

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 97/2021 OF 2ND JULY, 2021

BETWEEN

TAV AFRICA OPERATION SERVICES LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER
KENYA AIRPORTS AUTHORITY PROCURING ENTITY**

Review against the decision of Kenya Airports Authority with respect to Tender No. KAA/RT/MBD/0048/2020-2021 for the development and management of a passenger lounge at: Lot 1 Jomo Kenyatta International Airport and Lot 2 Kisumu International Airport.

BOARD MEMBERS

- | | |
|-------------------------|------------------|
| 1. QS Hussein Were | -Member in Chair |
| 2. Mr. Jackson Awele | -Member |
| 3. Mr. Steven Oundo | -Member |
| 4. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

Tendering Process

Kenya Airports Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KAA/RT/MBD/0048/2020-2021 for the development and management of a passenger lounge at: Lot 1 Jomo Kenyatta International Airport and Lot 2 Kisumu International Airport (hereinafter referred to as the "subject tender"). The tender was floated through restricted tendering method of procurement. Tenders were invited from seven (7) companies that had expressed interest and others operating similar facilities in Kenyan airports. The invitation was also posted in compliance with Section 102 (1) (c) and (d) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act") and Regulation 89 (8) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as t ("Regulations 2020").

Tender opening

Ten (10) firms submitted their tenders and which tenders were opened on 11th May 2021 and recorded by the Tender Opening Committee as follows:

No	Bidder's Name	Minimum Annual Guarantee	Lot
1.	The Good Earth (Group) Ltd	Kshs. 7,298,988.00	Lot 1
2.	Plaza Premium Lounge Management Ltd	Kshs. 33,000,000	Lot 1
3.	TAV Africa Operation Services Ltd	Kshs. 52,575,870.00	Lot 1
4.	Mutandao Holdings Limited	Kshs. 300,000.00	Lot 1
5.	Indiana Beach Apartments Ltd	Kshs. 5,000,000.00	Lot 1
6.	Swissport Kenya Limited	Kshs. 2,500,000.00	Lot 1

7.	Tradewinds Aviation Services Ltd	No quote in the form of tender	
8.	National Aviation Services WLL	Kshs. 15,000,000.00	Lot 1
9.	Paul Caffé Ltd	Kshs. 800,000.00	Lot 2
10.	NAS Airport Services Limited	Kshs. 300,000.00	Lot 2

Evaluation of Tenders

The tenders were evaluated against the evaluation criteria set out on pages 17 to 21 of the tender document. They were first subjected to preliminary evaluation to determine whether they met mandatory requirements and those found to be non-responsive were rejected. The responsive firms were then subjected to technical evaluation. Those who passed technical evaluation proceeded to be evaluated for financials.

Preliminary Evaluation

Tenders were evaluated against the mandatory requirements outlined at Part I of the Evaluation Criteria found at page 17 of the tender document. At the end of the preliminary evaluation three (3) tenders did not meet the Mandatory/preliminary requirements and were not evaluated further. The Applicant's tender was among the seven (7) tenders that were found responsive at this stage of evaluation and proceeded for technical evaluation.

Technical Evaluation

At this stage the evaluation committee of the Procuring Entity applied the criteria outlined in Part II - Technical Requirements - found at page 18 of the tender document. At the end of this stage three tenders were found non-

responsive and disqualified from further evaluation. The Applicant's tender was among the three tenders found non-responsive at this stage of evaluation. Four bidders were found responsive at this evaluation stage thus, proceeded for financial evaluation.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee applied the criteria set out at Part III (page 21) of the tender document – Evaluation of Tenderer's Financial Proposal with respect to the following remaining four (4) tenders:-.

Bidder No.	Bidder's Name	Annual minimum guarantee (Kshs)	Lot
Bidder No. 1	Good Earth Group Ltd	7,298,988.00	Lot 1
Bidder No. 2	Plaza Premium Lounge Management Ltd	33,000,000.00	Lot 1
Bidder No. 6	Swissport Kenya Limited	2,500,000.00	Lot 1
Bidder No. 9	Paul Caffé Ltd	800,000.00	Lot 2

Recommendation

The Evaluation Committee recommended as follows:

1. That the subject tender be awarded as follows:

Lot 1: Jomo Kenyatta International Airport be awarded to **M/s. Plaza Premium Lounge Management Limited** at Fixed annual concession rate of USD 5 per passenger served or equivalent in KES subject

to their total quoted **Minimum Annual Guarantee of Kshs. 33,000,000.00** exclusive of applicable taxes payable quarterly in advance. The tenderer's system will have the capability of linking to the Procuring Entity's SAP ERP system.

