

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 146/2021 OF 3<sup>RD</sup> DECEMBER 2021**

**BETWEEN**

**BLUE SEA SERVICES LTD..... APPLICANT**

**VERSUS**

**THE ACCOUNTING OFFICER,  
KENYA AIRPORTS AUTHORITY..... 1<sup>ST</sup> RESPONDENT  
KENYA AIRPORTS AUTHORITY..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOYMACX ENTERPRISES..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender Number: KAA/OT/MIA/0010/2021-2022 for Provision of Cleaning Services of Washrooms at Moi International Airport.

**BOARD MEMBERS**

1. Ms. Faith Waigwa -Chairperson
2. Mrs. Njeri Onyango -Vice Chairperson
3. Mr. Alfred Keriolale -Member

4. Mr. Nicholas Mruttu -Member
5. Eng. Mbiu Kimani, OGW -Member

## **IN ATTENDANCE**

Mr. Stanley Miheso - Holding brief for the Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The 1<sup>st</sup> Respondent, invited sealed tenders for Tender Number KAA/OT/MIA/0010/2021-2022 for Provision of Cleaning Services of Washrooms at Moi International Airport reserved for Youth, Women and People Living with Disability(hereinafter referred to as the "subject tender") from qualified and eligible tenderers through an open tender advertised in the Daily Nation, the 2<sup>nd</sup> Respondent's website ([www.kaa.go.ke](http://www.kaa.go.ke)), the Public Procurement Information Portal (PPIP) ([www.tenders.go.ke](http://www.tenders.go.ke)) and MyGov publication on 31<sup>st</sup> August 2021.

### **Addenda**

Through Addendum No. 1 dated 10<sup>th</sup> September 2021, the 2<sup>nd</sup> Respondent issued clarifications on questions asked by prospective tenderers and extended the tender submission deadline from 14<sup>th</sup> September 2021 to 21<sup>st</sup> September 2021. Through Addendum No. 2 dated 16<sup>th</sup> September 2021 the 2<sup>nd</sup> Respondent issued further clarifications on questions asked by prospective tenderers but retained the tender submission deadline as 21<sup>st</sup> September 2021.

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

Vide an online tender portal; the 2<sup>nd</sup> Respondent received a total of eighteen (18) tenders by the extended tender submission deadline of 21<sup>st</sup> September 2021 at 11:00 am. The tenders were virtually opened shortly thereafter in the presence of tenderers representatives and the following tenderers were recorded as having submitted their tenders;

- 1. All and Sundry Services*
- 2. Career Directions Ltd*
- 3. Virgin Clean Limited*
- 4. Soria Agencies*
- 5. Paninus Corner Ltd*
- 6. Harvest Cleaning Services*
- 7. Rorach Enterprises Ltd*
- 8. Salu Solutions*
- 9. Spic N Span Cleaning Services*
- 10. Dechrip East Africa Limited*
- 11. Ice Clean Care Group Company Limited*
- 12. Joymacx Enterprises*
- 13. Village Masters Ltd*
- 14. Nakaj Services Limited*
- 15. Prolific Works Ltd*
- 16. LimahE.A.Ltd*
- 17. Peesam Ltd*
- 18. Blue Sea Services Ltd*

The minutes of the opening of tender dated 21<sup>st</sup> September 2021 captured, *inter alia*, at MIN/2/2021, that the subject tender did not require a tender surety but a tender securing declaration form and that the Applicant and six (6) other tenderers submitted duly filled Tender Securing Form referring to KAA/OT/HQS/011/2021-2022 instead of KAA/OT/MIA/0010/2021-2022.

### **Evaluation of Tenders**

Going by an Evaluation Report executed by all the 2<sup>nd</sup> Respondent's Evaluation Committee members on 15<sup>th</sup> October 2021 (hereinafter referred to as the 'Evaluation Report'), the 2<sup>nd</sup> Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders with respect to the subject tender in the following three (3) stages: -

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

### **Preliminary Evaluation/Mandatory**

At this stage, the Evaluation Committee applied the criteria outlined in Preliminary Evaluation Requirements of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III-Evaluation and Qualification Criteria on page 33 of 146 to 35 of 146 of the blank Tender Document issued to tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document'). According to the evaluation report at the end of this stage of evaluation, thirteen (13) tenders, including the Applicant's tender,

were found non-responsive, while five (5) tenders, including the Interested Party's tender were found responsive thus proceeded to the Technical evaluation stage. The Applicant's tender was found non-responsive at this stage because the Applicant submitted a filled Tender Securing Form for KAA/OT/HQS/011/2021-2022 instead of KAA/OT/MIA/0010/2021-2022

### **Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Technical Evaluation of Section III-Evaluation and Qualification Criteria on page 35 of 146 to 37 of 146 of the Tender Document. At the end of this stage of evaluation two (2) tenders were found non-responsive while three (3) tenders including the Interested Party's tender were found responsive, thus proceeded for financial evaluation.

