

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 116/2021 OF 23<sup>rd</sup> SEPTEMBER 2021**

**BETWEEN**

**RAY STIMA SERVICES LIMITED.....APPLICANT**

**AND**

**ALEX GITARI.....1<sup>ST</sup> RESPONDENT (ACCOUNTING OFFICER)**

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

**ROADGRIP LIMITED JV-**

**AIRSIDE SOLUTIONS LIMITED.....3<sup>RD</sup> RESPONDENT**

Review against the decision of the Accounting Officer of Kenya Airports Authority (KAA) in relation to Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport.

**BOARD MEMBERS**

- |                            |                                 |
|----------------------------|---------------------------------|
| 1. Mrs. Njeri Onyango      | -Vice Chairperson (Panel Chair) |
| 2. Mrs. Irene Kashindi     | -Member                         |
| 3. Ms. Isabella Juma, CPA  | -Member                         |
| 4. Dr. Joseph Gitari       | -Member                         |
| 5. Arch. Steven Oundo, OGW | -Member                         |

**IN ATTENDANCE**

- |                     |   |
|---------------------|---|
| Mr. Philemon Kiprop | -Holding brief for the Acting Board Secretary |
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## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

Kenya Airports Authority (KAA) (hereinafter referred to as “the Procuring Entity”) invited eighteen (18) tenderers through a restricted tendering process vide invitation letters to submit proposals for Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport (hereinafter referred to as “the subject tender”). The Procuring Entity also published a notice on its website on 21<sup>st</sup> June 2021 ([www.kaa.go.ke](http://www.kaa.go.ke)).

The following tenderers were invited to submit proposals;

1. Sizabantu Contractors
2. Roadgrip Ltd in JV Airside Solutions Ltd
3. Mr. Bottari Services
4. Evolex International
5. Teknima Insaat
6. Jetting Systems Company
7. CKS Rubber Removers
8. Foster Contracting Company
9. Smets Technology
10. Cyclone Technology
11. Roehelser and Company
12. Hilite Airfield Services LLC
13. De Novo General LLC
14. Waterblasting Technologies

15. American Water Blasting
16. Opal
17. Avion
18. Beam A/S

### **Addenda**

Through Addendum No. 1 of 12<sup>th</sup> July 2021, the Procuring Entity extended the Tender Submission deadline from 13<sup>th</sup> July 2021 to 22<sup>nd</sup> July 2021 and through Addendum No. 2 of 19<sup>th</sup> July 2021, the Procuring Entity made clarifications on questions asked by tenderers and further extended the tender submission deadline to 29<sup>th</sup> July 2021.

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

The Procuring Entity received a total of twenty-three (23) 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. The following tenderers did not receive invitation letters but also submitted tenders together with the eighteen (18) tenderers mentioned hereinbefore;

1. Kensun Enterprises Ltd JV Filtronic International Ltd
2. Blue Quadrant Limited
3. Rays Stima Services Ltd
4. Eupec Suppliers Ltd
5. Ascot Engineering Solutions Ltd

## **Evaluation of Tenders**

An Evaluation Committee evaluated tenders three stages, namely:

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

### **Preliminary Evaluation**

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Clause A. Preliminary Evaluation Criteria of Section III-Evaluation and Qualification Criteria of the tender document. At the end of evaluation at this stage, nineteen (19) tenders were found non-responsive while five (4) tenders including the Applicant's and the 3<sup>rd</sup> Respondent's tenders were found responsive thus proceeded to the Technical Evaluation stage.

### **Technical Evaluation**

The Evaluation Committee subjected the remaining four (4) tenders to a technical evaluation against the criteria outlined in Clause B. Technical Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. At this stage of evaluation two (2) tenders were found non responsive while two (2) tenders including the Applicants and the 3<sup>rd</sup> Respondents tender were found responsive thus eligible to proceed to Financial Evaluation.

## **Financial Evaluation**

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in Clause I-Financial Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. At the end of this stage of evaluation, Roadgrip Limited JV Airside Solutions Limited was determined to be the lowest evaluated tenderer at its tender sum of USD 417,600.00 (USD Four Hundred and Seventeen Thousand, Six Hundred only).

## **Recommendation**

The Evaluation Committee recommended award of the subject tender to Roadgrip Limited JV Airside Solutions Limited having been determined to be the lowest evaluated tenderer.