Lot 2: Kisumu International Airport be awarded to **M/s. Paul Caffee Ltd** at Fixed annual concession rate of USD 1 per passenger served equivalent in KES subject to their total quoted **Minimum Annual Guarantee of Kshs. 800,000.00** exclusive of applicable taxes payable quarterly in advance. The tenderer's system will have the capability of linking to KAA SAP ERP system.

2. For the Fixed Annual concession fee:

Payments shall be made quarterly in arrears after reconciliation with the tenderers quoted Minimum Annual Guarantee.

The following rationale shall apply during reconciliation;

- (a) Where the concession fee is greater than the minimum guarantee, the Authority shall bill the concessionaire for the difference.
- (b) Where the concession fee is less than the minimum guarantee, the Authority shall take the minimum guarantee.

Professional Opinion

The Head of Procurement, in a Professional Opinion dated 18th June, 2021 noted that having reviewed the Evaluation and Due Diligence Reports for the subject procurement, it was his opinion that the procurement was carried out

as per the provisions of the Act. The said Professional Opinion was approved by the Chief Executive Officer on 18th June, 2021.

Notification of Award

In letters dated 18th June 2021, the Chief Executive Officer of the Procuring Entity notified the successful and unsuccessful tenderers of the outcome of the tender evaluation process.

REQUEST FOR REVIEW

The Applicant filed the Request for Review dated 2nd July 2021 together with a Statement in Support of the Request for Review dated 2nd July 2021 on even date through the firm of Hamilton Harrison & Mathews seeking the following orders:

- a) The award of Lot 1 of the tender to M/s Plaza Premium Lounge Management Limited, be annulled.***
- b) The Applicant's tender be declared to be responsive and its technical and financial tenders be evaluated and if the Applicant's tender is found to be the highest Minimum Annual Guarantee, the tender be awarded to the Applicant.***
- c) Without prejudice to the foregoing and in the event the Procuring Entity is found to be in violation of any express provisions of law, the tender be annulled and a fresh tender be advertised.***
- d) Costs of this application be awarded to the Applicant.***

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Procuring Entity, in opposition to the Request for Review, filed a Reply by the Procuring Entity dated 9th July 2021 on even date praying for the dismissal of the Request for Review with costs.

The successful and the unsuccessful tenderers in the subject tender did not file any response in support or in opposition to the Request for Review despite having been notified by the Acting Board Secretary of the existence of the Request for Review and being invited to make their response thereof.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management measures to mitigate the spread of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed its written submissions and list and bundle of authorities dated 15th July 2021 on even date whilst the Procuring Entity filed its written submissions dated 19th July 2021 on even date. The successful tenderers in the subject tender did not file any written submissions.

BOARD'S DECISION

The Board has carefully considered the parties' pleadings, written submissions and list and bundle of authorities including confidential documents submitted to it by the Procuring Entity pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- (i) *Whether the Procuring Entity failed to evaluate the Applicant's tender at the technical evaluation stage in accordance with the tender document, in breach of the provisions of section 80 (2) of the Act*
- (ii) *Whether the Procuring Entity failed to cure minor deviations in the Applicant's tender pursuant to section 79 (2) (a) of the Act*
- (iii) *Whether the Procuring Entity improperly adjudged the Applicant's tender as non-responsive in violation of section 79 (1) of the Act*
- (iv) *Whether the Procuring Entity failed to notify the Applicant that its tender was unsuccessful thereby occasioning breach of section 87 (3) of the Act*

The Board now proceeds to address the above issues. A brief background to the instant Request for Review proceedings is that the Procuring Entity invited sealed tenders from eligible tenderers in respect of development and management of a passenger lounge at Jomo Kenyatta International Airport (lot 1) and Kisumu International Airport (lot 2).

This was a restricted tender and the Accounting Officer approved use of the method on 18th March, 2021 *vide* Internal Memo Ref: KAA/11/02/2 vol. 22(13) dated 15th March, 2021.

Tenders were invited from seven (7) companies that had expressed interest in operating similar facilities at the airports. An invitation was also posted on the Authority's website with the closing date for the tender set for 24th March, 2021. Letters dated 19th March, 2021 inviting 14 tenderers to tender and containing the tender document were sent out to the prospective tenderers. Addenda 1 to 7 clarifying various issues were issued at different times and which also extended the closing / opening date of the tender.

The tender was opened on 11th May, 2021 with ten (10) tenderers responding. The tender was evaluated by a committee of four members and a secretary. A report signed by all members and the Secretary was produced dated 8th June, 2021 recommending award to the responsive tenderer with the highest financial proposal in terms of concession fee per passenger served. The successful and unsuccessful tenderers were notified *vide* letters dated 18th June, 2021.