### **Financial Evaluation**

From the Evaluation Report, the Evaluation Committee applied the criteria outlined in Financial Evaluation of Section III-Evaluation and Qualification Criteria on page 37 of 146 of the Tender Document ranking the Interested Party's tender as number 1 and finding the Interested Party as the lowest evaluated tenderer at Kshs.1, 760,000.24 per month and Kshs.21,120,002.88 per year.

### **Recommendation**

The Evaluation Committee recommended the award of the subject tender to the Interested Party at its tender sum of Kshs 21,120,000.00per annum

(Kenya Shillings Twenty-One Million, One Hundred and Twenty only) inclusive of VAT.

### **Professional Opinion**

In a Professional Opinion dated 23<sup>rd</sup> November 2021, the 2<sup>nd</sup> Respondent's General Manager Procurement and Logistics one Patrick K. Wanjuki, reviewed the tender procurement process in the subject tender, including the evaluation of tenders and was of the opinion that the process was carried out in accordance with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act"). He concurred with the Evaluation Committee's recommendation of award to the Interested Party at Kenya Shillings Twenty One Million, One Hundred and Twenty Thousand only (Kshs, 21,120,000.00) per annum inclusive of taxes. The Accounting Officer approved the Professional Opinion on 24<sup>th</sup> November 2021.

### **Notification to Tenderers**

Vide letters dated 23<sup>rd</sup> November 2021, the 1<sup>st</sup> Respondent notified all tenderers of the outcome of their respective tenders in the subject tender.

### **THE REQUEST FOR REVIEW**

Blue Sea Services Ltd, the Applicant herein, lodged a Request for Review dated 2<sup>nd</sup> December 2021 and filed on 3<sup>rd</sup> December 2021 together with an Affidavit in Support of the Request for Review sworn on 2<sup>nd</sup> December 2021 by Maina Muturi a Director of the Applicant through the firm of Mutisya Mwanzia & Ondeng Advocates, seeking the following orders verbatim:

- a. The Respondent's decision as communicated to the Applicant vide a letter dated 23<sup>rd</sup> December 2021 be cancelled and set aside.*
- b. Any letter of award of tender arising from Tender No, KAA/OT/MIA/0010/2021-2022 for Provision of cleaning services of washrooms at Moi International Airport issued by the Respondents to Interested Party be cancelled and set aside.*
- c. The Public Procurement Administrative Review Board be pleased to declare that the Applicant is the successful bidder in respect of Tender No. KAA/OT/MIA/0010/2021-2022 for Provision of cleaning services of washrooms at Moi International Airport.*
- d. The Procurement and proceedings leading to the decision by the Respondents to award Tender No. KAA/OT/MIA/0010/2021-2022 for Provision of cleaning services of washrooms at Moi International Airport to the Interested Party be reviewed and the Board be pleased to direct the 1<sup>st</sup> Respondent to award the said tender to the Applicant being the lowest evaluated bidder.*
- e. The Respondents be directed to execute the contract in respect of Tender No. KAA/OT/MIA/0010/2021-2022 for Provision of cleaning services of washrooms at Moi International Airport with the Applicant,*
- f. Award of costs to the Applicant.*

Vide letters dated 3<sup>rd</sup> December 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review.

In response, on 10<sup>th</sup> December 2021 the 2<sup>nd</sup> Respondent filed a Response dated 8<sup>th</sup> December 2021 signed by one David K. Ngetich for the General Manager- (Procurement and Logistics).

Vide letters dated 14<sup>th</sup> December 2021, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for Review while inviting them to furnish the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

The Interested Party did not file a response with the Board and neither did any other tenderer.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all requests for review applications 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 written submissions dated 17<sup>th</sup> December 2021 on 20<sup>th</sup> December 2021.