## **Due Diligence Report**

Due diligence was carried out and following a positive outcome, in a due diligence report dated 9<sup>th</sup> September 2021 an Evaluation Committee recommended the award of the subject tender to the 3<sup>rd</sup> Respondent at its tender sum of USD 417,600.00 (USD Four Hundred and Seventeen Thousand, Six Hundred only) subject to the confirmation of availability of funds and the immediate establishment of a Contract Implementation Team.

## **Professional Opinion**

In a Professional Opinion dated 10<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 of USD 417,600.00 (USD Four Hundred and Seventeen Thousand, Six Hundred only). He recommended that the Accounting Officer approves the Professional Opinion. The Accounting Officer subsequently approved the Professional Opinion.

## **Letters of Notification**

Vide letters dated 10<sup>th</sup> September 2021, the Procuring Entity notified all tenderers of the outcome of their respective tenders.

## **REQUEST FOR REVIEW**

M/s Ray Stima Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 22<sup>nd</sup> September 2021 and filed on 23<sup>rd</sup> September 2021 through the firm of Chege Kariuki and Company Advocates seeking the following prayers;

- a. THAT the Board be pleased to make a declaration that the conduct of the Respondents is unfair, illegal and unlawful.***
- b. THAT the Board be pleased to disqualify the 3<sup>rd</sup> Respondent from executing or entering into a contract with the 2<sup>nd</sup> Respondent in Tender No. KAA/RT/JKIA/0098/2020-2021 for***

***Provision of maintenance services for runway rubber and paint removal at Jomo Kenyatta International Airport.***

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

***IN THE ALTERNATIVE,***

- e. THAT the Respondent be compelled to pay damages in the sum United States Dollars Four Hundred and Forty Four Thousand Nine Hundred and Ninety Nine twenty cents (USD.444, 999.20/=) being the bid offered by the Applicant.***
- f. THAT the Honourable 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 29<sup>th</sup> September 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 Replying Affidavit sworn by a Mr Sylvester Mutunga Kimasyu sworn on 7<sup>th</sup> September 2021 through the firm of Gerivia Advocates LLP.

### **PRELIMINARY OBJECTION**

The 3<sup>rd</sup> Respondent also filed a Notice of Preliminary Objection dated 7<sup>th</sup> October 2021 which read together with a Replying Affidavit sworn by Mr Sylvester Mutunga Kimasyu sworn on even date, raise an objection against the jurisdiction of the Board to entertain the Request for Review.

The 3<sup>rd</sup> Respondent state that the Applicant ought to have filed the Request for Review within 14 days of 29<sup>th</sup> July 2021 when the tenders were opened. The 3<sup>rd</sup> Respondent asserts that the Applicant knew of the 3<sup>rd</sup> Respondent participation in the tender and should have moved the Board within 14 days of the occurrence of the alleged breach in accordance with section 167 of the Public Procurement and Asset Disposal Act 2015 (herein after referred to as "the Act").

### **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 Act and frames the issues for determination as follows;

***(I) Whether the Board has jurisdiction to entertain the request for review.***

Depending on the outcome of the first issue;

***(II) Whether the Procuring Entity ought not to have awarded the subject tender to the 3<sup>d</sup> Respondent on account of conflict of interest.***

***(III) What are the appropriate orders to grant in the circumstances?***

### **Issue 1.**

The Respondent's preliminary objection is on the ground that the Request for Review was filed out of the statutory timelines and that this Board has no jurisdiction to entertain it.

It is trite law that courts and decision making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi JA stated as follows

in the *locus classicus* Court of Appeal's case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR***:

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

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that:-

***"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. "***

It therefore behooves upon this Board to determine whether it has jurisdiction to entertain the Request for Review.

The Supreme Court in the case of ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR*** pronounced itself regarding the source of the jurisdiction of a court or any other decision as follows:-

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

The jurisdiction of the 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."***  
[Emphasis added]

Section 167(1) of the Act should be considered with Regulation 203 (2) of the Regulations 2020 which states that:

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

- a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***
- b) be accompanied by such statements as the applicant considers necessary in support of its request;***
- c) be made within fourteen days of—***
  - i. the occurrence of the breach complained of, where the request is made before the making of an award;***
  - ii. the notification under section 87 of the Act; or***
  - iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***
- d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable."***

In line with the cases of ***Republic v Public Procurement Administrative Review Board & 2 Others [2015] eKLR*** and ***Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Kemotrade Investment Limited [2018] eKLR***, the Board would not

have jurisdiction to entertain the Request for Review if it was filed outside the prescribed 14 days. The Board will now determine if the Request for Review was filed within time.

