

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 41/2022 OF 5TH MAY 2022

BETWEEN

LEONARDO TECHNOLOGIES & SERVICES

LIMITED-----APPLICANT

-VERSUS-

ACCOUNTING OFFICER

KENYA CIVIL AVIATION AUTHORITY-----1ST RESPONDENT

KENYA CIVIL AVIATION AUTHORITY-----2ND RESPONDENT

INDRA LIMITED-----INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Civil Aviation Authority with respect to Tender No. KCAA/032/2021-2022 for Supply, Training, and Commissioning of Area Control Centre and Disaster Recovery System Equipment for Lot1: Supply, Delivery, Installation, and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system)

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Steven Oundo, OGW | - Member |
| 3.Ms. Phyllis Chepkemboi | -Member |
| 4. Dr. Paul Jilani | -Member |
| 5.Rahab Robi | -Member |

IN ATTENDANCE

- | | |
|---------------------|----------------------------------|
| Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

Kenya Civil Aviation Authority the Procuring Entity and the 2nd Respondent herein, is a State Corporation established under the Kenya Civil Aviation Act, 2013 with a mission to economically and efficiently plan, develop, manage and regulate a modern, safe and secure civil aviation industry while delivering quality training and Air Navigation Services (ANS).

The 2nd Respondent invited tenders for Supply, Installation, Training and Commissioning of Area Control Center and Disaster Recovery System Equipment (LOT 1 TO 5) - Tender No. KCAA/032/2021-2022.

This was an International Open Tender published in the Daily Nation and Mygov Newspaper (my.gov.go.ke) on Tuesday, 21st December 2021. The tender was also published on the 2nd Respondent's website www.kcaa.or.ke and the government tender portal www.tenders.go.ke.

The tender initial closing date for submission was Thursday, 27th January 2022. The 2nd Respondent received various requests for extension of the tender submission date by some interested tenderers and the tender submission date was first extended to 9th March 2022. However, some interested tenderers requested for further extension and the tender submission deadline was further extended to Friday, 25th March 2022 at 11:00AM.

Opening of the Tenders

The tender opening was done on 25th March 2022 immediately after 11:00hrs East African Time in the presence of tenderers' representatives present who chose to attend. The Applicant was represented by Ms. Ann Wambui and Mr. Richard Njuguna.

The five (5) tenderers who responded for Lot 1 (hereinafter referred to as the 'subject tender') are as indicated in table 1 below;

Firms under Lot 1

Bidder	Name of Bidder	Bid Price
1	Indra Limited	Lot 1 – Euro 7,696,600
2	Intelcan Techno systems Inc.	Lot 1 – USD 6,766,083.88,
4	IBrosss.r.o.	Lot 1- Euro 6,991,834
9	Leonardo Technologies & Services Limited	Lot 1- KSHS 127,223,232, USD 1,201,296, and EURO 5,749,076,
15	Geci Espanola S.A.	Lot 1 – Euro 8,674,820.25

Evaluation of the Tenders of the subject tender

The 2nd Respondent's Evaluation Committee of the subject tender comprised of five (5) members and the secretary. The Evaluation Committee adopted the evaluation criteria contained in the blank tender document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document') which comprised of the following:

- a) Preliminary tender requirements
- b) Technical capability assessment
- c) Financial evaluation.
- d) Due diligence / post qualification

With regard to the Preliminary Requirements Evaluation Criteria, the tenderers were required to comply with all the mandatory requirements in

order to proceed to the next stage of mandatory technical evaluation. The outcome of the Preliminary tender requirements under Lot 1 was that three (3) tenderers out of the five (5) tenderers who quoted for Lot 1 met the preliminary requirements under Lot 1 while two (2) tenderers did not meet the requirements. The three (3) responsive tenderers were evaluated further under technical evaluation criteria for Lot 1.

The responsive tenderers under the preliminary requirements under Lot 1 were as follows:

Responsive tenderers for Lot 1

Lot No	Description of the Lot	Bidder No.
1.	Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system	1, 9 and 15

With regard to the Mandatory Technical Evaluation Criteria, responsive tenderers under Lot 1 were required to meet ALL the technical requirements as per the technical specifications provided in the Tender Document.

All the three tenderers evaluated under the technical evaluation met all the requirements and were therefore recommended to proceed to Financial evaluation Stage .

Financial evaluation

The tender prices were checked for arithmetic errors, converted into the evaluation currency in accordance with Clause 2.23 of the Tender Document namely Kenya shillings and added up to get the total tender price (Kenya shillings) for all the tenderers and ranked as presented in table below:

Financial comparison

No	Bidder Name	Read out price	Corrected Tender Price	Error	Exchange rate used	Price in Kshs after conversion	Ranking
1.	Indra Limited	Euro 7,696,600	Euro 7,696,600	0	126.0665	970,283,423.90	1
2.	Leonardo Technologies & Services Limited	KSHS127,223,232	KSHS127,223,232	0	1	127,223,232	2
		USD 1,201,296	USD 1,201,296	0	114.7853	137,891,121.75	
		EURO 5,749,076	EURO 5,749,076	0	126.0665	724,765,889.55	
		Total Price				989,880,243.3	
3.	Geci Espanola S.A.	Euro 8,674,820.25	Euro 8,674,820.25	0	126.0665	1,093,604,227.05	3

From the table above, it was noted that there was no arithmetic errors in all the three tenders. The Applicant quoted for Lot 1 in three currencies namely Kenya Shillings, United States Dollars and Euro.

The lowest evaluated tenderer for Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system under Lot 1 was M/s Indra Limited at a total cost of Euro 7,696,600. This is equivalent to Kshs 970,283,423.90 using the Central Bank of Kenya Exchange rate as at the date of tender submission deadline.

The following was the exchange rate used for conversion to single currency for purposes of evaluation.

Exchange rate used

No	Description	Information
1.	Currency used for tender evaluation	Kshs
2.	Exchange rate - EURO	126.0665
3.	Exchange rate - USD	114.7853
4.	Effective date of exchange rate	25/03/2022
5.	Authority or publication specified for exchange rate	Central Bank of Kenya

Due diligence

It was noted that the lowest tenderer M/s Indra Limited, the Interested Party herein, had supplied and installed a similar Air Traffic Management

System successfully in 2021 for the 2nd Respondent. Before the award of the subject tender, the 2nd Respondent conducted detailed due diligence on similar projects undertaken by the Interested Party and confirmed that the Interested Party had adequate experience to implement the project with all the required components for the subject tender. Further, specific due diligence on the AMAN/DMAN component was undertaken from the previous clients of the Interested Party where the component had been successfully implemented as indicated in the Tender Document of the Interested Party. The 2nd Respondent confidentially wrote to the clients of the Interested Party and obtained confidential response which confirmed that indeed the Interested Party had implemented the component of AMAN/DMAN.