### **APPLICANT'S CASE**

The Applicant avers that pursuant to an invitation to tender by the Respondents it submitted its tender in the subject tender. The Applicant further avers that page 44 of the Tender Document required tenderers to fill a Form of Tender-Securing Declaration according to the instructions indicated which form made reference to tender no. KAA/OT/HSG/0011/2021-2022. It is the Applicant's case that it submitted a responsive tender having filled the form on page 44 as required and that its tender had the lowest tender sum as read at tender opening. However, that it received a notification letter from the Respondents informing it that its tender was non-responsive because the Applicant filled a tender securing form for KAA/OT/HGS/0011/2021-2022 instead of KAA/OT/MIA/0010/2021-2022. In the Applicant's view, this disqualification was irregular because the Applicant filled the tender securing form for KAA/OT/HGS/0011/2021-2022 as provided by the Respondents. Further, that the Applicant cannot be penalised and/or be punished for doing that which the Tender Document provided. It is the Applicant's case that if the Respondents provided the wrong caption of the tender security in the Tender Document; the Respondent ought to have rectified the same through an addendum (which was not done) instead of faulting tenderers for the Respondents failure to rectify such mistake. Further, that it was irregular for the Respondents to award the Interested Party the subject tender yet the Interested Party submitted a tender security which was not in line with the instructions in the Tender Document.

The Applicant further alleges that the Summary of Bills of Quantities under the Tender Document provided for the price schedule to be carried down as grand total per year. It is the Applicant's allegation that the Interested Party was awarded the subject tender despite the Interested Party having submitted a tender security which was not in line with the instructions in the tender document making such an award irregular. According to the Applicant, this is because, the Interested Party was awarded the subject tender at Kshs.21,120,002.88 inclusive of all taxes per annum for three (3) years yet the Interested Party had quoted a figure of Kshs 1,760,000.24 pm which did not comply with the instructions in the Tender Document.

The Applicant also alleges that it was issued with a defective notification of award which contravenes the provisions of the Act rendering it null and void with no consequence in law.

It is the Applicant's view that the Respondents bent the rules in the Tender Document in order to accommodate the Interested Party while unfairly doing away with the Applicant's tender which ought to have been the lowest evaluated tender.

Consequently, the Applicant alleges the Respondents are in breach of the duties imposed on them by the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), specifically section 44 of the Act for failure to comply with the responsibilities therein, have failed to promote integrity and fairness of the

procurement process in breach of Article 10, 47, 201, 207, 227 and 232 of the Constitution and prays to be awarded of the subject tender.

## **RESPONDENTS RESPONSE**

The Respondents contend that a previous cleaning contract for Moi International Airport expired on 31<sup>st</sup> September 2021 and they have had to extend the contract for the previous service provider for a brief period to enable procurement of a new contractor.

The Respondents admits that the Applicant is a tenderer in the subject tender in which tenders were subjected to preliminary, technical and financial evaluation to determine compliance with Tender Document. It is the Respondents contention that the subject tender was awarded to the lowest evaluated tenderer being the Interested Party at Kshs.21, 120,002.88 only inclusive of all taxes per annum for a period of three (3) years.

The Respondents also contend that no tenderer sought clarification from it with respect to the tender securing form making reference to KAA/OT/HGS/0011/2021-2022. However, the 2<sup>nd</sup> Respondents admit that the said tender securing form had an error which could have been addressed through an Addendum.

The Respondents contend that the price schedule provided for a tenderer to provide quotes of the grand total price either per month or per year.

Further, that the Interested Party quoted clearly per month in the Form of Tender corresponding with the amount in the priced schedule and that the Interested Party was awarded the subject tender for being the lowest evaluated tenderer as per the criteria under financial evaluation and in accordance with section 86 (1) of the Act.

It is the Respondents contention that the letter issued to the Applicant informing the Applicant of its unsuccessful tender was done pursuant to section 87(3) of the Act and the entire procurement process of the subject tender was conducted in compliance with the provisions of the Constitution, the Act and Regulations 2020 which process led to a fair outcome with the Interested Party emerging the lowest evaluated tenderer.

The Respondents pray for the Request for Review to be dismissed, for the 2<sup>nd</sup> Respondent to be allowed to conclude the procurement process and for the Applicant to pay the costs of the Review.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings and the confidential documents submitted to it pursuant to section 63 (1) (e) of the Act and finds the following issue calls for determination: -

- 1. Whether the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of Section 80(2) of the Act read with Clause 5 of Preliminary Evaluation Requirements of Part 1: Preliminary Evaluation Criteria,**

**Mandatory Requirements of Section III-Evaluation and Qualification Criteria at page 32 of 146 of the Tender Document.**

- 2. Whether tenderers were required to submit a tender sum/price in the form of tender with respect to price per month or per annum/year for purposes of award of the subject tender.**

The Board will now proceed to address the issue as framed.

