Nairobi dated 3rd July 2020**

addressed to all unsuccessful bidders be and are hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to issue new letters of notification with respect to Tender No. KAA/OT/JKIA/0092/2019-2020 for Proposed Refurbishment of Terminals 1B and 1C at Jomo Kenyatta International Airport – Nairobi dated 3rd July 2020 informing all bidders of the outcome of the evaluation in accordance with section 87 of the Act, within seven (7) days from the date of this decision, taking into consideration the findings of this Board in this Request for Review.
4. 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 6th Day of August 2020



CHAIRPERSON
PPARB



SECRETARY
PPARB

