

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 121/2021 OF 30<sup>TH</sup> SEPTEMBER 2021**  
**BETWEEN**

**RAY STIMA SERVICES LIMITED.....APPLICANT**  
**AND**  
**ALEX GITARI (ACCOUNTING OFFICER).....1<sup>ST</sup> RESPONDENT**  
**KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**CONTRALINKS SOLUTIONS**  
**AND SERVICES LIMITED.....3<sup>RD</sup> RESPONDENT**

Review against the decision of the Accounting Officer of Kenya Airports Authority in relation to Tender No. KAA/OT/ES/JKIA/0108/2020-2021 for the Supply and Installation of 11KV Cable Serving Substation 1B at Jomo Kenyatta International Airport.

**BOARD MEMBERS**

- |                            |                                 |
|----------------------------|---------------------------------|
| 1. Mrs. Njeri Onyango      | -Vice Chairperson (Panel Chair) |
| 2. Mrs. Irene Kashindi     | -Member                         |
| 3. Ms. Rahab Robi          | -Member                         |
| 4. Mr. Alfred Keriolale    | -Member                         |
| 5. Arch. Steven Oundo, OGW | -Member                         |

**IN ATTENDANCE**

Mr. Stanley Miheso	-Holding brief for the Acting Board Secretary
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## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

Kenya Airports Authority (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KAA/OT/ES/JKIA/0108/2020-2021 for the Supply and Installation of 11KV Cable Serving Substation 1B at Jomo Kenyatta International Airport (hereinafter referred to as "the subject tender") through an advertisement published in MyGov newspaper publication on 29<sup>th</sup> June 2021.

### **Addenda**

Through Addendum No. 1 of 9<sup>th</sup> July 2021, the Procuring Entity extended the tender submission deadline to 20<sup>th</sup> July 2021 from 13<sup>th</sup> July 2021. In Addendum No. 2 of 15<sup>th</sup> July 2021 the Procuring Entity issued clarifications on questions asked by candidates. Through Addendum No. 3 of 16<sup>th</sup> July 2021 the Procuring Entity further extended the tender submission deadline to 22<sup>nd</sup> July 2021, the same was further extended in Addendum No. 4 of 21<sup>st</sup> July 2021, to 29<sup>th</sup> July 2021. In Addendum No. 5 of 23<sup>rd</sup> July 2021, the Procuring Entity issued further clarifications.

### **Tender Submission Deadline and Opening of Tenders**

The Procuring Entity received a total of three (3) tenders by the revised tender submission deadline of 29<sup>th</sup> July 2021 at 11.00 am. The tenders were opened by a Tender Opening Committee shortly thereafter in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders:

1. Ray Stima Services Limited.
2. Contralinks Solutions and Services Limited.
3. Burhani Engineers Limited.

### **Evaluation of Tenders**

An Evaluation Committee evaluated tenders in three stages, namely:

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

### **Preliminary/ Mandatory Evaluation**

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in clause 1 under Preliminary/ Mandatory Evaluation of Section III: Evaluation and Qualification Criteria at pages 30 and 31 of the Tender Document. At the end of evaluation process at this stage, all three (3) tenders were found responsive thus proceeded to the Technical Evaluation stage.

### **Technical Evaluation**

The Evaluation Committee subjected the aforementioned three (3) tenders to the technical evaluation process against the criteria outlined in Clause 2 under Technical Evaluation Criteria of Section III: Evaluation and Qualification Criteria at page 31 and 32 of the Tender Document. Two (2) tenders were found responsive, thus eligible to proceed to Financial Evaluation. The Applicant's tender was among the two (2) tenders found responsive at this stage of evaluation.

## **Financial Evaluation**

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in Clause F. Award Criteria of Section I: Instructions To Tenderers at page 15 of the Tender Document. At the end of this stage of evaluation, the 3<sup>rd</sup> Respondent's Tender was evaluated the lowest evaluated tender at its tender sum of Kshs 10,355,465.00 inclusive of 16% VAT.

## **Recommendation**

The Evaluation Committee recommended the award of the subject tender to the 3<sup>rd</sup> Respondent at its tender sum of Kshs 10,355,465.00 subject to due diligence.