**Whether the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of Section 80(2) of the Act read with Clause 5 of Preliminary Evaluation Requirements of Part 1: Preliminary Evaluation Criteria, Mandatory Requirements of Section III-Evaluation and Qualification Criteria at page 32 of 146 of the Tender Document.**

The Respondents vide a letter dated 23<sup>rd</sup> November 2021 notified the Applicant of the outcome of evaluation of its tenders 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 filed a tender securing form for KAA/OT/HQS/0011/2021-2022 instead of KAA/OT/MIA/0010/2021-2022.***

***The tenderer who was determined to be the lowest evaluated and therefore the successful tenderer is M/s Joymacx Enterprises at their quoted price of Kshs 21,120,002.88 inclusive of all taxes per annum for three (3) years."***

The Applicant is aggrieved by this decision of the Respondents in finding its tender unsuccessful and awarding the subject tender to the Interested Party. According to the Applicant, the tender securing form provided in the Tender Document made reference to KAA/OT/HQS/0011/2021-2022 and which form the Applicant duly filled, in accordance with the instructions indicated and therefore its tender should not have been unsuccessful and that the Interested Party's tender should be the one found unsuccessful because the Interested Party submitted a tender security not in compliance with the instructions in the Tender Document.

On their part, the Respondents admit there is an error on the tender securing form provided in the Tender Document but no tenderer sought any clarification on the same to warrant an addendum to be issued for purpose of correcting such mistake.

The Board is cognizant of Article 227 of the Constitution which provides for the kind of system a procurement entity is required to apply when contracting for goods or services and provides as follows:

***Article 227. Procurement of public goods and services***

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
  - (a) .....***
  - (b) .....***
  - (c) ..... and***
  - (d) .....***

The Act of Parliament envisaged in Article 227(2) of the Constitution is the Act. Section 80 of the Act speaks to how evaluation of tenders should be conducted and provides as follows:

***Section 80. Evaluation of tenders***

**(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected .**

**(2) 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.**

**(3) .....**

**(4) .....**

**(5) .....**

**(6) .....**

**(7) .....**

The import of Section 80 (1) and (2) of the Act read with Article 227 (1) of the Act requires an evaluation committee to evaluate tenders in a system that is fair using the criteria and procedure laid out in a tender document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers because such criteria is provided for in a tender document issued to tenderers by a procuring entity.

We have carefully studied the Tender Document and note the criteria for evaluation of the subject tender is contained in Section III: Evaluation and

Qualification Criteria running through pages 32 of 146 to 40 of 146 of the Tender Document.

Clause 5 of the Preliminary Evaluation Requirement of Part I: Preliminary Evaluation Criteria, Mandatory Requirements at page 33 of 146 of the Tender Document is a mandatory criterion for evaluation requiring submission of a duly filled tender securing form.

We also note there are other provisions of the Tender Document that speak to tender securing declaration form as follows:-

Clause 5 of the Invitation To Tender provides as follows:

***All Tenders must be accompanied by a Tender Securing Declaration Form.***

Clause 12 of Section I - Instructions To Tenderers at page 14 of 146 of the Tender Document;

***12.1 The Tender shall comprise the following:***

***a*** .....

***b*** .....

***c Tender Security or Tender-Securing Declaration in accordance with ITT 21.1;***

***d*** .....

***e*** .....

- f*** .....
- g*** .....
- h*** .....
- i***.....

Clause 21.1 and 21.2 of Section I- Instructions To Tenderers at page 18 of 146 of the Tender Document provide as follows;

***21.1 The Tenderer shall furnish as part of its Tender, either a Tender-Securing Declaration or a Tender security, as specified in the TDS, in original form and, in the case of a Tender Security, in the amount and currency specified in the TDS.***

***21.2 A Tender Securing Declaration shall use the form included in Section IV, Tendering Forms.***

Clause ITT21.1 of Section II-Tender Data Sheet at page 29 of 146 of the Tender Document provides as follows:

***The Tender Security shall Not be required for these Tender***

***Tender Securing Declaration form shall be required for these Tender***

Section IV -Tendering Forms at page 44 of the Tender Document provides for the form tenderers were to fill as tender securing declaration as

referred in Clause 21.2 of Section I - Instructions To Tenderers at page 18 of 146 of the Tender Document which form reads as follows:

***I. FORM OF TENDER -SECURING DECLARATION***

***[The Tenderer shall fill in this Form in accordance with the instructions indicated.]***

***Date:.....[date (as day, month and year)] ITT No.:...KAA/OT/HQS/0011/2021-2022.....[number of Tendering process] Alternative No.:.....N/A.....[insert identification No if this is a Tender for an alternative] To:..Kenya Airports Authority.....[complete name of Procuring Entity] We, the undersigned, declare that: We understand that, according to your conditions, Tenders must be supported by a Tender-Securing Declaration.***