The 3<sup>rd</sup> Respondent contends that the Applicant knew of the participation of Roadgrip Limited in JV with Airside Solutions Limited in the tender proceedings from tender opening on 29<sup>th</sup> July 2021.

The Applicant's case is however not merely that Airside Solutions participated in the tender. The Applicant main ground in the Request for Review is that the Procuring Entity should not have been awarded the tender to the 3<sup>rd</sup> Respondent due to an alleged conflict of interest by virtue of the fact that Mr. Bootsy M. Mutiso wholly owns Airside Solutions Limited, a joint venture partner of the successful bidder. The alleged breach thus occurred at award of the tender which the Applicant knew when it received the notification dated 10<sup>th</sup> September 2021. The Applicant stated that it received this notification by email on 14<sup>th</sup> September 2021 and this was not controverted. The Request for Review was filed on 23<sup>rd</sup> September 2021, this having been within the 14 days' statutory period.

In view of the foregoing, the 3<sup>rd</sup> Respondent's preliminary objection is overruled. The Board concludes that it has the jurisdiction to entertain the Request for Review.

## **Issue II**

The Applicant contends that the successful bidder joint venture partner, Airside Solutions Limited is a limited liability company wholly owned by one Mr. Bootsyt M. Mutiso who was Member of the Board of Directors of the Procuring Entity whose term expired on 21st May, 2021. The Applicant asserts that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents together with Mr. Bootsyt M. Mutiso (through Airside Solutions Limited) performed acts of collusion in the award of tender by failing, neglecting and/or refusing to declare that Mr. Bootsyt M. Mutiso was conflicted and/or had prior knowledge of the particulars of the tender in contravention of Articles 10 (b) (c), 227 and 232 of the Constitution of Kenya, 2010. The Applicant contended that the award of the tender to the 3<sup>rd</sup> Respondent contravened various provisions of the Act reproduced below.

The Applicant relied upon Section 55 (3) which read together with subsections (1) and (2) provide as follows:

***"(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—***

- (a) the person has the legal capacity to enter into a contract for procurement or asset disposal;***
- (b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;***
- (c) the person, if a member of a regulated profession, has satisfied all the professional requirements;***



- (d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;*
  - (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;*
  - (f) the person has fulfilled tax obligations;*
  - (g) the person has not been convicted of corrupt or fraudulent practices; and*
  - (h) is not guilty of any serious violation of fair employment laws and practices.*
- (2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1) (e), (f), (g) and (h).*
- (3) Despite the provisions of subsection (2), a person or other body having a substantial or controlling interest shall be eligible to bid where— (a) such person has declared any conflict of interest; and (b) performance and price competition for that good, work or service is not available or can only be sourced from that person or consortium.*

The Applicant also relied on various subsections of section 66 of the Act which provide as follows;

- "66. (1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.**
- (5) An employee or agent of the procuring entity or a member of the Board or committee of the procuring entity who has a conflict of interest with respect to a procurement —**
- (a) shall not take part in the procurement proceedings;**
- (b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract;**
- (8) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person—**
- (a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or**
- (b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.**



***(10). For the purpose of subsection (8), the following are persons seeking a contract for a procurement— (a) a person submitting a tender, proposal or quotation; or (b) if direct procurement is being used, a person with whom the procuring entity is negotiating.”***

The Applicant also relied on parts 3 and 3(a) and (g) of Mwongozo Code of Ethics which provide in part as follows.

***" 3.1 Prevention of conflict of interest***

***Board members and employees maintain public confidence in the objectivity of their service by preventing an avoiding situations that could give the appearance of a conflict of interest or result in a potential or actual conflict of interest. In addition, Board members and employees are required to observe any specific conduct requirements contained in the statutes governing ethical behaviour and their profession, where applicable.***

***It is not possible to foresee every situation that could give rise to real, apparent or potential conflict of interest, however, where conflict arises, the Board member or employee should:***

***Excuse themselves, or anyone who works for them, from any decision-making that will create a conflict of interest with their private interests;***

***a) Disclose in writing to the relevant authority the facts and explain the circumstances that create or could create the conflict of interest;***

***g) Be aware that the acceptance of any offer of future employment including consultancy of directorship with a contractor, supplier, customer or business partner constitutes a potential conflict of interest;"***

The Applicant also asserted that the Respondents have failed the test on the principles on non-discrimination, proper application of the rule of law, equality, good governance, integrity, transparency and accountability as envisaged in Article 10(c) of the Constitution of Kenya.