## **Due Diligence**

The Procuring Entity carried out due diligence on Contralinks Solutions & Services Limited (the 3<sup>rd</sup> Respondent herein) and in a due diligence report dated 14<sup>th</sup> September 2021, the evaluation committee concluded that they were satisfied that Contralinks Solutions & Services Limited had the technical capacity and the necessary equipment to carry out the works in the subject tender.

## **Professional Opinion**

In a Professional Opinion dated 16<sup>th</sup> September 2021, the Procuring Entity's General Manager (Procurement and Logistics) reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on

award of the subject tender to the 3<sup>rd</sup> Respondent at its tender price Kshs 10,355,465.00 (Kenya Shillings Ten Million, Three Hundred and Fifty-Five Thousand, Four Hundred and Sixty-Five Thousand) inclusive of 16% VAT.

The Accounting Officer approved the Professional Opinion on 17<sup>th</sup> September 2021.

### **Letters of Notification**

The Procuring Entity notified all tenderers of the outcome of their respective tenders by letters dated 16<sup>th</sup> September 2021 and notified the 3<sup>rd</sup> Respondent that it had been awarded the subject tender.

### **THE REQUEST FOR REVIEW**

M/s Ray Stima Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 30<sup>th</sup> September 2021 and filed on even date together with a Statement in Support thereof signed by Janet Kaari Mbijiwe on 30<sup>th</sup> September 2021 and filed on even date through the firm of Chege Kariuki Advocates seeking the following prayers;

- 1) THAT the Board be pleased to order an investigation into the technical claims of the 3<sup>rd</sup> Respondent as refers the instant tender;***
- 2) THAT upon its findings of 1 above, the Board does make a declaration that the conduct of the Respondents is fraudulent, illegal and unlawful.***
- 3) THAT the Board be pleased to disqualify the 3<sup>rd</sup> Respondent from executing or entering into a contract with the 2nd***

***Respondent in Tender No-KAA/OT/ES/JKIA/0108/2020-2021  
for Supply and Installation of 11KV cable Serving Substation 1B  
at Join Kenyatta International Airport,***

- 4) THAT the Board be pleased to award the tender to the second most responsive bidder.***
- 5) THAT the Board be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>d</sup> Respondents to meet the costs of these proceedings***

***IN THE ALTERNATIVE,***

- 6) THAT the Respondents be compelled to pay damages in the sum of KES 11,521,700 being the bid offered by the Applicant.***
- 7) THAT the Honorable Board be pleased to make any or such further Orders as the ends of justice may require.***

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Reply dated 7<sup>th</sup> October 2021 signed by Patrick K Wanjuki, the Procuring Entity's General Manager, Procurement and Logistics.

The 3<sup>rd</sup> Respondent on its part filed a Memorandum of Response dated 15<sup>th</sup> October 2021 through the firm of Kimani & Muchiri Company LLP.

### **SUBMISSIONS**

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified

that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

None of the parties filed submissions.

### **BOARD'S DECISION**

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Public Procurement and Asset Disposal Act, 2015 (herein after referred to as "the Act") and frames the issues for determination as follows;

- I. Whether the Procuring Entity evaluated the 3<sup>rd</sup> Respondent bid in accordance with the Tender Document as read with Section 80(2) of the Act.***
- II. Whether the Respondents connived and colluded in the award of the tender to the 3<sup>rd</sup> Respondent.***
- III. What are the appropriate orders to grant in the circumstances?***

#### **Issue 1**

The Applicant contends that the 3<sup>rd</sup> Respondent who is the successful bidder herein does not meet the qualifications of the bid, particularly the technical qualifications as outlined in the invitation to tender. The Applicant averred that the invitation to tender outlined that bidders must have the following requirements for the technical evaluation:-

***"Tenderer shall demonstrate participation as contractor, management contractor or subcontractor, in at least three (3)***

***electrical Medium voltage electrical installations and cable terminations contracts within the above mentioned years, with an AVERAGE value of at least Kenya Shillings fifteen million (Kshs.15,000,000) that have been successfully or substantially completed ..."***

And

***"Must demonstrate availability of the following key minimum equipment necessary to undertake the work.***

- Underground cable fault locator equipment cable pressure test,***
- Complete Cable jointing Tool Kit which must have insulation Stripping tool, cable cutters, Elbow Insertion tool among others."***

Relying on its alleged practical experience and market knowledge spanning over 12 years, the Applicant asserted the 3<sup>rd</sup> Respondent could not have complied with the above requirements considering its market share and competitors. The Applicant added that it strongly believes that the 3<sup>rd</sup> Respondent has not carried out and/or participated in at least three (3) electrical medium voltage electrical installations and cable terminations contracts within the above mentioned years. The Applicant further contended that it is industry knowledge that only two entities in the country own, operate and/or have the equipment listed above and that the 3<sup>rd</sup> Respondent is not one of the entities.