The Interested Party also provided the simulator at East African School of Aviation which evaluation Committee noted is currently being used for training.

Professional opinion and Notification to Tenderers

Following the approval of award and professional opinion by the 1st Respondent, the 2nd Respondent proceeded to notify all the unsuccessful tenderers and successful tenderers of the outcome of the procurement process vide letters dated 21st April, 2022.

REQUEST FOR REVIEW

M/s Leonardo Technologies & Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 5th May 2022 and filed on even date together with a Supporting Affidavit sworn on 5th May 2022 by Dominico Lovino, through the firm of KRK Advocates LLP Advocates, seeking the following orders: -

- 1. That the 2nd Respondent's decision communicated to the Applicant by way of Notification of Intention to Award Contract letter dated 21st April 2022 declaring the Interested Party as the successful bidder of Tender No. KCAA/032/2021-2022 for Supply, Installation, Training and Commissioning of Area Control Centre and Disaster Recovery System Equipment for Lot 1: Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system be set aside and nullified in its entirety.***
- 2. A declaration that the 2nd Respondent failed to evaluate the Interested Party's bid in accordance with the Tender Document, the Public Procurement and Asset Disposal Act No. 33 of 2015 and the Regulations to determine its qualification and responsiveness.***
- 3. That the 2nd Respondent do issue a letter of award of Tender No. KCAA/032/2021-2022 for Supply, Installation, Training***

and Commissioning of Area Control Centre and Disaster Recovery System Equipment for Lot 1: Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system to the Applicant being the most competent and the real lowest evaluated bidder.

4. That the 2nd Respondent do pay the Applicant the costs of and incidental to this Review; and

5. Any other such orders that the Review Board may deem fit to issue.

In response, the Respondents lodged a Memorandum of Response to the Request for Review dated 11th May 2022 and filed on 12th May, 2022 through its inhouse counsel, Kuchio Tindi Advocate, while the Interested Party lodged a Replying Affidavit sworn on 16th May 2022 and filed on even date through the firm of Iseme Kamau & Maema Advocates.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate the Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request 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 shall be deemed as properly filed if they bear the official stamp of the Board.

The Applicant lodged its Written Submissions dated 18th May, 2022 and filed on 20th May 2022, the Interested Party also lodged its Written Submissions dated 20th May 2022 and filed on 23rd May 2022.

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination: -

I. Whether there was procedural impropriety and inconsistencies in evaluating the Applicant's price(s) by failing to consider prices as read out during tender opening and failing to exclude DSA provisional sum and VAT component.

I (a) whether the Applicant's price is eligible for margin of preference.

ii. Whether the notification of award letter lacked legitimacy having been signed by the Director General on his last day in office.

- iii. Whether the Interested Party met the requirement of Clause 1 of the Mandatory eligibility criteria and whether the Commissioning Certificate provided by the Respondent for tender No. KCAA/057/2019-2020 is false, fraudulent, and illegal;*
- iv. Whether the Interested Party satisfied the requirements at the Preliminary Evaluation Stage with respect to the following criteria: -*
- Clause (23) on Annual turnover;*
 - Clause (24) on Ability to raise capital*
 - Clause (No. 21 (a) on specific Experience*
 - Respondent requires is a modern, up to date and efficient Air Traffic Management System*
 - Due diligence will reveal that the Interested Party has not met the requirements specified in paragraph 2*

ISSUE I

Whether there was procedural impropriety and inconsistencies in evaluating Applicant's price(s) by failing to consider prices as read out during tender opening and failing to exclude DSA provisional sum and VAT component.

I (a) whether the Applicant price is eligible for margin of preference.

APPLICANT'S CASE

The Applicant submits that it was represented by two (2) representatives namely ,Ms Ann Wambui and Mr. Richard Njuguna as confirmed by the Respondents in annexure 1 of their response at the tender opening of the subject tender. The Applicant further submits that the said representative attended and specifically Ms.Ann Wambui took note of the sums that were read out during the tender opening meeting.

The Applicant avers that according to Ms. Wambui notes, the tender sum as read out by the Respondents' at the tender opening committee in respect to the Applicant was Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00 for Lot 1 equivalent to Euro 6,769,007.13 at the prevailing exchange rate of 1 Euro at 126.0665 Kenya Shillings and 1 USD at 114.7853 on 25 March 2022 and this was the sum submitted by the Applicant exclusive of VAT.

The Applicant state that it now emerges that the Applicant's tender sum as recorded in the Respondents' tender opening Minutes was Kenya shillings 127,223,232.00 (One Hundred and Twenty Seven Million, Two Hundred Twenty Three Thousand, Two Thirty Two Shillings Only), United States

Dollars (USD) 1,201,296.00 (One Million, Two Hundred and One Thousand, Two Hundred and Ninety Six US Dollars Only), and Euro 5,749,076.00 (Five Million, Seven Hundred and Forty Nine Thousand and Seventy Six Euro Only). The Applicant submits that this was indeed the Applicant's tender sum inclusive of VAT. However the Applicant argues that this was not the tender sum that was read out by the Tender Opening Committee.

The Applicant contends that the Respondents modified the tender as read out during the tender opening meeting when they recorded their minutes. This is because the tender opening minutes reflect a different tender price for the Applicant from what was read out. This discovery as alluded by the Applicant was made due to the vigilance of the Applicant's representatives who took notes during the tender opening meeting.

The Applicant in conclusion reiterates that the tender price as read out by the tender opening committee was Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00 for Lot 1 equivalent to Kshs 853,345,037.33 at the prevailing exchange rate of 1 Euro at 126.0665 Kenya Shillings and 1 USD at 114.7853 on 25 March 2022. Therefore, the Applicant states that it left the tender opening meeting knowing that they were the lowest tenderer in their lot.

The Applicant submits that the analysis of the lowest evaluated tenderer is pegged on the tender sums as read out in the tender opening committee

and any deviation thereof is contrary to Section 82 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). The Evaluation Committee was informed by the tender opening minutes as forwarded to them. They therefore proceeded with false figures when evaluating the tender prices to find in favour of the Interested Party, as such, the Applicant submits that the Evaluation Committee based its analysis on the wrong price provided in the opening minutes rather than the price read out.

The Applicant alleges that the adjustment or change of its tender sums from what was read out in the tender opening meeting and substituting therefore with another sum is a straightforward procedural impropriety and unfairness of the whole tendering process from inception and the same affects the entire process leading up to the award of the tender to the Interested Party.