The Applicant further added that the conduct of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also contravene the tenets of Articles 227 (a) and 232 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act No. 4 of 2015 by disenfranchising the Applicant an opportunity to earn a just and honest living from a process which is meant or perceived to be fair, equitable, competitive and transparent.

The Applicant maintains that the Procuring Entity ought to have barred the 3<sup>rd</sup> Respondent from participating in the subject tender on account of conflict of interest, unfair competition and in breach of fair administrative action.

The crux of the Applicant's case is on conflict of interest arising from the fact that Mr. Bootsy M. Mutiso, the sole owner of one of the successful JV bidder was a Board member of the Procuring Entity until 21<sup>st</sup> May 2021.

The Act does not define what conflict of interest means. A conflict of interest is commonly known to exist exists when there is a clash or a perceived clash between professional or official responsibilities and duties on the one hand and personal interests on the other hand. Black's Law Dictionary defines conflict of interest as *"a real or seemingly incompatibility between one's private interests and one public or fiduciary duties."* From this definition, conflict of interest can thus be direct or may be perceived.

The foregoing definition is captured in the Public Officer and Ethics Act at section 12 which also provides guidelines on how to handle conflict of interest as follows:

- 1) *"A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.*
- 2) *Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those*

*shares or having that interest would result in the public officer's personal interests conflicting with his official duties.*

*3) A public officer whose personal interests conflict with his official duties shall—*

*a. declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and*

*b. refrain from participating in any deliberations with respect to the matter.*

*4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to—*

*a. himself;*

*b. a spouse or relative;*

*c. a business associate; or*

*d. a corporation, partnership or other body in which the officer has an interest.*

*5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.*

*6) In this section, "personal interest" includes the interest of a spouse, relative or business associate"*

It is not disputed that Mr. Bootsy M. Mutiso is the sole shareholder and director of Airside Solutions Limited. The Applicant exhibited a CR12 form which confirmed this. It is also not disputed that he is an immediate former Member of the Board of Directors of the Procuring Entity his term having end

on 21<sup>st</sup> May 2021, which was exactly a month before the subject tender was published on 21<sup>st</sup> June 2021. The Applicant asserted that Mr Mutiso participated in the Board discussions revolving around the subject tender and more specifically, in the deliberations and resolutions on the budgetary allocation and approval of the procurement plan for the subject tender. In response, the Procuring Entity averred that Mr. Bootsy M. Mutiso was not present at the Board of Directors meeting held on 30<sup>th</sup> July, 2020 that deliberated and approved the Procurement Plan and Budget thus the issue of conflict of interest does not arise. The Procuring Entity further stated that there was no express provision of the subject works save for a consolidated budget for runway maintenance in the Procurement Plan.

On its part, the 3<sup>rd</sup> Respondent adopted the responses made by the Procuring Entity on the issue and also added that neither the Act or the Code of Governance for State Corporations require disclosure or declarations of conflict when it comes to former employees or agents of an organization (such as the Procuring Entity herein). The 3<sup>rd</sup> Respondent asserted that Mr Mutiso's tenure as the Procuring Entity's Board member ended and that he did not have any duties in the subject tender.

The Board observes as follows from the confidential documents;

1. On 18<sup>th</sup> to 20<sup>th</sup> September, 2019 the Kenya Civil Aviation Authority (KCAA) conducted a certification audit of Jomo Kenyatta International Airport (JKIA) and prepared a report dated 20<sup>th</sup> September 2020 which noted that there were deficiencies in JKIA that would result in severe

safety concerns. Some of the deficiencies noted were that there were rubber deposits that had completely obliterated the runway markings. KCAA required the Procuring Entity to submit a correction plan. The background in the evaluation report confirms that the subject tender was part of the corrective measures required to be implemented as a result of KCAA's audit.

2. The procurement plan for the Procuring Entity for the year 2020-2021 was prepared on 30<sup>th</sup> July 2020 and approved on or about 31<sup>st</sup> August 2020.
3. From the extract of the Board Minutes of the Procuring Entity's Board Procuring Entity's Board meeting held on 30th July, 2020, Mr. Bootsy M. Mutiso was not present at this meeting which approved the relevant budget and the procurement plan.