***We accept that we will automatically be suspended from being eligible for Tendering or submitting proposals in anycontract with the Procuring Entity for the period of time of [one year] starting on [date], if we are in breach of our obligation(s) under the Tender conditions, because we:***

- a)Have withdrawn our Tender during the period of Tender validity specified in the Form of Tender; or***
- b)Having been notified of the acceptance of our Tender by the Procuring Entity during the period of Tender validity, (i) fail to sign the Contract agreement; or (ii) fail or refuse to***

*furnish the Performance Security, if required, in accordance with the ITT.*

*We understand this Tender Securing Declaration shall expire if we are not the successful Tenderer, upon the earlier of (i) our receipt of your notification to us of the name of the successful Tenderer; or (ii) twenty-eight days after the expiration of our Tender.*

*Name \_\_\_\_\_ of \_\_\_\_\_ the  
Tenderer\*.....  
.....Name of the person duly authorized to sign the Tender  
on \_\_\_\_\_ behalf \_\_\_\_\_ of \_\_\_\_\_ the  
Tenderer\*\*.....  
.....Title of the person signing the Tender.....  
.....Signature of the person named above.....  
.....Date signed.....day of.....,*

*\*: In the case of the Tender submitted by joint venture specify the name of the Joint Venture as Tenderer*

*\*\* : Person signing the Tender shall have the power of attorney given by the Tenderer attached to the Tender*

*[Note: In case of a Joint Venture, the Tender-Securing Declaration must be in the name of all members to the Joint Venture that submits the Tender.]*

It is clear from the provisions of the Tender Document cited hereinbefore it was a mandatory requirement for a tenderer to submit a duly filled form of tender-securing declaration. This tender-securing declaration would take the form provided at page 44 of 146 of the Tender Document. The said form as provided at page 44 of 146 made reference to KAA/OT/HQS/0011/2021-2022. We agree with the 2<sup>nd</sup> Respondent that such reference of KAA/OT/HQS/0011/2021-2022 was erroneous because the subject tender number is KAA/OT/MIA/0010/2021-2022. This form of tender-securing declaration provided at page 44 of 146 of the Tender Document in making reference to KAA/OT/HQS/0011/2021-2022 was therefore required to be for a different tender (for provision of cleaning services for KAA Head Office, ICAO Building, Data Centre, Gym and Training Academy) as can be deduced in the Tender Advertisement Notice of 31<sup>st</sup> August 2021 which tender is different from the subject tender. We also note that this form of tender-securing declaration even though it made reference to KAA/OT/HQS/0011/2021-2022 still provided a blank space for number of Tendering process to be inserted.

We have carefully studied the Applicant's tender and note at page 10 thereof, the Applicant opted to obtain a hard copy of the form of tender-securing declaration perhaps by downloading and then printing out the same. Thereafter, the Applicant filled in the blank spaces by hand but did not insert the subject tender's number which is KAA/OT/MIA/0010/2021-2022. This resulted in the duly filled Applicant's form of tender-securing declaration referring to only KAA/OT/HQS/0011/2021-2022 as provided for at page 44 of 146 of the Tender Document.

We have also carefully studied the Interested Party's tender and note at page 49 thereof, the Interested Party also opted to obtain a hard copy of the form of tender-securing declaration perhaps by downloading and then printing out the same. Thereafter, just like the Applicant, the Interested Party filled in the blank spaces by hand but unlike the Applicant, the Interested Party inserted the subject tender's number, KAA/OT/MIA/0010/2021-2022, in the blank space provided between the words *KAA/OT/HQS/0011/2021-2022* and *[number of Tendering process]* at page 44 of 146 of the Tender Document. This resulted in the duly filled Interested Party's form of tender-securing declaration referring to both KAA/OT/HQS/0011/2021-2022 as provided for at page 44 of the Tender Document and KAA/OT/MIA/0010/2021-2022 with respect to the subject tender as inserted by hand by the Interested Party.

A tender-securing declaration is a form of security a tenderer issues to a procuring entity to secure the fulfillment of any obligation in a tender process by the issuing tenderer as can be deciphered in the interpretation section 2 of the Act. The difference between a tender security and a tender-securing declaration is that the former is in most cases issued to a procuring entity by third parties e.g. banks, insurance companies or other permitted financial institutions with an absolute value (mostly monetary value) on behalf of a tenderer while a tender-securing declaration is issued to a procuring entity by a tenderer participating in a tender process and bears no absolute value.