The Applicant was among ten (10) tenderers who participated in the subject procurement process by submitting a tender by the tender submission deadline of 11th May 2021. After evaluation of tenders, the Procuring Entity notified all tenderers of the outcome of their respective tenders. The Applicant was informed, *vide* letter of notification dated 18th June, 2021 that its tender was unsuccessful. The letters stated as follows: -

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

It was noted that you:

- Provided reference letters from British Airways which did not demonstrate development and management of passenger lounge facility as required.***
- Provided reference letters from Priority Pass, Dragon Pass and Riga Airport which do not refer to the bidder but to other companies/entities yet there is no Agreement/Joint Venture (JV) in the submission of the tender.***
- Provided agreements from Riga Airport and OMAC that do not refer to the bidder but to other companies/entities yet there is no Agreement/Joint Venture in the submission of the tender.***
- Provided an agreement with Turkish Airlines effective 15th July, 2019 hence did not demonstrate at least 3 consecutive years as required and there was no reference letter from the***

site owner/company on this agreement addressed to Kenya Airports Authority as required.”

The letter also indicated who was successful in each of the lots. It is the letter of notification dated 18th June 2021 that triggered this Request for Review, filed by the Applicant on 2nd July 2021. The issues for determination as framed by the Board are now addressed as follows:

Whether the Procuring Entity failed to evaluate the Applicant’s tender at the technical evaluation stage in accordance with the tender document, in breach of section 80 (2) of the Act:

The Applicant averred that the reasons advanced by the Procuring Entity in the letter of notification dated 18th June 2021 took the Applicant by surprise because:

- a. The reference letter from British Airways stated that TAV OS has, since April 2017 until present, provided third-party lounge services at JKIA and that TAV Lounge hosts British Airways customers travelling in premium cabins as well as frequent flyers and their guests. It is therefore not correct that this letter did not demonstrate management of passenger lounge facility as alleged.
- b. Requirement (i) only required tenderers to provide reference letters addressed to the Procuring Entity. The requirement does not expressly state that the reference letter should state the name of the bidder. The reference letters from ***Priority Pass, Dragon Pass and Riga Airport*** set out the experience of TAV OS which wholly owns the Applicant and are sufficient evidence of the Applicant’s experience.

- c. The Applicant produced agreements dated 1st February, 2016 and 15th July, 2019 with **Turkish Airlines** as proof of the Applicant's experience. These agreements prove that the Applicant has operated the Turkish Airlines Lounge at JKIA since 2016. It is therefore not correct for the Procuring Entity to assert that the Applicant only produced the agreement dated 15th July, 2019.

The Applicant averred further that the evaluation criteria were contained in the Appendix to Instructions to Tenderers. Part II of the evaluation criteria provided for the evaluation of tenderer's technical requirements and stated as follows with respect to experience:

"Firms MUST demonstrate at Least Three (3) consecutive Years (2017,2018,2019) or (2018,2019,2020) relevant experience in the development and management of a passenger lounge facility or development and management of at least four-star hotel lounges. This shall be demonstrated by the following:

- i. The reference shall be in the form of letters from the site owner/company addressed to Kenya Airports Authority;***
- ii. Documentary evidence such as copies of leases / agreements / contracts / Letters of Award, which should be valid for a period between 2017 to 2020 and signed between Bidder and the listed site owner/company."***

To the Applicant, there was no conjunction between two requirements on experience set out above, and that the requirement did not state whether tenderers were required to provide reference letters and agreements.

According to the Applicant, Requirement (i) only required tenderers to provide reference letters addressed to the Procuring Entity and that the requirement did not expressly state that the reference letter should state the name of the tenderer while requirement (ii) expressly stated that the leases, agreements, contracts or letters of award provided should be signed by the tenderer.

The Applicant submitted that the Procuring Entity issued 6 addenda and 1 clarification. In Addendum 2 dated 1st April, 2021 some tenderers raised queries including query 3 that asked the Procuring Entity to confirm whether in (i) when a reference letter from the site owner/company addressed to Kenya Airports Authority is submitted, there will be no need to provide other documentary evidence mentioned in (ii). The Procuring Entity's answer was:

"This requirement items (i) and (ii) to remain the same as per the tender Document. Bidders to respond as requested."

Query 9 asked the Procuring Entity to confirm whether on experience it is sufficient if tenderers just provide reference letters from clients or site owners as some lease agreements are confidential. The Procuring Entity's answer was:

"Bidders to provide documents as outlined in the tender document to demonstrate their experience."