The Applicant maintained that the 3<sup>rd</sup> Respondent could not have passed the technical evaluation stage. The Applicant added that the subject tender is a



retender which was occasioned by the failure by bidders to comply with the technical evaluation of the earlier tender, which tender the Applicant strongly believed the 3<sup>rd</sup> Respondent was a part of.

The Applicant avers that the 1<sup>st</sup> Respondent as the accounting officer erred in failing to establish a credible technical evaluation committee and by awarding the tender to an unqualified entity.

In response the Procuring Entity stated it fully complied with the provisions of the Constitution of Kenya, 2010, the Act, the Public Procurement Regulations of 2020 (hereinafter "the Regulations"), contrary to the Applicant's allegations.

The Procuring Entity avers that it subjected three bids to the technical evaluation upon which both the Applicant and 3<sup>rd</sup> Respondent met the requirements and qualified for the financial evaluation stage. Upon conducting the financial evaluation, the 3<sup>rd</sup> Respondent's bid was the lowest at a price of Kshs. 10,355,465.00 inclusive of 16% VAT compared to that of the Applicant of Kshs.11,521,700.00.

The Procuring Entity further averred that the Applicant has wrongfully assumed that the 3<sup>rd</sup> Respondent did not qualify for the award of the tender. The Procuring Entity states that there was a specific criteria for evaluation outlined in the tender document and that knowledge of the market and market players by a bidder was not one of them. The Procuring Entity added that is highly misinformed and subjective for the Applicant to imply that it is the only entity with requisite experience hence ought to be issued with an award.

The Procuring Entity further averred that Section 46(1) of the Act mandates the accounting officer to ensure that an evaluation committee is established in accordance with the Act and Regulations. Accordingly, the Procuring Entity

asserts that the Applicant cannot purport to evaluate the process and state that the 3<sup>rd</sup> Respondent could not have complied with the requirements or was not qualified leading to an irregular award of the tender by the Procuring Entity. The Procuring Entity added that the retender of the subject tender is irrelevant since both the Applicant and 3<sup>rd</sup> Respondent submitted their bids, were evaluated and the lowest evaluated bidder was awarded the tender.

On its part, the 3<sup>rd</sup> Respondent stated that it met all the tender requirements. The 3<sup>rd</sup> Respondent annexed copies of award letter and completion certificates in response to the Applicant's allegation that it did not meet tender requirements with respect to its previous experience.

The 3<sup>rd</sup> Respondent added that the Applicant's assertions are subjective, unfounded and not supported by any evidence on record. The 3<sup>rd</sup> Respondent further stated that the Applicant's market knowledge is not a parameter known either in law or any other discipline that can be employed objectively in determining the 3<sup>rd</sup> Respondent's qualification for the subject tender and that the same amounts to speculative theories which the Board ought to dismiss.

The Board observes that the crux of the Request for Review relates to the evaluation of the 3<sup>rd</sup> Respondent's tender at the technical evaluation stage.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured by Section 80(2) of the Act which provides as follows;

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the***

***provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***”[Emphasis added]

Considering the provisions of section 80(2), it is incumbent upon the Board to establish if the Procuring Entity evaluated the Applicant’s bid according to the criteria set out in the Tender Document.