It is therefore absurd that a tenderer would issue a tender-securing declaration for use in the subject tender, KAA/OT/MIA/0010/2021-2022, while referring to a different tender, KAA/OT/HQS/0011/2021-2022 (for provision of cleaning services for KAA Head Office, ICAO Building, Data Centre, Gym and Training Academy), without mentioning the subject tender at all. We say so because, in the event a tenderer fails to fulfill any obligation in the subject tender process, the 2<sup>nd</sup> Respondent will face hurdles when enforcing this kind of tender-securing declaration for the reason that it relates to a different tender from the subject tender. Logic dictates that a tenderer is required to issue a tender-securing declaration in the subject tender making reference to the subject tender's number being KAA/OT/MIA/0010/2021-2022.

Following the 2<sup>nd</sup> Respondent's admission that the form of tender-securing declaration provided at page 44 of 146 of the Tender Document bore an error with respect to referring to KAA/OT/HQS/0011/2021-2022 which we have established is a different tender (for provision of cleaning services for KAA Head Office, ICAO Building, Data Centre, Gym and Training Academy) from the subject tender, it follows that tenderers cannot be faulted for using a template that has been provided by the 2<sup>nd</sup> Respondent albeit with erroneous reference to tender number. It therefore follows that the 2<sup>nd</sup> Respondent unfairly found the Applicant's tender unsuccessful on account of an error that the 2<sup>nd</sup> Respondent committed in the template of the form of tender-securing declaration provided at page 44 of 146 of the Tender Document.

In the circumstances we find that the Evaluation Committee did not evaluate the Applicant's tender in accordance with the provisions of Section 80(2) of the Act read with Clause 5 of Preliminary Evaluation Requirements of Part I: Preliminary Evaluation Criteria, Mandatory Requirements of Section III-Evaluation and Qualification Criteria at page 32 of 146 of the Tender Document.

**Whether tenderers were required to submit a tender sum/price in the form of tender with respect to price per month or per annum/year for purposes of award of the subject tender.**

The Applicant alleges that the summary of bills of quantities in the tender Document provided for the price schedule to be carried down as grand total per year. It is the Applicant's allegation that the Interested Party ought not to have been awarded the subject tender because the Interested Party quoted a figure of Kshs.1, 760,000.24 p.m. as noted during the virtual opening of tenders which was not in compliance with the summary of bills of quantities.

On their part, the Respondents contend that the priced schedule provided for tenderers to either provide quotes of the grand total price either per month or per year. They further contend that the Interested Party's tender quote clearly stipulated per month in the form of tender which amount corresponded with the amount in the price schedule and therefore complied with the requirement of the priced schedule.

We have perused the Tender Document and note that it provides a template of a form of tender to be adopted by tenderers on their respective letterheads under Section I – Tendering Forms at pages 41 of 146 to 43 of 146 of the Tender Document as follows:

### ***1. FORM OF TENDER INSTRUCTIONS TO TENDERERS***

***i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the Tenderer's complete name and business address.***

***ii) All italicized text is to help Tenderer in preparing this form.***

***iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDERER attached to this Form of Tender.***

***iv) The Form of Tenders shall include the following Forms duly completed and signed by the Tenderer.***

***a) Tenderer's Eligibility-Confidential Business Questionnaire***

***b) Certificate of Independent Tender Determination***

***c) Self-Declaration of the Tenderer***

***1.1 Date of this Tender submission: 14th September 2021 [insert date (as day, month and year) of Tender submission]***

***PROVISION OF CLEANING SERVICES OF WASHROOMS AT MOI INTERNATIONAL AIRPORT.***

***ITT No.: KAA/OT/MIA/0010/2021-2022[insert number of ITT process] Alternative No.: N/A [insert identification No if this is a Tender f or an alternative] To: Kenya Airports Authority[insert complete name of Procuring Entity]***

***a) No reservations: We have examined and have no reservations to the tendering document, including Addenda issued in accordance with ITT9;***

***b) Eligibility: We meet the eligibility requirements and have no conflict of interest in accordance with ITT4;***

***c) Tender-Securing Declaration: We have not been suspended nor declared ineligible by the Procuring Entity based on execution of a Tender-Securing Declaration or Proposal- Securing Declaration in Kenya in accordance with ITT21;***

***d) Conformity: We offer to provide the Non-Consulting Services inconformity with the tendering document of the following:[insert a brief description of the Non-Consulting Services];***

***e) Tender Price: The total price of our Tender, excluding any discounts offered in item(f) below is: [Insert one of the options below as appropriate]***

***Total price is: [insert the total price of the Tender in words and figures, indicating the various amounts in local currency];***