The Applicant submitted further that since the Procuring Entity chose to refer the tenderers to the wording of the tender document without any additional clarification, each tenderer was free to decide the form of experience it would like to provide between (i) and (ii).

The Applicant stated that in its submitted tender the cover letter dated 11th May, 2021 expressly stated as follows:

"We, TAV Africa Operation Services Limited ("TAV Africa") – 100% owned by TAV OS, the hospitality arm of Groupe ADP/TAV Airports #1 Airport Operating Platform worldwide..."

The Applicant also submitted that it provided a copy of its company search (Form CR12) which showed that the Applicant was owned by ***TAV Isletme Hizmetleri Anonim Sirketi*** which, when translated from Turkish to English, is ***TAV Operation Services***. It asserted that the Procuring Entity was always aware that the Applicant is a wholly owned subsidiary of TAV OS.

The Applicant contended that the Procuring Entity violated the provisions of Section 79(2) of the Act by arbitrarily disqualifying its tender as being non-responsive yet it met all the tender requirements having submitted evidence of experience, which included reference letters showing the experience of TAV OS in the development and management of passenger lounge facilities.

The Procuring Entity, in response, averred that it was essential that the two requirements (i) and (ii) in the Appendix to Instructions to Tenderers be satisfied by the tenderers under the Technical Evaluation stage as proof of experience. The Tender document required a demonstration from the tenderers through their references that they had experience in development and management of a passenger lounge facility or development and management of at least four-star hotel lounges.

The requirement (ii) states ***"documentary evidence such as copies of leases/agreements/contracts/letters of award....and signed between bidder and the listed site owner/company."***

According to the Procuring Entity the word "listed" was in reference to the site owner/company in the preceding requirement and that the Applicant could not purport that there was no nexus between the two requirements. The Procuring Entity further submitted that Addendum No. 2 dated 1st April 2021 emphasized that the criteria were to remain as captured in the tender document, an indication that the same was not ambiguous but was a prerequisite to satisfying the technical requirements. The Procuring Entity also submitted that such letters and documentary evidence could only be in reference to the tenderer of the subject tender and not any other party. According to the Procuring Entity the fact that the Applicant provided reference letters and agreements as per technical evaluation criteria Item I no. (i) and (ii) was an indication that the Applicant was fully aware of the requirements contrary to its assertions. However, the Procuring Entity emphasized, the reference letters from ***Priority Pass, Dragon Pass and Riga Airport*** did not refer to the tenderer, TAV Africa Operation Services Limited, but to TAV Operation Services yet the Applicant did not submit any Joint Venture Agreement (JV) at the time of presenting its tender. Further, the Applicant submitted leases under criteria no. (ii) but the agreements from Riga Airport and OMAC are TAV Operation Services as opposed to TAV Africa Operation Services Limited, the tenderer.

The Procuring Entity stated that the tendering firm was TAV Africa Operations Services Limited and not the TAV Operation Services. The tendering firm was the one evaluated, not its parent company or subsidiary which are separate

entities registered in different countries. Moreover, the Applicant did not submit any agreement to demonstrate joint tendering. The Applicant as a bidder was wrong to assume that the Procuring Entity was aware of the nature of its business and business structure and that the same would be applied to its advantage in the tendering process.

The Procuring Entity stated further that the reference letter from British Airways neither demonstrated site ownership nor experience in development of a passenger lounge by the Applicant as required in the evaluation criteria and that it made reference to TAV Operation Services and not TAV Africa Operation Services Limited, the Applicant.

The Procuring Entity submitted that the Applicant in its tender provided an agreement with Turkish Airlines effective 15th July 2019 which did not demonstrate at least three consecutive years (2017, 2018, 2019) or (2018, 2019, 2020) as required in the tender document. Additionally, there was no reference letter from the site owner/company on this agreement addressed to the Procuring Entity as required under technical evaluation criteria no. 1 (i) on Experience.

The Procuring Entity underpinned its arguments on Section 79 of the Act, Regulation 75(1) of the Regulations, Regulation 76 (1) and (2) of the Regulations. It also relied on the Tender document's stipulation at page 20 to the effect that bidders who do not meet any of the requirements will be disqualified and not evaluated further.

The Board has discerned that the matter in dispute is the way the Applicant's tender was evaluated at the technical evaluation stage.