The Applicant averred that the 3<sup>rd</sup> Respondent could not have complied with the technical requirements of the tender. The relevant technical evaluation criteria is found on pages 32 and 33 of the tender document. The first matter in dispute is technical requirement number 1 that states as follows:-

<b>1</b>	<p><b><i>Tenderer shall demonstrate participation as contractor, management contractor or subcontractor, in at least three (3) electrical Medium voltage electrical installations and cable terminations contracts within the above mentioned years, with an AVERAGE value of at least Kenya Shillings fifteen million [Kshs.15,000,000], that have been successfully or substantially completed(proof shall be in form of completion certificates or partial completion certificate whose works must be 70% substantially completed, claim Invoices with details of the clients address, contact person telephone and email Must be provided).</i></b></p> <ul style="list-style-type: none"> <li>• <b><i>Copy of Defects Liability Certificates; or</i></b></li> <li>• <b><i>Copy of completion certificate; or</i></b></li> </ul>	<b><i>Must meet</i></b>
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	<ul style="list-style-type: none"> <li>• <b><i>Interim payment certificate of not less than 70% value of the contract;</i></b></li> </ul>	
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This was amended in item No.6 of Addendum No.5 dated 23<sup>rd</sup> July, 2021 which stated that:-

<b>6</b>	<p><b><i>The criterion has been amended as follows:-</i></b></p> <p><b><i>Tenderer and at least one party in Joint Venture shall demonstrate participation as contractor, management contractor or subcontractor, in at least three (3) electrical Medium voltage electrical installations and cable terminations contracts within the last three years (2017, 2018 and 2019), with an AVERAGE value of at least Kenya Shillings five million [Kshs.5,000,000], that have been successfully or substantially completed (proof shall be in form of completion certificates or partial completion certificate whose works must be 70% substantially completed, claim Invoices with details of the clients address, contact person telephone and email Must be provided).</i></b></p> <ul style="list-style-type: none"> <li>• <b><i>Copy of Defects Liability; or</i></b></li> <li>• <b><i>Certificates or Copy of completion certificate; or</i></b></li> <li>• <b><i>Interim payment certificate of not less than 70% value of the contract;</i></b></li> </ul>
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The Board observes from the evaluation report that the Procuring Entity found that the 3<sup>rd</sup> Respondent provided the documentation to meet the above requirements.

The Board also notes from the confidential documents that the 3<sup>rd</sup> Respondent's original tender document at pages 46 to 71 included the following evidence of the first requirement in question:-

<b>Date</b>	<b>Document</b>	<b>Company</b>	<b>Amount</b>
14-01-2020	Letter of completion	CCC Engineering	
	Contract	CCC Engineering	17,408,528.75
03-03-2020	Certificate of completion	Steels Formula (K) Limited	16,800,000.00
02-12-2019	Completion Certificate	Hardrock Holdings & Investment Co. Ltd	15,500,700(from award letter)
02-08-2019	Completion Certificate	Ram Power Limited	17,125,302.00 (from Form EXP-4.2(b))

The 3<sup>rd</sup> Respondent annexed some of the supporting documents.

The next requirement the Applicant contested was technical requirement No.2 that stated:-

<b>2</b>	<p><b><i>Equipment and Machinery</i></b></p> <p><b><i>Must demonstrate availability of the following key minimum equipment necessary to undertake the work. The equipment must be serviceable and in good working condition.</i></b></p> <ul style="list-style-type: none"> <li><b><i>• Underground cable fault locator equipment &amp; cable pressure test;</i></b></li> <li><b><i>• Complete Cable jointing Tool Kit which must have Insulation Stripping tool, cable cutters, Elbow Insertion tool among others</i></b></li> </ul>	<b><i>Must meet</i></b>
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	<p><b>Notes</b></p> <ul style="list-style-type: none"> <li>• <i>If the equipment is owned, must provide CLEAR copies of proof of ownership;</i></li> <li>• <i>If equipment is hired or leased Provide a commitment letter from the lessor of the equipment addressed to the Managing Director/CEO Kenya Airports Authority indicating that the lessor shall avail the equipment upon award of the tender and submit a copy of a written agreement to lease between lessee and lessor indicating list of equipment and their corresponding copies of log books or proof of ownership by lessor;</i></li> <li>• <i>The equipment listed shall be available on site when required;</i></li> </ul>	
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The Board observes from the evaluation report that the Procuring Entity found that the 3<sup>rd</sup> Respondent provided the documentation to meet the foregoing requirements.