As much as Mr Mutiso did not sit in the meeting that approved the budgetary allocation and the procurement plan for the subject tender, it is the Board's view that it is probable that he knew of the details of tender before it was floated considering that he sat on the Procuring Entity's Board at the material time. The Board noted from Kenya Gazette Notice No.5145 of 2018 that Mr Mutiso was appointed as a member of the Procuring Entity on 22<sup>nd</sup> may 2018 for a period of 3 years. He was thus a member of the Board during the period KCAA conducted the above mentioned certification exercise that noted deficiencies in the runway which subsequently necessitated the subject tender. The Claimant assertion that the successful bidder had undue



advantage over the other candidates due to possible information asymmetry is accordingly not far-fetched.

Neither the Procuring Entity nor the 3<sup>rd</sup> Respondent has confirmed why Mr Mutiso did not attend the meeting of 30<sup>th</sup> July 2020. It was not contended that he recused himself on account of potential conflict of interest. It has also not been claimed or shown, that Mr Mutiso did not receive the Requisite Board Papers relevant to the meeting in issue, or that the minutes of that meeting were not discussed in subsequent Board Meetings where he would have been present.

It was thus incumbent upon the 3<sup>rd</sup> Respondent to disclose Mr Mutiso's previous relationship with the Procuring Entity and for the Procuring Entity to have considered this in the evaluation process in order to dispel any notion that the successful bidder had an undue advantage over the other bidders. We have looked at the evaluation report and did not see that there was any such consideration.

It is the Board's considered view that the disclosure is deemed necessary noting that the tender document provides as follows;

***4.3 A Tenderer shall not have a conflict of interest. Any tenderer found to have a conflict of interest shall be disqualified. A tenderer may be considered to have a conflict of interest for the purpose of this tendering process, if the tenderer:***

**(h) Has a close business or personal relationship with senior management or professional staff of the Procuring Entity who has the ability to influence the bidding process [Emphasis Added]**

Given the foregoing, the disclosure of Mr Mutiso's prior relationship with the Procuring Entity was necessary to dispel any notion that he would influence the bidding process.

The Board observes that the requirement to disclose such perceived conflict of interest can be deciphered from section 66(6) of the Act which provides that:

**" An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection, but for that subsection, would have been within his or her duties shall disclose the conflict of interest to the procuring entity."**

The requirement for disclosure of such conflict of interest, also falls within the tenets of transparency under Articles 10 and 227 of the Constitution.

We wish to make it clear that Airside Solutions Limited was not precluded from participating in the tender by the fact that Mr Mutiso was a board member of the Procuring Entity. This is in recognition of the fact that conflict of interest may not be entirely avoided but disclosure is of paramount



importance in order to manage any direct or perceived conflict of interest as can be seen in the legal provisions set out above. The court addressed this issue in the case of ***Teachers Service Commission v Kenya National Union of Teachers (KNUT) and Another [2019]eKLR*** as follows

*"...The Court holds that in the concept of conflict of interest, avoidance of the conflict of interest is desirable but in practice the primary focus is not avoidance but managing or handling situations of conflict of interest through measures such as declaration of interests; disqualification where appropriate; and undertaking remedial or mitigating measures as appropriate."*

The Applicant accused the Respondents of moral, ethical and integrity concerns and further alleged that the Respondents colluded in awarding the tender to the successful bidder and that this contravened section 66 of the Act. No evidence was proffered to demonstrate that there was collusion as alleged or any other such impropriety. For the avoidance of doubt, it is the Board's finding that the perceived or potential conflict arising out of Mr Mutiso's previous membership of the Board of the Procuring Entity and the subsequent involvement of the Company associated by him soon after his tenure ended, ought to have been disclosed and considered accordingly by the Procuring Entity. The Board otherwise overrules the other grounds raised by the Applicant in impugning the award of the tender to the 3<sup>rd</sup> Respondent.

### **Issue 3.**

In totality, the preliminary objection is overruled and the Request for Review partly succeeds to the extent stated above. Save as stated in the final prayers below, the other specific prayers sought by the Applicant in its Request for Review are dismissed.

### **FINAL ORDERS**

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

- 1.The award of the tender to the 3<sup>rd</sup> Respondent with respect to Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby quashed in its entirety.**
- 2.The Procuring Entity be and is hereby directed to exclude the 3<sup>rd</sup> Respondent from the procurement proceedings and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.**
- 3.The Accounting Officer of the Procuring Entity is directed to proceed with the subject procurement process including the making of an award within 14 days from the date of this decision.**

**4. Given that the procurement proceedings are not yet concluded, each party shall bear their own costs in the Request for Review.**

**Dated at Nairobi this 14<sup>th</sup> day of October 2021**



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**VICE CHAIRPERSON (PANEL CHAIR)  
PPARB**



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**SECRETARY  
PPARB**