It is therefore the Applicant's submission that the Evaluation Committee ought to have evaluated the Applicant's tender as per the tender read out at the tender opening i.e. Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00 for Lot 1.

The Applicant submits further that it was the lowest evaluated tenderer had the Respondents removed the Provisional Sums in the Applicant's tender. In other words, the Applicant alleges that the

Respondents erroneously found the Interested Party to be the lowest evaluated tenderer based on the wrong computation of the tender prices and argues that in computing the tender price, it was clear under clause 37.4 (a) of the Tender Document the provisional sums and contingencies ought to be excluded in order to arrive at the lowest evaluated tender price.

PROCURING ENTITY'S RESPONSE

In response, the 2nd Respondent states that the Applicant's contention under paragraph 8 of the request for review is clandestinely misleading. The figures stated by the Applicant under paragraph 8 of the request for review are without the mandatory 16% Value Added Tax (VAT) component.

The 2nd Respondent contends that based on the form of tender submitted by the Applicant, it is explicit that the figures therein of Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00 for Lot 1 were not inclusive of the mandatory 16% VAT.

The 2nd Respondent submits that the above is buttressed by the Applicants' schedule No. 5 on Grand Summary at page 4026 of the Applicants' tender which corroborates the grand total price as KES 127,223,232.00, USD 1,201,296.00 and Euro 5,749,076.00.

The 2nd Respondent submits that, the purported amendment of the tender price by the Applicant is not only a desperate futile afterthought but basically a ploy to steal a match off the realms of the Interested Party. At any rate the 2nd Respondent noted that, the Applicant was successful in Lot 4 where the tender price was quoted in the same format as in Lot 1. The Applicant has not disputed the same criteria used to award Lot 4 to them successfully but faults the same criteria when they were not awarded Lot 1. This is approbating and reprobating at the same time.

This is particularly fortified by the fourth clarification dated 11th March 2022 at clauses 25 and 26 on page 7 of 8 that was made by the 2nd Respondent in answer to the requests for clarifications from the tenderers. The clarifications were to the effect that:

“All applicable taxes MUST be included and will be used for evaluation purposes to determine the most economical bid”.

The Interested Party's tender price was equally converted from Euro to Kenya Shilling using the same Central Bank of Kenya selling exchange rate prevailing at the tender submission date.

The 2nd Respondent states that its imperative to note, the Applicant quoted for various components under Lot 1 in different currencies. As such, to compute the final tender price, all the Applicants' prices were converted to

Kenyan Shillings using the Central Bank of Kenya selling exchange rate prevailing at the tender submission date. This is as per Section II - Tender Data Sheet, ITT 35.1 on page 27 of 288 of the Tender Document.

The conversion from different currencies worked out as shown in the table below as reported in the Evaluation Report;

Table 10: Tender Price conversion and comparison

N o	Bidder Name	Read out price	Corrected Tender Price	Error	Exchange rate used	Price in Kshs after conversion
1.	Indra Limited	Euro 7,696,600	Euro 7,696,600	0	126.0665	970,283,423.90
2.	Leonardo Technologies & Services Limited	KSHS 127,223,232	KSHS 127,223,232	0	1	127,223,232
		USD 1,201,296	USD 1,201,296	0	114.7853	137,891,121.75
		EURO 5,749,076	EURO 5,749,076	0	126.0665	724,765,889.55
		Total Price				989,880,243.30

It's the 2nd Respondents case therefore that, it determined the Applicant was not the lowest evaluated tenderer because the Applicant's tender price

was KES 989,880,243.30 whilst the Interested Party's tender price was KES 970,283,423.90(see table 10 above). Accordingly, it was the Interested Party's tender that was the lowest evaluated tender upon which the 2nd Respondent awarded the subject tender.

INTERESTED PARTY'S RESPONSE

The Interested Party by a Replying Affidavit dated 16th May2022 and filed on an even date contends that the allegation that the Respondents ought to have relied on the figures indicated in the notes taken by the Applicant's representative during tender opening in the sum of Euros 6,769,007.03 lacks merit because such figures in those notes are irrelevant. In any event, the price included in the tenderer's tender had to be evaluated in accordance with the requirements of Clause 19 as well as Clause 37.4 of ITT of the Tender Document, which requirements the Respondents were bound to consider before arriving at the lowest evaluated tender.

The Interested Party further contends that the figures noted in the Applicant's notes during tender opening of Euros 6,769,007.03 differs from the figures indicated by the Applicant in the unsigned document marked as annexure DI7 showing the price of KES 127,223,232.00, USD 1,201,295.00 and Euros 5,749,076.00. Which sums include VAT of 16% which price was to be transferred to the form of tender and which is the price which appears in the notification of award letter. The figures indicated in the Applicant's notes clearly did not include VAT, which was required to be

included as confirmed by the Respondents in the Response to Clarifications dated 11 March 2022 at Item No.25 and No.26 which confirmed that all applicable taxes MUST be included and would be used for evaluation purposes for purposes of determining the most economical tender.

APPLICANT'S REJOINDER

In a rejoinder the Applicant's filed Supplementary Affidavits in Support of the Request for Review both sworn on 17 May 2022 by Ms. Ann Wambui and Domenico Iovino respectively reiterating that the Applicant's tender price read out by the Respondents 'tender opening committee has some inconsistencies since the Respondent did not specify whether the said tender prices as read out excluded VAT.

Further, the Applicant at paragraphs 20 and 21 of the Supplementary Affidavit of Iovino is that a margin of preference should be applied to its tender especially the Kenya currency component.

The Applicant submits that it was the only tenderer in LOT 1 to quote the tender sum in 3 currencies which evidenced sourcing some goods and services from Kenya promoting Kenyan local economy and providing employment locally. Annexure DI-7 of the Applicant's Affidavit in Support of the Request for Review shows that some Plant and Mandatory Spare Parts (Total Schedule No. 1), Design Services (Total Schedule No. 3) and

Installation and other services (Total Schedule No. 4) would be sourced locally from within Kenya in Kenya Shillings (KES) currency.

The Board notes that the instant Request for Review was triggered by the Respondent's decision communicated by way of Notification of Intention to Award Contract letter dated 21st April 2022 addressed to and notifying the Applicant that the Interested Party was the successful tenderer in respect of Tender No. KCAA/032/2021-2022 for Lot 1 and that the Applicant's tender was unsuccessful because it was not the lowest evaluated tenderer.