From the confidential documents, the Board also notes that 3<sup>rd</sup> Respondent's original tender document on pages 72 to 81 included the following evidence of the first requirement in question:-

<b>Date</b>	<b>Document</b>	<b>Equipment</b>
26-02-2019	HD Electric Company	Underground fault cable locator, Surgerflex 32

<b>Date</b>	<b>Document</b>	<b>Equipment</b>
	Invoice 211477 (paid)	Underground Bushing Probe, 15, 25 % 35kv class
26-02-2019	HD Electric Company Invoice 211484 (paid)	Stripping tools
02-05-2020	Shiv Tech Co. Ltd Receipt 6231 (paid)	Cable Cutter 4 No. Digital Multimeter 8 No. Load Break Elbows 10 sets

Given the above, the Board concludes that the Procuring Entity properly evaluated the 3<sup>rd</sup> Respondent's bid in accordance with the Tender Document. We agree with the Procuring Entity and the 3<sup>rd</sup> Respondent that the Applicant has not preferred any evidence to support its claims that the 3<sup>rd</sup> Respondent's bid was technically unresponsive. The Applicant's alleged market knowledge is not sufficient ground.

The Applicant did not also adduce any evidence to support the assertion that the 1<sup>st</sup> Respondent as the accounting officer erred in failing to establish a credible technical evaluation committee and by awarding the tender to an unqualified entity.

In totality, the Applicant's assertions are speculative and are not substantiated. The Board cannot base its decisions as speculations and conjecture.

Considering the foregoing the Applicant fails on the first issue for determination.

## **Issue II**

The Applicant averred that the Respondents must have colluded and/or connived in approving the technical evaluation of the 3<sup>rd</sup> Respondents bid without carrying out a proper due diligence and verifying that the 3<sup>rd</sup> Respondent was qualified to undertake the tender awarded. The applicant added that if a proper due diligence is carried out, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's will determine that the 3<sup>rd</sup> Respondent is unqualified to carry out the tender awarded.

In response the Procuring Entity averred that it undertook due diligence of the 3<sup>rd</sup> Respondent in accordance with Section 83(1) of the Act and following a positive outcome of the due diligence process, recommended award of the tender to the 3<sup>rd</sup> Respondent being the lowest evaluated hence successful bidder.

The Procuring Entity added that it is trite law that he who alleges must prove. According to the Procuring Entity, the Applicant has raised serious allegations of collusion by the Respondents with regard to the subject tender but has failed to substantiate them and thus the same should not be entertained.

On its part, the 3<sup>rd</sup> Respondent averred that the 2<sup>nd</sup> Respondent conducted a due diligence on its experience and performance in request of the three contracts it submitted in support of its bid by seeking confirmation of competence from three procuring entities who all gave positive recommendations in response.



The 3<sup>rd</sup> Respondent added that the allegation that the Respondents colluded and/or connived in appointing the technical evaluation is malicious and in bad faith.

The 3<sup>rd</sup> Respondent contended that the Request for Review does not raise any iota of impropriety or breach of law and/or due process as provided under the Act as the part of the Respondents that would warrant granting the prayers sought herein.

Section 83 of the Act on post qualification that states:-

***"83. Post-qualification***

- (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
  - (a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation.”***

From the confidential documents, the Board notes that the 3<sup>rd</sup> Respondent was subjected to a due diligence process and a report produced signed by all the evaluation committee member which affirmed that the 3<sup>rd</sup> Respondent can perform the contract.

Given the findings on issue 1 above, in addition to lack of any evidence to support the alleged connivance and collusion, the Board finds that there is no basis to fault the Procuring Entity on how it conducted the due diligence exercise. It is indeed trite law that he who asserts must prove this being a well settled rule of evidence codified at section 107 of the Evidence Act. The Applicant has not adduced any evidence to support its assertion on collusion, connivance and conduct of the due diligence exercise. The Applicant thus fails on the second issue for determination.

### **Issue 3**

The upshot of the above findings is that the Request for Review is not merited and fails in its entirety.

### **FINAL ORDERS**

In exercise of the powers under section 173 of the Act, the Board makes the following orders:

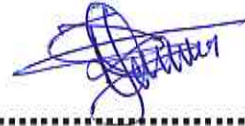
- 1. The Request for Review dated 30<sup>th</sup> September 2021 is dismissed in its entirety.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 21<sup>st</sup> day of October 2021



.....  
**VICE CHAIRPERSON (PANEL CHAIR)**

**PPARB**



.....  
**SECRETARY**

**PPARB**