***f) Discounts: The discounts offered and the methodology for their application are:***

***i) The discounts offered are: [Specify in detail each discount offered.]***

***ii) The exact method of calculations to determine the net price after application of discounts is shown below: [Specify in detail the method that shall be used to apply the discounts];***

***g) Tender Validity Period: Our Tender shall be valid for the period of 126 days from the date fixed for the Tender submission deadline (specified in TDS 23.1(as amended if applicable),and it shall remain binding upon us and may be accepted at any time before the expiration of that period.***

***h) Performance Security: If our Tender is accepted, we commit to obtain a Performance Security in accordance with the tendering document;***

***i) One Tender Per Tenderer: We are not submitting any other Tender(s) as an individual Tenderer, and we are not participating in any other Tender(s) as a Joint Venture member or as a subcontractor, and meet the requirements of ITT4.3, other than alternative Tenders submitted in accordance with ITT14;***

***j) Suspension and Debarment: We, along with any of our subcontractors, suppliers, consultants, manufacturers, or service providers for any part of the contract, are not subject to, and not controlled by any entity or individual that is subject to, a temporary suspension or a debarment imposed by the PPRA. Further, we are not ineligible under Kenya's official regulations or pursuant to a decision of the United Nations Security Council;***

***k) State-owned enterprise or institution: [select the appropriate option and delete the other] [We are not a state-owned enterprise or institution] / [We are a state-owned enterprise or institution but meet the requirements of ITT 4.6];***

***g) Commissions, gratuities and fees: We have paid, or will pay the following commissions, gratuities, or fees with respect to the Tendering process or execution of the Contract: [insert complete name of each Recipient, its full address, r gratuity].***

<b>Name of Recipient</b>	<b>Address</b>	<b>Reason</b>	<b>Amount</b>

*(If none has been paid or is to be paid, indicate "none.")*

*a) [Delete if not appropriate, or amend to suit] We confirm that we understand the provisions relating to Standstill Period as described in this tendering document and the Procurement Regulations.*

*l) Binding Contract: We understand that this Tender, together with your written acceptance thereof included in your Form of Acceptance, shall constitute a binding contract between us, until a formal contract is prepared and executed;*

*m) Not Bound to Accept: We understand that you are not bound to accept the lowest evaluated cost Tender, the Best Evaluated Tender or any other Tender that you may receive; and*

*o) Fraud and Corruption: We hereby certify that we have taken steps to ensure that no person acting for us or on our behalf engages in any type of Fraud and Corruption.*

***p) Collusive practices: We hereby certify and confirm that the tender is genuine, non- collusive and made with the intention of accepting the contract if awarded. To this effect we have signed the "Certificate of Independent tender Determination" attached below.***

***q) Code of Ethical Conduct: We undertake to adhere by the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from (specify website) during the procurement process and the execution of any resulting contract.***

***r) We, the Tenderer, have completed fully and signed the following Forms as part of our Tender:***

***i) Tenderer's Eligibility; Confidential Business Questionnaire—to establish we are not in any conflict to interest.***

***ii) Certificate of Independent Tender Determination—to declare that we completed the tender without colluding with other tenderers.***

***iii) Self-Declaration of the Tenderer—to declare that we will, if awarded a contract, not engage in any form of fraud and corruption.***

***iv) Declaration and commitment to the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal.***

***Further, we confirm that we have read and understood the full content and scope of fraud and corruption as informed in "Appendix 1- Fraud and Corruption" attached to the Form of Tender.***

***Name of the Tenderer:..... \*[insert complete name of person signing the Tender] Name of the person duly authorized to sign the Tender on behalf of the***

***Tenderer:.....\*\*[insert complete name of person duly authorized to sign the Tender] Title of the person signing the Tender:..... [insert complete title of the person signing the Tender]***

***Signature of the person named above: .....[insert signature of person whose name and capacity are shown above]***

***Date signed..... [insert date of signing] day of .....[insert month], [insert year]***

Nowhere in the form of tender provided in the Tender Document required tenderers to quote their tender sum/price per month or per annum/year.