The Board notes that the Applicant was ranked 2 at the financial evaluation stage thus its evaluated price was not lower than that of the Interested Party who was ranked 1st at the financial evaluation stage.

The Board is cognizant of the provision of Section 82 of the Act which states that: -

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

Of the Tender Document

Fourth clarification dated 11th March 2022 at clauses 25 and 26 provided as follows:

"All applicable taxes MUST be included and will be used for evaluation purposes to determine the most economical bid".

The Board notes that the Applicant was aggrieved by the said Notification of Award because according to the Applicant it had the lowest tender price as **read out** during the tender opening meeting, as noted down by the Applicant's representative Ms.Wambui which amount was read out by the Respondents' tender opening committee in respect to the Applicant as Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00. This being the sum submitted by the Applicant exclusive of VAT.

The Applicant's contention under paragraph 8 of the request for review is that the figures stated by it under paragraph 8 of the request for review are without the mandatory 16% Value Added Tax (VAT) component and further, that its prices have provisional sum which ought to be omitted/excluded and which provisional sum were not provided by the 2nd Respondent.

The Board studied the Applicant's original tender which has prices for the subject tender as provided in Commercial offer and the form of tender pages 4009 to 4013. The Board extracts the content of the same as shown below:-

COMMERCIAL OFFER

***SUBJECT: Commercial Proposal and Price Quotation for Lot 1
(Supply, Delivery, Installation and Commissioning of an
Air Traffic Management System, GPS Clock System and
Voice & Data Logging System)***

Reference: TENDER (ITT) NO. KCAA/032/2021-2022

Having examined the tendering documents TENDER (ITT) NO. KCAA/032/2021-2022, we are pleased to submit to your kind attention our Commercial Proposal and Price Quotation to Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock System and Voice & Data Logging System in response to the invitation to tender in reference.

Our offered Total Tender Price for KCAA/032/2021-2022 Lot 1 is quoted in three currencies,

- a. KES 109,675,200.00 (ONE HUNDRED AND NINE MILLION, SIX HUNDRED AND SEVENTY FIVE THOUSAND, TWO HUNDRED SHILLINGS ONLY) PLUS 16% VAT KES 17,548,032.00 (SEVENTEEN MILLION, FIVE HUNDRED AND FORTY EIGHT THOUSAND, THIRTY TWO SHILLINGS ONLY), GIVING A TOTAL OF KES 127,223,232.00 (ONE HUNDRED AND TWENTY SEVEN MILLION, TWO HUNDRED TWENTY THREE THOUSAND, TWO HUNDRED THIRTY TWO SHILLINGS ONLY).***

b. USD 1,035,600.00 (ONE MILLION, THIRTY FIVE THOUSAND, SIX HUNDRED US DOLLARS ONLY) PLUS 16% VAT USD 165,696.00 (ONE HUNDRED AND SIX FIVE THOUSAND, SIX HUNDRED AND NINETY SIX US DOLLARS ONLY), GIVING A TOTAL OF USD 1,201,296.00 (ONE MILLION, TWO HUNDRED AND ONE THOUSAND, TWO HUNDRED AND NINETY SIX US DOLLARS ONLY).

c. EURO 4,956,100.00 (FOUR MILLION, NINE HUNDRED AND FIFTY SIX THOUSAND AND ONE HUNDRED EURO ONLY) PLUS 16% VAT EURO 792,976.00 (SEVEN HUNDRED AND NINETY TWO THOUSAND, NINE HUNDRED AND SEVENTY SIX EURO ONLY), GIVING A TOTAL OF EURO 5,749,076.00 (FIVE MILLION, SEVEN HUNDRED AND FORTY NINE THOUSAND, AND SEVENTY SIX EURO ONLY).

We undertake Supply, Delivery, Installation and Commissioning of an Air Traffic Management System, GPS Clock System and Voice & Data Logging System in accordance with the implementation schedule specified in the Technical Proposal at the offered price or such other sums that may be determined during the supply contract negotiations, once our price is accepted and a valid supply contract is signed within the validity period of our price quotation.

***The amount is in accordance with the attached Price Schedules,
and is an integral part of this proposal.***

Domenico Iovino

Executive Chairman

FORM OF TENDER

a.

b.

c.

d.

e. Tender Price: The Total Price of our Tender, excluding any discounts offered in item (f) below is quoted in three currencies: Option 1

a. KES 109,675,200.00 (ONE HUNDRED AND NINE MILLION, SIX HUNDRED AND SEVENTY FIVE THOUSAND, TWO HUNDRED SHILLINGS ONLY) PLUS 16% VAT KES 17,548,032.00 (SEVENTEEN MILLION, FIVE HUNDRED AND FORTY EIGHT THOUSAND, THIRTY TWO SHILLINGS ONLY), GIVING A TOTAL OF KES 127,223,232.00 (ONE HUNDRED AND TWENTY SEVEN MILLION, TWO HUNDRED TWENTY THREE THOUSAND, TWO HUNDRED THIRTY TWO SHILLINGS ONLY).

b. USD 1,035,600.00 (ONE MILLION, THIRTY FIVE THOUSAND, SIX HUNDRED US DOLLARS ONLY) PLUS 16% VAT USD 165,696.00 (ONE HUNDRED AND SIX FIVE THOUSAND, SIX HUNDRED AND NINETY SIX US DOLLARS ONLY), GIVING A TOTAL OF USD 1,201,296.00 (ONE MILLION, TWO HUNDRED

AND ONE THOUSAND, TWO HUNDRED AND NINETY SIX US DOLLARS ONLY).

c. EURO 4,956,100.00 (FOUR MILLION, NINE HUNDRED AND FIFTY SIX THOUSAND AND ONE HUNDRED EURO ONLY) PLUS 16% VAT EURO 792,976.00 (SEVEN HUNDRED AND NINETY TWO THOUSAND, NINE HUNDRED AND SEVENTY SIX EURO ONLY), GIVING A TOTAL OF EURO 5,749,076.00 (FIVE MILLION, SEVEN HUNDRED AND FORTY NINE THOUSAND, AND SEVENTY SIX EURO ONLY).

Name of Tenderer: Leonardo Technologies & Services Limited

Name of person duly authorized to sign the

Tender on behalf of the Tenderer: Domenico Iovino

Title of person signing the Tender: Executive Chairman

Signature of person named above:

Date signed 24/03/2022

From above two crucial documents contained in the Applicant's original tender, the **commercial offer** and the **form of tender,** the Board observes that the Applicant cannot run away from its tender prices quoted

in its form of tender and rely on notes by its representative named Ann Wambui.