The evaluation criteria were set out at pages 17 to 21 of the tender document. It is not in dispute that the Applicant was found responsive at Part I - Preliminary Evaluation, Mandatory requirements stage and proceeded to part II - Evaluation of Tenderer's Technical Requirements stage where it was found non-responsive and disqualified. The grounds for disqualification as set out in the letter of notification to the Applicant dated 18th June 2021 are connected to the technical requirements item 1 - Experience as found on page 18 of the tender document, which states: -

"Part II: Evaluation of Tenderer's Technical Requirements"

ITEM	REQUIREMENT	
1	Experience	Firms MUST demonstrate at Least Three (3) consecutive Years (2017, 2018, 2019) or (2018, 2019, 2020) relevant experience in the development and management of a passenger lounge facility or development and management of at least four-star hotel lounges. This shall be demonstrated by the following: <ul style="list-style-type: none">i. The reference shall be in the form of letters from the site owner/company addressed to Kenya Airports Authority;ii. Documentary evidence such as copies of leases / agreements / contracts / Letters of Award, which should be valid for a period between 2017 to 2020 and signed between Bidder and the listed site owner/company.

The Board now takes a walk through each of these reasons upon which the Applicant was found non-responsive: -

- a. ***"Provided reference letters from British Airways which did not demonstrate development and management of passenger lounge facility as required. "***

The Board has perused Annex 2.1.4 of the Applicant's tender where it submitted a reference letter dated 1st April, 2021 from British Airways signed by Lukasz Wyrzykowski, Global Lounge Business Executive. The letter read as follows: -

"Please treat this as a reference letter for TAV Operation Services operating a CIP lounge at Nairobi Jomo Kenyatta International Airport (NBO).

Since April 2017 until present TAV Operation Services provides British Airways with third-party lounge services at NBO airport. The TAV Lounge hosts BA customers travelling in premium cabins as well as frequent flyers and their guests. The TAV Lounge forms an important part of our premium ground experience in Nairobi. Throughout the time of our collaboration TAV Operation Services demonstrated a true professionalism as well as passion for excellent customer service."

The British Airways letter was clearly submitted in fulfilment of evaluation criteria ITEM 1 – Experience - of Tenderer's Technical Requirements of the tender document. The said criteria, set out at page 18 of the tender document, required a tenderer to demonstrate service for three consecutive years evidenced in two parts, both parts being mandatory. Part one was by way of reference letters [ITEM 1(i)] and part two was by way of copies of leases, agreements, contracts or letters of award [ITEM 1(ii)].

The Board, from the reading of the British Airways letter in conjunction with the criterion on experience in the tender document, observes that the said letter was supplied by the Applicant in fulfilment of evaluation criteria ITEM 1 (i) of Tenderer's Technical Requirement of service of three consecutive years. However, the Applicant did not provide documentary evidence of three consecutive years' service in the form of copies of leases, agreements, contracts or letters of award as required under evaluation criteria ITEM 1 (ii).

The Board has heard arguments by the Procuring Entity that the British Airways letter supplied by the Applicant was in reference to a party that is not the Applicant herein. It is clear that the impugned letter was in reference to **TAV Operation Services (TAV OS)** and not **TAV Africa Operation Services Limited (TAV AOS)**. The question that arises is whether TAV OS and TAV AOS are one and the same for purposes of the subject tender.

The two bear different registration certificates from different jurisdictions and there is no supporting documentation in the Applicant's tender to prove existence of a parent-subsidary relationship between them. The Applicant did not attach an attestation certificate to demonstrate the relationship between the two companies.

On the question that has arisen, the Board resolves that **TAV Africa Operation Services Limited** is a separate and distinct entity from **TAV Operation Services**. The former is the Applicant herein while the latter is the entity the British Airways letter was in reference of. In the Board's considered view, the only way **TAV AOS** could benefit from the capability and experience of **TAV OS** is if the two entities submitted a joint tender. Clause

2.1.1 of the Appendix to Instructions to Tenderers in the tender document provides as follows:

"Eligible tenderers who are able to demonstrate capacity to develop and manage a passenger lounge facility. Firms who are interested in bidding for the business individually or as a consortium / joint venture must show proof of relevant experience..."

The Board has perused the Applicant's original submitted tender document including the Contract Form, Confidential Business Questionnaire, Tender Security Form and Self Declaration Form and found nowhere in the tender a Consortium or Joint Venture Agreement between **TAV OS** and **TAV AOS** for the purpose of the subject tender. It is not enough to merely state that **TAV OS** wholly owns **TAV AOS**.

In the circumstances, it is the Board's considered view that the Applicant submitted a letter of reference meant for **TAV OS**, an entity that is alien to the process of the subject tender, for purposes of fulfilling the evaluation criteria ITEM 1(i) of Tenderer's Technical Requirement of three consecutive years of service. Accordingly, it is the finding of this Board that the Applicant failed to meet the requirement of evaluation criteria ITEM 1(i) and was evaluated as such.

b. "Provided reference letters from Priority Pass, Dragon Pass and Riga Airport which do not refer to the bidder but to other

companies/entities yet there is no Agreement/Joint Venture (JV) in the submission of the tender.”