On the other hand, the price schedule of services provided under the summary of bills of quantities required tenderers to quote their total price per month and total price per year as follows:

**SUMMARY OF BILLS OF QUANTITIES**

*Having examined and priced the bills of quantities for the above services, inspected and surveyed the premises, obtained necessary information and read the general terms and conditions of tender and agreement terms I/we hereby tender the under mentioned charges.*

**PRICE SCHEDULE OF SERVICES**

<b><i>Item</i></b>	<b><i>Description</i></b>	<b><i>UOM</i></b>	<b><i>Qty</i></b>	<b><i>Unit price per month (KES)</i></b>	<b><i>Other Charges (if any) per month</i></b>	<b><i>Total Price per month</i></b>	<b><i>Total price per year</i></b>
<b><i>1</i></b>	<b><i>Cleaning of Washrooms</i></b>	<b><i>NO</i></b>	<b><i>167</i></b>				
<b><i>2</i></b>	<b><i>Cabbage collection to Central Collection point</i></b>	<b><i>Sum</i></b>	<b><i>1</i></b>				
<b><i>3</i></b>	<b><i>Subtotal</i></b>						
<b><i>4</i></b>	<b><i>Add 16% VAT and any other</i></b>						

	<i>applicable taxes</i>						
<b>4</b>	<b><i>Grand Total carried to form of tender</i></b>						

***Note: Bidders are advised to ensure that the quoted total cost covers the staff salaries and a reasonable profit. Where salaries indicated under compliance table above do not meet the minimum government wage rate as gazetted or you have costed your bid below the indicated salary (basic plus house allowance) to be paid to each of the categories of staff, the bid shall not be considered as responsive irrespective of having met all the other requirements.***

The Interested Party completed its summary of bills of quantities by providing a Grand Total as 1,760,000.24 in the second last column of the table provided hereinbefore and which column was for total price per month and also as 21,120,002.88 in the last column of the table provided hereinbefore and which column was for total price per year. However, the only grand total amount carried to the Interested Party's form of tender was that of Kshs.1,760,000.24p.m(One Million, Seven Hundred and Sixty Thousand and Twenty Four Cents) per month. In our view even though the price schedule of services provided for a grand total per month and per year which the Interested Party provided, the form of tender did not specify whether the tender sum was to be per month or per year. In our view, we find no prejudice is occasioned on any tenderer or the 2<sup>nd</sup>

Interested Party as long as a tenderer has quoted their tender price/sum either per month or per year in the form of tender because one can convert such quote to per year if quoted per month and to per month if quoted per year by multiplying or dividing by 12months respectively. It would be unfair to disqualify a tenderer who quoted its tender price per month on the basis that they did not quote their tender sum/price per year in light of our finding that the form of tender did not specify that the tender sum be quoted per month or per year.

In the circumstances, we find a tenderer could either submit their tender sum/price in the form of tender with respect to price per month or per year for purposes of award of the subject tender.

We have perused the Evaluation Report and note at page 42 thereof, the Applicant was disqualified at the preliminary stage of evaluation on only one reason (filling the Tender Securing Form for HQ-KAA/OT/HQS/0011/2021-2022 instead of KAA/OT/MIA/0010/2021-2021) and which reason we have pronounced ourselves on. It follows; the Applicant's tender should be admitted to the technical evaluation stage and be evaluated at the Technical Evaluation stage. We also note other than the Applicant, there are two other tenderers namely, Dechrip East Africa Ltd and Nakaj Services Ltd whose tenders were disqualified at the preliminary evaluation stage for only one reason and which reason is similar to the one that caused the Applicant's tender to be disqualified. Fairness dictates that these two tenderers' tenders should equally be admitted at the Technical Evaluation stage for evaluation.

The upshot of our findings in this review is that it succeeds only with respect to the following specific orders.

### **FINAL ORDERS**

In exercise of the powers conferred upon it under section 173 of the Act, the Board makes the following orders with respect to the Request for Review filed on 3<sup>rd</sup> December 2021:

- 1. The letters of notification dated 23<sup>rd</sup> November 2021 notifying the Applicant and all other unsuccessful tenderers of the outcome of their tenders in tender no. KAA/OT/MIA/0010/2021-2022 for Provision of Cleaning Services of Washrooms at Moi International Airport be and are hereby cancelled and set aside.**
  
- 2. The letter of notification dated 23<sup>rd</sup> November 2021 awarding the Interested Party tender no. KAA/OT/MIA/0010/2021-2022 for Provision of Cleaning Services of Washrooms at Moi International Airport be and is hereby cancelled and set aside.**
  
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee to admit the tenders submitted by the Applicant, Dechrip East Africa Ltd and Nakaj Services Ltd to the Technical Evaluation stage and evaluate them together**

with all other tenders that qualified to be evaluated at the Technical Evaluation stage.

4. Further to order 3, the 1<sup>st</sup> Respondent is hereby ordered to proceed with the procurement process of tender no. KAA/OT/MIA/0010/2021-2022 for Provision of Cleaning Services of Washrooms at Moi International Airport to its logical conclusion taking into consideration the Board's finding in this review.
5. Given that the subject tender's procurement proceedings are not complete each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 23<sup>rd</sup> day of December 2021



.....  
**CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**