Based on the above form of tender and commercial offer submitted by the Applicant, it is explicit that the figures therein of Kenya Shillings 109,675,200.00, United States Dollars (USD) 1,035,600.00 and Euro 4,956,100.00 for Lot 1 were not inclusive of the mandatory 16% VAT. The said form of tender at page 4011 and 4012 of the Applicants' original tender, explicitly clarifies the resultant price (in both figures and words) upon factoring in of the mandatory 16% VAT component as Kenya shillings 127,223,232.00 (One Hundred and Twenty Seven Million, Two Hundred Twenty Three Thousand, Two Thirty Two Shillings Only), United States Dollars (USD) 1,201,296.00 (One Million, Two Hundred and One Thousand, Two Hundred and Ninety Six US Dollars Only), and Euro 5,749,076.00 (Five Million, Seven Hundred and Forty Nine Thousand and Seventy Six Euro Only)

The Board finds that the Applicant's tender sums/prices as provided in the Applicant's form of tender are final and cannot be altered through removal of Provisional sum or excluding the VAT component in accordance with Section 82 of the Act and which in total upon converting the foreign currencies to Kenya Shillings is KES 989,880,243.30 upon summation.

Therefore the Applicant was not the lowest evaluated tenderer because its total tender sum was KES 989,880,243.30 while the Interested Party's

tender price was KES 970,283,423.90. We do note that no one altered the Applicant's tender sums/prices as alleged and the Board finds that there was no impropriety detected in the evaluation of Applicant's tender price and the evaluation process was procedural and fair since they were obligated in coming up with the lowest evaluated price to comply with Regulation 77 of the Public Procurement and Asset Disposal Regulation, 2020 (hereinafter referred to as 'Regulations 2020') by taking the tender/bid price in the tender form/form of tender.

The Applicant in its supplementary affidavit in support of the Request for Review argued that the Kenya shilling component of its price be considered for a margin of preference since it will source locally some plant and spares. The Board is alive to the provision of the Tender Document ITT Clause 26 which allows for margin of preference at Section II –Tender Data Sheet amending ITT 36.2 which provides as follows, ***A margin of preference of Ksh 15% SHALL be allowed for LOTS 4 AND 5.*** It's clear to the Board that LOT 1 was not subject to application of a margin of preference. Regulations 77 of Regulations 2020 require a margin of preference to be applied on a tender sum as provided in the tender document. In this instant review no application of a margin of preference was provided in the Tender Document with respect to Lot 1 of the tender.

Given the foregoing, the Board holds that the Applicant's tender sum/price was properly evaluated.

ISSUE II

Whether the notification of award letter lacked legitimacy having been signed by the Director General on his last day in office.

The Applicant submits that on or around April 2022, by a Notification of Intention to Award Contract letter dated 21st April 2022 to the Applicant signed by the Director General of the 2nd Respondent, the 2nd Respondent communicated to the Applicant that its tender for the contract was unsuccessful on the ground that – **“...you were not the lowest evaluated bidder”**.

The Applicant avers that the said Notification of Intention to Award Contract was signed by the Director General of the 2nd Respondent and not the 1st Respondent. Furthermore, it was the said Director General last day of work at the 2nd Respondent and therefore lacked legitimacy to issue the said award.

The Applicant alleges that, during the evaluation process several members of the 2nd Respondent's evaluation committee resigned including the technical evaluation officer and they were replaced by persons who were not part of the process of evaluation of the tenders.

In the premises, the Applicant states that the evaluation process was haphazard, unfair and raised suspicion as to the legitimacy and bona fides of the 2nd Respondent's decision and submits that the irregularities stated in paragraph 12 and 13 above renders the 2nd Respondent's decision otiose.

The Applicant further states that the 2nd Respondent has violated provisions of Section 46 of the Act and Regulation 28 and 29 of Regulations 2020.

In response the, the 2nd Respondent contends that the same is headless foraying without focus. The fact that the Applicant recognizes that "it was the last day at work", in itself is an admission that the Director General was validly still in office. That contention turns on nothing "nihil fit ex nihilo".

The 2nd Respondent contends that there was no any resignation of a member of the Evaluation Committee throughout the period of tender evaluation. The Applicant has not attached any evidence to substantiate the allegations of resignation. The same is based on hearsay. The Applicant is put to strict proof thereof.

The Board notes from the evaluation report that Vide an Appointment letter referenced KCAA/CONF/1010/5 VOL 5(30) and dated 18th May, 2022 a Tender Evaluation Committee comprising of five (5) members and the secretary was constituted in the subject matter under Section 46 of the Act

as read with Regulation 28 of Regulations 2020 and were required to discharge its function set out under the said Section read together with Regulations 29, 30,31, and 74 to 80 of Regulations 2020.

The Boards observe that Section 67 of the Act is clear that any information relating to an evaluation, including the constitution of the committees and any possible resignations, dissent is confidential information which the Applicant ought not to have access to and use. The Applicant's averment that members of evaluation committee resigned borders on access to confidential information.

On legitimacy of award by the Director General whose term of office ended on the same date of award is clear to the Board that he was in office up to midnight 22nd April 2022. The Board Notes that Director General had been appointed by a gazette notice dated 3 August 2018 (annexed to the Respondents' Response) for a period of four (4) years with effect from 23rd April 2018. This therefore means that the Director-General's term stated running from 24th April, 2018 and lapsed on 22nd April 2022, and as such, the notifications issued were issued within the term of the Director General.

As such, the letter that was signed on 21st April 2022 as provided for by Section 87 of the Act read with Regulation 82 of the Regulations 2020 had the legitimacy required.

ISSUE III

Whether the Interested Party met the requirement of Clause 1 of the Mandatory eligibility criteria and whether the Commissioning Certificate provided by the Respondent for tender No. KCAA/057/2019-2020 is false, fraudulent, and illegal;

APPLICANT'S CASE

The Applicant submits that sometime in 2020, it participated in an invitation to tender issued by the 2nd Respondent for the Supply, Delivery, Installation and Commissioning of an Air Traffic Management (ATM) System at Jomo Kenyatta International Airport (Tender KCAA No. 057/2019-2020). As per tender requirements, this tender was required to be commissioned for operation and to go live at the JKIA Tower within 240 days which was in March 2021 and the said tender was awarded to the Interested Party who failed to commission it in time delaying for more than one (1) year due to the Interested Party's failures at the time of integrating on-site some of the external existing systems operated by the 2nd Respondent.

The Applicant submits that the Interested Party failed to meet a mandatory eligibility criterion, in the nature of having an existing ongoing contract with the 2nd Respondent that has delayed beyond the original completion.