The Board has perused Annextures 2.1.5, 2.1.6 and 2.1.7 of the Applicant's tender where it submitted reference letters as follows: -

- i. Annex 2.1.5 The Collinson Group (owner of the Priority Pass, Lounge Key, Lounge Club and Lounge Pass lounge access programs) dated 31st March, 2021***
- ii. Annex 2.1.6 Dragon Pass dated 1st April, 2021***
- iii. Annex 2.1.7 Riga International Airport dated 1st April, 2021***

The Board notes that the letters in Annextures 2.1.5, 2.1.6 and 2.1.7 of the Applicant's tender are in reference to ***TAV Operation Services***. The arguments and findings in respect of the three letters are similar to the ones dealt with under Ground 1 of the Applicant's letter of notification. In order to avoid repetition, the Board will not belabour this issue since it has been exhaustively dealt with elsewhere in this decision.

A similar finding is returned with regard to evaluation criteria ITEM 1 (ii) as the Applicant did not provide documentary evidence of three consecutive years' service in the form of copies of leases, agreements, contracts or letters of award as required, for **The Collinson Group** and **Dragon Pass**. A lease agreement was however provided for Riga International Airport.

- c. "Provided agreements from Riga Airport and OMAC that do not refer to the bidder but to other companies/entities yet***

there is no Agreement/Joint Venture in the submission of the tender"

The Board has seen a sub-lease contract agreement for Riga International Airport at Appendix 2.1.1. of the Applicant's tender. The sub-lease contract No. NT-15/6-15/7 was between TAV Latvia as the Lessor and ***TAV Latvia Operation Services SIA*** as the Lessee and it was registered in the Republic of Latvia under No. 40103880590. There is also at Annex 2.1.8 of the Applicant's tender a concession agreement dated 1st January, 2017 between Oman Airports Management Company SAOC and ***TAV Operation Services-Oman***.

As determined with regard to ***TAV Operation Services*** that has been discussed elsewhere in this decision, ***TAV Latvia Operation Services SIA*** and ***TAV Operation Services-Oman*** are alien to the process of the tender subject of this request for review given that they have not demonstrated any binding agreements with ***TAV Africa Operation Services Limited***, the Applicant herein and a tenderer in the subject tender.

d. "Provided an agreement with Turkish Airlines effective 15th July, 2019 hence did not demonstrate at least 3 consecutive years as required and there was no reference letter from the site owner/company on this agreement addressed to Kenya Airports Authority as required."

This document was not in the bundle the Procuring Entity supplied to the Board. Even if the agreement was availed, it is highly doubtful that it will tilt the finding of the Board on this particular issue.

The Board makes reference to Part II – Evaluation of Tenderer's Technical Requirements Item 1 at page 18 of the tender document which states as follows: -

"Firms MUST demonstrate at least three (3) consecutive years ... relevant experience in the development and management of a passenger lounge facility ... This shall be demonstrated by the following:

- i. The reference shall be in the form of letters ...***
- ii. Documentary evidence such as copies of leases / agreements / contracts / letters of award ..."***

Further, the end of the said Part II at page 21 states as follows: -

"NB: Bidders who do not meet any of the above requirements will be disqualified and not evaluated further."

The technical requirements were couched in mandatory terms of "**must**" and "**shall**". It is not in doubt therefore, from the reading of Part II of the evaluation criteria at pages 18 to 21 of the tender document, that Technical Requirements were mandatory conditions of the tender which tenderers were required to meet.

It is not lost to the Board that the Applicant admitted in its written submissions that the proof of experience it provided was for its parent company and not the Applicant's although no attestation was provided to that effect. In the circumstances, the course of action open to the Procuring Entity is the one outlined in Regulation 76, which states:

"(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document."

"(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)."

Section 80 (2) places an obligation on the Procuring Entity to evaluate tenders in accordance with the criteria set out in the tender document. It states verbatim as follows: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

In view of the foregoing, the Board is satisfied that the Procuring Entity evaluated the Applicant's tender at the Technical Evaluation Stage in accordance with the evaluation criteria set out in the tender document and was therefore in compliance with the provisions of section 80 (2) of the Act.

For all of the foregoing, the Board finds that the Applicant failed to meet the requirement of evaluation criteria ITEM 1 (i) and (ii) at the technical evaluation stage and was thus correctly evaluated. Accordingly, this ground of review fails and is disallowed.