Clause 1 of the Mandatory eligibility criteria in the Tender Document states as follows:

"Ineligibility - Bidders and associated firms who have existing ongoing contracts with KCAA which have delayed beyond the original scheduled completion period in the contract without proper justification or having none performing records or terminated contracts for non-performance are not eligible to participate."

It is the Applicant's submission that the Interested Party was ineligible to participate in this tender since it had an ongoing and/or uncompleted contract with the Respondent which is yet to be commissioned and so the Interested Party is in conflict with the above criterion. In particular, the Interested Party participated in Tender Contract No. KCAA/057/2019-2020 which they were awarded.

The Applicant submits that contrary to the assertions of the Respondents and the Interested Party, that the contract was completed and commissioned, the situation on the ground is different and the Interested Party is yet to fully implement the system.

It is the Applicant's submission that the Interested Party is yet to integrate the system they installed at Jomo Kenyatta International Airport ("JKIA").

As such, the users on the ground cannot and have not been using the Interested Party's Air Traffic Management (ATM) system. The traffic management system currently in use at the JKIA is TopSky – ATC sourced from the Thales Group.

The Applicant argues that the Board being the first trier of facts pertaining to these tender proceedings, the Applicant invites the Board to carry out its own investigations on the actual position on the ground. Given the reliable information obtained by the Applicant from the end users of the said ATM, the Applicant submits that the Commissioning Certificate issued by the Respondents is fictitious and/or untrue and merely designed to help the Interested Party unfairly get a foothold for participating in the tender despite them being ineligible contrary to Section 176 (d) and (g) of the Act. Further, it is also the reason the Respondent who tendered the said certificate avoided a sworn testimony in responding to this matter. The issue of the fraudulent certificate is a serious one as the issue borders on criminality and the Board ought to investigate the position on the ground.

PROCURING ENTITY'S RESPONSE

The Respondents plead that the Applicant is a stranger to the contract they are alluding to. As such, they cannot be allowed to anchor their pleadings on hearsay.

Further to the foregoing, the Respondent submitted that the contract being alluded to was signed on 22nd December 2020 with a kick off date of 5th January 2021 and an implementation period of eight (8) months from the kick off date. The commissioning of the project was done on 12th August 2021 which was ahead of the scheduled commissioning date of 5th September 2021.

THE INTERESTED PARTY'S CASE

The Interested Party states that it successfully discharged its obligations to supply, deliver, install, and commission the ATM system as confirmed by the Commissioning Certificate within the period provided for performance. The said Commissioning Certificate indicates that the Interested Party fully performed its obligations under the contract, and no finding of delay has been made by any competent authority.

The Interested Party further avers that, the said allegation is an attempt to create issues where none exist under the Contract signed by the Respondents and the Interested Party, commissioning milestone was to take place no later than fifteen (15) days of the issuance of a Site Acceptance Test (SAT) Certificate. The SAT Certificate was signed and issued on 28 July 2021. The Interested Party signed the Certificate of Commissioning on 5 August 2021, awaiting the Respondents' signature which was done on 12 August 2021, thereby confirming commissioning milestone according to the contractual terms. The Commissioning

Certificate was therefore valid and authentic. Moreover, this has been confirmed by the 2nd Respondent who signed the Certificate.

The Board perused and studied the Interested Party's original tender to establish whether it met the eligibility criteria in the Tender Document and proceeds to note the following: -

- i. At pages 471 of the Interested Party's original tender, is reference letter issued by the Kenya Civil Aviation Authority(KCAA) dated 16th February, 2022 which provides as follows in part;*

RE: CERTIFICATION OF THE PROJECT FOR SUPPLY, DELIVER, INSTALL, AND COMMISSION AN AIR TRAFFIC MANAGEMENT SYSTEM AT JOMO KENYATTA INTERNATIONAL AIRPORT (JKIA) TENDER CONTRACT NO. KCAA/057/2019-2020

That Kenya Civil Aviation Authority(KCAA) signed a contract with Indra Limited("inda") a Kenyan registered company and subsidiary of Indra Sistemas S.A, (Spain) for execution of the above mentioned project on 22nd December, 2020 for a value of Euros 2,622,000.

-
-
- *Indra has complied with their contractual obligations to date and successfully completed ATM system commissioning at Jomo Kenyatta International Airport*

(JKIA) with full KCAA's full satisfaction. During the execution of the project, no penalties were applied to Indra

- The supplied system was fully accepted by KCAA on 12th August, 2021 and is currently in operation. It meets current requirements, Standards, and recommendations' from International Aeronautical Agencies*
- The system warranty period is 12th August 2021-11th August, 2024*

This certificate is issued by Kenya Civil Aviation Authority (KCAA) as a commercial recommendation and documentary evidence of the said project in Indra's business opportunities

Signed

William kitum

Manager Procurement

For: Director General

- ii. At page 473 of the Interested Party's original tender is Commissioning Certificate which reads as follows*

COMMISSIONING CERTIFICATE

KCAA/057/2019-2020

Supply, Delivery, Installation and Commissioning of an Air Traffic Management (ATM) System

Nairobi, 12th August, 2021

This document certifies the commissioning milestone provided by Indra

Commissioning shall take place not later than fifteen (15) days after is using of the site acceptance test (SAT) certificate, signed in Nairobi on 28th July 2021.

Commissioning period was carried out in Nairobi from the 29th July, 2021 to 12th August, 2021 in accordance with the milestone described on Clause 5.a)(vi) "commissioning of the ATM system" of the variations agreement No. 1 to Contract KCAA/057/2019-2020 between KCAA and Indra Limited.

This certificate is written in English and signed in duplicate and each party keeps one original.

Signed in Nairobi (date) 12th August 2021

For KCAA

Name James Nderitu

Sign

FOR INDRA

Name Leandro Blanco sevilla

Signature Digitall signed

Leandro Blanco sevilla

Date: 2021.08.05

From the foregoing documentation, which the Interested Party submitted to satisfy Criterion under Clause 1 of the Mandatory eligibility criteria, the Board observes that the said documents intimate the Interested Party performed its obligations under the previous contract it signed with the Respondents. Secondly, the Respondent who is the consumer of the services and goods that were supplied by the Interested Party in the previous contract has confirmed that the Interested Party met the timelines of the contract in performance of the same. Thirdly, the Respondents issued certification of the previous contract. However, other than alleging such documents are falsified and/or fraudulent, the Applicant has failed to substantiate the same. The standard of proof for fraud is high and needs to be particularised which the Applicant has failed to do so.

We note the Applicant has requested that the Board conducts its own investigation on this issue. However, we note that the Board's mandate under Section 28 of the Act is limited to reviewing, hearing and determining tendering disputes and the powers of the Board are limited to what is provided under Section 173 of the Act, which investigation is not part of.

An allegation of fraud or falsification of documents is a grave issue and one that attracts criminal sanctions if proven. The Regulator of Public Procurement in Kenya, the Public Procurement Regulatory Authority is clothed with jurisdiction to conduct investigation and act on complaints received that are not subject of administrative review before the Board under Section 9(h) of the Act and after this Board has completed its review, where information comes to the attention of the Public Procurement Regulatory Board that was not brought before this Board in the course of review under Section 40(2) of the Act.

III) Whether the Interested Party satisfied the requirements at the Preliminary Evaluation Stage with respect to the following criteria: -

- ***Clause (23) on Annual turnover;***
- ***Clause (24) on Ability to raise capital***
- ***Clause (No. 21 (a) on specific Experience***
- ***Respondent requires is a modern, up to date and efficient Air Traffic Management System***
- ***Due diligence will reveal that the Interested Party has not met the requirements specified in paragraph 2***

APPLICANT CASE

The Applicant submits that the Interested Party as the determined successful tenderer did not meet the minimum mandatory eligibility criteria required of it by the ITT on two grounds. Firstly, it did not meet the requirement of requisite annual turnover specified in the Preliminary Evaluation Criteria of the Tender document and secondly, it had a pending contract with the Respondents that had not been completed in time contrary to requirements of the same Preliminary Evaluation Criteria. On the second ground of not completing a previous contract, we have herein before addressed the same.

The Applicant alleges that one of the mandatory eligibility criteria listed by the 2nd Respondent is that **"Bidders MUST have an annual turnover for each of the last three years of at least Kshs 500 million for bidders under Lot 1..."**. The Applicant submits that the Interested Party did not meet the set threshold because in the year 2020, it had an annual turnover of Kshs. 407,374,696/= as opposed to the Applicant's Annual turnover of Kshs. 543,314,000/= in the same year.

The Applicant Further states that, the ITT in clause 41.2 of the Tender Document provides that:

41.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT 15.1. The determination SHALL NOT take into consideration THE QUALIFICATIONS OF OTHER FIRMS SUCH AS THE

TENDERER'S SUBSIDIARIES, PARENT ENTITIES, AFFILIATES, subcontractors (other than Specialized Subcontractors if permitted in the Tendering Document) or any other firm (s) different from the Tenderer.

The Applicant submits that the purported clarification given by the Respondents which allowed the Interested Party to use the financial statements of its parent company cannot stand in law as it amounts an amendment to the Tender Document rather being a mere clarification of a confusing clause. It flies in the face of Section 75 (1) of the Act which prohibits an addendum that MATERIALLY alters the substance of the original tender.

The Applicant submits that this amendment significantly and materially altered the Tender Document. It removes a key component of clause 41.2 above which expressly provided that the tenderers shall not rely on financial qualification of a parent company among others. Further, that whilst the conditions specified in the Tender Document allowed the 2nd Respondent to satisfy itself as to the financial might of tenderers, removing such protections in favour of Interested Party and allowing its parent company's financial statements based in a foreign jurisdiction exposes the 2nd Respondent and risks default in performance.

The Applicant submits that allowing a company which clearly does not meet the mandatory eligibility criteria on financial capability to participate

in a sensitive tender such as this one which determine the safety of the Kenya air space, based on the books of accounts of its parent company conflicts with the above provisions and it is allowing otherwise ineligible tenderers to participate via the back door.

In addition the Applicant avers that, the Interested Party's parent company cannot be held liable for a contract they are not privy to. Apart from the manufacturer's guarantee, Indra Sistemas, S.A. the Spanish parent company was not required to guarantee the financial stability and/or capability of the company. Its financial statements are based on its own global operations and not those of the Interested Party.

The Applicant submits that there was a purpose for the procuring entity to require tenderers to present evidence of their financial capacity going back 3 years and expressly excluding reliance on a parent company financial position. The attempted change of the same by the Respondents allow room for unqualified tenderers to participate in sensitive tenders. If for any reason the company is not financially stable, the Respondents cannot compel the parent company to inject capital into the unqualified tenderer. This makes mockery of a requirement of the financial position of a tenderer.

The Applicant referred the Board to **Miscellaneous Civil Application No. 85 of 2018, 42 Republic v Public Procurement Administrative**

Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, the Honourable Justice Mativo addressed the importance of requirements in the tender document whilst stating as follows:

“Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to 41 circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions”

The Applicant agrees fully with the sound reasoning of the court. Indeed, where the rules of the game are unfairly shifted during the game, the outcome cannot be said to be fair. The Applicant submits that the purported clarification relied on by the Respondent cannot change the very

purpose of requiring the financial information of the tenders in the first place.

Indeed, if the Interested Party had met the financial qualifications as needed, there would be no need to place reliance on the parent company's financial muscle. It is important to note that the Interested Party has very little control over how its parent company exercises its capital and assets. As such, it cannot place reliance over books of accounts it cannot control.

RESPONDENTS RESPONSE

In its Response to the Request for Review, the Respondents stated that they relied on the financial might of the Interested Party's Spanish parent company to find the Interested Party has satisfied requirements of the Preliminary Evaluation Criteria with respect to turnover. The same has been repeated by the Interested Party in paragraph 24 of their Replying Affidavit.

On this issue, the Board observes the Applicant is partly challenging the Tender Document and Addendum that in its view modified the Tender document, further the Applicant is appreciating the fact the Interested Party used qualification of its parent company in the instant tender .

The Applicant has referred to the Board to provisions of, the ITT in clause 41.2 provides that:

41.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT 15.1. The determination SHALL NOT take into consideration THE QUALIFICATIONS OF OTHER FIRMS SUCH AS THE TENDERER'S SUBSIDIARIES, PARENT ENTITIES, AFFILIATES, subcontractors (other than Specialized Subcontractors if permitted in the Tendering document) or any other firm (s) different from the Tenderer

The Procuring Entity issued a number of clarifications on request for clarification by tenderers and by their own motion in the subject tender one was relevant to the issue herein on ITT in clause 41.2

Clarification No. 20 of the Procuring Entity's Response to Clarifications dated 18th January 2022 provides that: -

No	Requested clarification by bidders	Response by KCAA
20	<p><u>Preliminary Evaluation criteria point 21 A on page 31-32</u></p> <p>Bidders must demonstrate that they have specific experience for each lot Applied for as shown below:.....</p> <p><u>Preliminary evaluation Criteria point 23 on page 32</u></p> <p>Bidders MUST have annual turnover for each of the last three years of at least</p>	<p>Yes .the Bidder to provide evidence of relationship with parent company including ownership documents</p>

	<p>Ksh.500 million for bidders under Lot 1</p> <p>.....</p> <p>Please confirm that a local subsidiary company can sue or rely on credentials (references ,financial capabilities etc) of the parent company to meet these requirements</p>	
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From above clarification it is apparent to the Board that a request for clarification was sent to the Respondents on whether a local subsidiary could use and rely on credentials of the parent company to meet the said requirements, and the Respondents clarified in their first response to clarifications dated 18th January 2022, at Item No. 20 and 23 on page 31 and 32 , that **YES**, indeed tenderers could, so long as they could provide evidence of the relationship with the parent company, including ownership of documents.