Whether the Procuring Entity failed to cure minor deviations in the Applicant's tender pursuant to section 79 (2) (a) of the Act

The Applicant argued that if there were any informalities, non-conformities or irregularities in the Applicant's tender, the same should not have resulted in the Applicant's tender being declared non-responsive in that any non-conformity or irregularities, if they existed in the tender, were minor and did not materially depart from the requirements set out in the tender documents. It argued that these could have been waived without affecting the substance of the tender.

To buttress its argument, the Applicant cited Clause 2.20.3 of the Instructions to Tenderers in the tender document which provided that the Procuring Entity may waive any minor informality or non-conformity or irregularity in a tender which does not constitute a material deviation provided such waiver does not prejudice or affect the relative ranking of any tenderer.

It was the Applicant's further argument that if the Procuring Entity felt the submission of the reference letters in the name of TAV OS did not conform to its requirements, then to the extent that the TAV OS wholly owned the Applicant and TAV OS's experience was not challenged, such a non-conformity or irregularity was a minor one that could be waived without affecting the

substance of the tender. It added that no prejudice would be suffered by the other tenderers nor did the Applicant stand to gain any advantage through this waiver.

The Procuring Entity, in response, submitted that Section 79 of the Act refers to minor deviations that do not materially depart from the substance of the tender document. It added that Regulation 79(2) of Regulations 2020 requires that the classification of a deviation from the requirements as minor under Section 79(2)(a) of the Act shall be applied uniformly and consistently to all tenders received. The Procuring Entity argued that the inconsistency in the documentation submitted by the Applicant touched on the crux of the requirements under the tender document and could not be disregarded under the guise of minor deviation.

The Procuring Entity contented that, by submitting proof of experience of another entity other than itself as the bidder, the Applicant failed to meet the tender requirements and thus its bid was rejected in line with the provisions of the Act.

The question which has arisen for the determination of the Board is whether the Procuring Entity acted properly when it failed to consider any non-conformity or irregularity in the Applicant's tender as a minor deviation that could be waived without affecting the substance of the tender.

To answer this question, the Board takes cognisance of the provisions of Section 79 (2) (a) of the Act that states: -

"A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents”

Further, Regulation 75 (2) of Regulations 2020 states: -

"The classification of a deviation from the requirements as minor under section 79(2)(a) of the Act shall be applied uniformly and consistently to all tenders received by a procuring entity."

The Board has made an observation herein that the Technical Requirements under Part II of the evaluation criteria in the tender document were mandatory conditions expressly stated as such. The same could not therefore be waived since, to do so would amount to an amendment of the tender document after the period for submission of the tender is over.

Section 75 of the Act allows for modification of tender documents but only before the deadline for submitting tenders. Clause 2.5 of Instructions to Tenderers in the tender document also provided for amendment of tender documents prior to the deadline for submission of tenders through an addendum to all bidders. In the tender subject of this request for review there was no addendum issued by the Procuring Entity to all bidders before the deadline for submission of tenders for the purpose of altering the evaluation criteria under Part II Evaluation of Technical Requirements.

For the foregoing reasons, the Procuring Entity could neither have considered the Applicant's non-conformity as a minor deviation nor waived it pursuant to section 79 (2) (a) of the Act as prayed for by the Applicant. The Board therefore

finds that the Procuring Entity acted properly and in conformity with the law and the tender document and proceeds to disallow this ground of review.

Whether the Procuring Entity improperly adjudged the Applicant's tender as non-responsive in breach of section 79 (1) of the Act

The Applicant averred that the Procuring Entity violated the provisions of Section 79 of the Act by failing to consider its tender yet it met all the requirements in the instructions to tenderers. It averred further that the Procuring Entity's own instructions to tenderers at clause 2.20.4 expressly stated that a substantially responsive tender was one which conformed to all the terms and conditions of the tender documents without material deviations.

The Applicant stated that in its submitted tender the cover letter dated 11th May, 2021 stated as follows:

"We, TAV Africa Operation Services Limited ("TAV Africa") – 100% owned by TAV OS, the hospitality arm of Groupe ADP/TAV Airports #1 Airport Operating Platform worldwide..."

It also submitted that it provided a copy of its company search (Form CR12) which showed that the Applicant was owned by ***TAV Isletme Hizmetleri Anonim Sirketi*** which, when translated from Turkish to English, is ***TAV Operation Services***. According to the Applicant, the Procuring Entity was therefore always aware that the Applicant is a wholly owned subsidiary of TAV OS.

The Applicant contended that it submitted evidence of experience which included reference letters showing the experience of TAV OS in the development and management of passenger lounge facilities.

In response the Procuring Entity submitted that the Applicant provided reference letters and other documentary proof which belonged to parties other than the Applicant. According to the Procuring Entity the Applicant failed to meet its obligations under the technical evaluation criteria and, as result of the non-compliance, was deemed non-responsive and consequently did not qualify for the financial evaluation.

The question which has arisen for the determination of the Board is whether the Procuring Entity acted properly when it declared the Applicant's tender as a non-responsive at technical evaluation stage thus disqualifying it from further evaluation at the financial stage.

To answer this question, the Board makes reference to Section 79 (1) of the Act that states: -

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

Further, Regulation 75 (1) of the Regulations states: -

"A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations."

By its own admission, the Applicant provided documents for proof of experience which documents, belonged to its parent company and not to the Applicant. In the absence of a Joint Venture Agreement or Consortium Agreement between the parent company and the Applicant, or an Attestation of the parent company-subsidary company relationship, it follows that the Applicant did not provide documents to prove that it had the requisite experience as per the tender document.

The Board therefore finds that the Procuring Entity properly found the Applicant's tender as non-responsive in accordance with the provisions of section 79 (1) of the Act and proceeds to disallow this ground of the request for review.

Whether the Procuring Entity failed to notify the Applicant that its tender was unsuccessful thereby occasioning breach of section 87 (3) of the Act

The Applicant averred that the Applicant was not notified that its tender was not responsive. This denied it the opportunity to seek timely and necessary reliefs for the consideration of its technical and financial tenders. It averred further that by a letter dated 25th June, 2021 it requested the Procuring Entity to provide a summary of the evaluation report pursuant to Sections 67(4) and 68(2)(d)(iii) of the Act and that to date it has not received this summary and

further that it reserves the right to raise additional grounds once it receives the summary of the evaluation report.

The Procuring Entity stated in response that Section 67(1) of the Act provides that during or after procurement proceedings, no Procuring Entity and no employee or agent of the Procuring Entity or member of a board, commission or committee of the Procuring Entity shall disclose information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition.

It stated further that it had nonetheless submitted the confidential file containing all information with respect to the subject tender proceedings to the Board in line with Section 67(e) of the Act.

The Procuring Entity averred that the Applicant's allegation that they were not notified that its tender was not responsive which denied them the opportunity to seek timely and necessary reliefs for consideration of its technical and financial tenders was misleading. It averred further that all unsuccessful tenderers, including the Applicant, were notified of the outcome of the process through respective letters dated 18th June 2021 sent through electronic mail on 22nd June, 2021 at 12:44 pm following which the Procuring Entity received a confirmation dated Tuesday, June 22, 2021 12:44 pm of the relayed message. The notification was also dispatched through registered mail.

The Board has perused the documents placed before it and observes that the Procuring Entity notified the Applicant *vide* letter dated 18th June 2021 that its tender was unsuccessful giving reasons thereof and disclosed the successful

bidder. It is also clear that the notification letter and the reasons are the primary reason for the coming into being of this request for review. To that extent, the Board is satisfied that the Procuring Entity discharged its obligations under section 87 (3) of the Act which states as follows:

"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."

The Board notes that the letter of notification dated 18th June 2021 carried the ingredients of notification instructed under section 87 (3) of the Act.

With regard to a summary of evaluation, this is permissible under section 67 (4) of the Act that states: -

"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)."

The Procuring Entity has admitted that it did not provide the summary of the evaluation report requested by the Applicant due to confidentiality requirements under Section 67(1) of the Act.

The Board notes that nothing in section 67 (1) of the Act stops the Procuring Entity from supplying a summary of the evaluation report to a tenderer when requested to do so. In the tender subject of this request for review the Procuring Entity did not provide the Applicant with the summary of evaluation report. The Procuring Entity however supplied all the confidential information, including the evaluation report to the Board and the same was used for purposes of the review as provided under Part XV of the Act. Further, in the light of the fact that the Applicant was notified of the outcome of the procurement proceedings of the subject tender and was able to come before the Board, it has not suffered any prejudice.

In totality of the foregoing, the Request for Review fails and the Board proceeds to grant the following orders: -

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders in this Request for Review: -

- 1. The Request for Review filed by the Applicant, Messrs Tav Africa Operation Services Limited on 2nd July 2021 with respect to Tender No. KAA/RT/MBD/0048/2020-2021 for the development and management of a passenger lounge at: Lot 1 Jomo Kenyatta**

International Airport and Lot 2 Kisumu International Airport for Kenya Airports Authority, be and is hereby dismissed.

2. In view of the outcome of this Request for Review, each party shall bear its own costs herein.

Dated at Nairobi this 22nd day of July 2021



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CHAIRMAN

PPARB



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SECRETARY

PPARB