It follows therefore that the instant tender allowed tenderers to use qualification and credentials of a parent company if the parent company is not tendering and vice versa.

The Board perused the Interested Party's tender document to firstly establish if they provided evidence of a relationship:

- i. At pages 199 of Interested Party's original tender, there is a Declaration related to Indra Limited (Kenya) Legal Status dated 1st

March,2022 together with declaration table on ownership of companies of Indra Sistemas :

The said Declaration states as follows: -

"SUBJECT: Tender No. KCAA/032/2021-2022- For Supply, Installation, Training and Commissioning Of Area Control Centre And Disaster Recovery System Equipment For Lot 1: Supply, Delivery, Installation And Commissioning Of An Air Traffic Management System, Gps Clock System And Voice & Data Logging System)

Indra Sistemas S.A, Spanish Company having its registered office at Avda, de Bruselas 35, 28108 Alcobendas (Madrid), Spain, duly represented by Mr. Frederico Rueda Laorga, with Spanish ID Number 50.802.959-F, using the Power of Attorney signed in Madrid on 9th February 2022, granted by the illustrious notary Mr. Gerardo Von WichmanRovira, with the number of its Protocol 481, hereby:

DECLARES

- 1. INDRA LIMITED is a subsidiary of INDRA SISTEMAS, S.A.**
- 2. INDRA SISTEMAS, S.A. is the parent company of INDRA LIMITED and holds through the companies of its group the 100% of shares of INDRA LIMITED.**

3.....

***IN WITNESS THEREOF the Company INDRA SISTEMAS,
S.A., executes this statement through its Authorized
attorney on the day and year first written above***

Mr. Enrique Catillo San Martin

ATM Director

INDRA sisternas, S.A

- ii. At pages 205 of Interested Party's original tender is Indra Sistemas power of Attorney
- iii. At page 227 of the Interested Party's original tender is Indra Sistemas S.A Commercial register certificates for the firms.

With the above observation, the Board notes that the documentation submitted by the Interested Party shows a relationship between it and the parent company as required by the clarification. To this end, reliance on the financial documentation of the Interested Party's parent company was proper because it was permitted in the clarification.

We also note that the clarifications made by the Respondents with respect to the subject tender were never challenged by the Applicant until now when the instant Request for Review and the Applicant is out of time to challenge the same because the clarification having been issued on 18th January 2022, the Applicant ought to have approached the Board to

challenge the same within 14 days thereof, which time lapsed on 1st February 2022.

The Applicant contention is that **INDRA LIMITED** cannot stand on its own.

However, having established **INDRA LIMITED** could use and rely on credentials (references, financial capabilities and other relevant documents) of INDRA sistemas ,S.A (parent company) to meet the said requirements, and the Respondents rightly declared the Interested Party to have met the Requirement of the cited Mandatory criteria requirements, the Board in a its decision delivered on 29th September 2020 (**Application Number 125 of 2020: Bytewise Limited Vs Accounting officer, KCAA and another**) held that:

“the interested party is an indirectly almost wholly owned subsidiary of M/s Indra Sistemas S.A, the Manufacturer of the ATM system to be supplied to the Procuring Entity and in the circumstances, the two companies ought to be treated as one concern so as not to be defeated on a technical point”.

The Board will now proceed to consider each of the Applicant concern in relation to criteria No.21 (a) 23 and 24 of the Preliminary Evaluation Criteria:-

- ✓ *The Interested Party included in its Proposal and Bid Documents the average annual turnover of its parent company. The annual turnover for the Interested Party and Indra Sistemas, the parent company, for the last three years is set out as follows, which credentials the Interested Party was allowed to rely on:-*

Year	INDRA LIMITED (KES)	INDRA SISTEMAS S.A. (KES equivalent)
2020	KES 407,374,696	KES 407,497,114,160 Exchange Rate: 133,8950)
2019	KES 554,047,330	KES 363,223,836,158 Exchange Rate: 113,3679)
2018	KES 602,156,815	KES 361,418,767,304 (Exchange Rate: 116,4464)
*Average Annual Turnover	KES 521,192,947	KES 377,379,905,874

The said information is set out at page 335 of the Interested Party's Proposal and Bid Documents and the documents referred to above are set out at pages 333 to 346, and pages 687 to 868 of the Interested Party's Proposal and Bid Documents.

- ✓ *The Interested Party further submitted bank references from Bank of Africa dated 17th January, 2022 (confirming to raise 400 million),*

Deutsche Bank of Madrid signed on the 24th January, 2022, as well as Santander showing that the Interested Party was able to raise over Euro 15million required for Lot 1 for both the Interested Party and the parent company which are set out at pages 339 to 344 of the Interested Party's Proposal and Bid Documents.

- ✓ *To Meet No. 21(a) of the Preliminary Evaluation Criteria, the Interested Party Contract in Peru for ATC automation, Bahamas Honduras . The said evidence included completion certificates, extracts of contracts, as well as recommendation letters. The said evidence appears at pages 357 to 474 of the Interested Party's Proposal and Bid Documents.*

The Board is mindful that the subject tender is a project that is key for air safety and we note from the confidential file that a due diligence report dated 19th April, 2022 was prepared containing details of the due diligence exercise to confirm and verify the qualification of the Interested Party.

In totality of our findings herein, the Request for Review is dismissed and the Board makes the following specific orders: -

FINAL ORDERS

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

1. The Request for Review filed by the Applicant herein on 5th May, 2022 with respect to Tender No. KCAA/032/2021-2022 for Supply, Training, and Commissioning of Area Control Centre and Disaster Recovery System Equipment for Lot1: Supply, Delivery, Installation, and Commissioning of an Air Traffic Management System, GPS Clock system and Voice & Data Logging system), be and is hereby dismissed.

2. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 25th day of May 2022



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB