

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 80/2022 OF 1st SEPTEMBER 2022

BETWEEN

PARAPET LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY.....RESPONDENT

Review against the decision of the Accounting Officer of the Kenya Airports Authority in relation to Tender No. KAA/OT/JKIA/0018/2022-2023 for Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C, D and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M- Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets, Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4).

BOARD MEMBERS PRESENT

- | | |
|-----------------------|--------------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |

3. Ms. Rahab RobiChacha -Member
4. Mr. Jackson Awele -Member

IN ATTENDANCE

Mr. Stanley Miheso -Holding brief for the Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Airports Authority, the Procuring Entity through the Respondent herein, invited sealed tenders from eligible firms in response to Tender No. KAA/OT/JKIA/0018/2022-2023 Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C,D and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M- Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4) (hereinafter referred to as the 'subject tender') through an advertisement in MyGovNewspaper on 9th August 2022 with a submission deadline of 30th August 2022 at 11:00a.m.

The blank tender documents for the subject tender (hereinafter referred to as the 'Tender Document') was to be accessed and downloaded from the Procuring Entity's website <https://www.kaa.go.ke/corporate/procurement> or <https://suppliers.kaa.go.ke/irj/portal> or the Public Procurement Information Portal at www.tenders.go.ke free of charge and the tendering process was to be conducted through the Procuring Entity's online tender portal available at <https://suppliers.kaa.go.ke/irj/portal> .

Addenda

The Procuring Entity issued three addenda namely Addendum No.1 dated 22nd August 2022 which, *inter alia*, rescheduled site visits while extending the subject tender's submission deadline to 6th September 2022 (hereinafter referred to as 'Addendum No.1'); Addendum No.2 dated 25th August 2022 which, *inter alia*, reserved the eligibility of firms to participate in the subject tender to a duly registered youth group, women and people living with disability owned enterprises while retaining the subject tender's submission deadline as 6th September 2022 at 11.00a.m (hereinafter referred to as 'Addendum No.2'); and Addendum No.3 dated 5th September 2022 which was issued during the pendency of the instant Request for Review and which further extended the subject tender's submission deadline to 20th September 2022 at 11:00 a.m (hereinafter referred to as 'Addendum No.3').

Submission of Tender and Tender Opening

The procurement proceedings of the subject tender was suspended pursuant to Section 168 of the Act following the filing of the instant Request for Review on 1st September 2022 before the submission deadline of the subject tender scheduled for initially 6th September 2022 and subsequently 20th September 2022 at 11.00 a.m. Consequently, the subject tender was not closed nor opened.

Evaluation

The instant Request for Review having been filed before the closing and/or opening of the subject tender, no evaluation of tenders with respect to the subject tendertook place.

REQUEST FOR REVIEW

Parapet Limited, the Applicant herein, lodged a Request for Review dated 1st September 2022 together with a Statement and the Applicant's Supporting Affidavit sworn on 1st September 2022 by the Applicant's Director, one Dominic Ooko Otieno, and filed on even date and a Rejoinder dated 12th September 2022 and filed on even date through the firm of Kanaga & Associates seeking the following orders:

- a) The Addendum No. 2 dated 25th August 2022 for Tender No. KAA/OT/JKIA/0018/2022-2023 be declared illegal, null and void for violating the Constitution and the Public Procurement and Asset Disposal Act 2015.***

b) The Respondent be ordered to withdraw the Addendum No. 2 dated 25th August 2022 from the Original Tender document No. KAA/OT/JKIA/0018/2022-2023.

c) The costs of this request for review be awarded to the Applicant.

In a Notification of Appeal and letter dated 1st September 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 1st September 2022.

The Respondent filed a Reply by the Procuring Entity on 5th September 2022 signed by Lilian Okidi, the Acting General Manager (Procurement and Logistics) of the Procuring Entity together with confidential documentation pursuant to Section 67 (3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide the aforesaid Circular No. 2/2020, the Board dispensed with physical hearings and directed all request for review applications be canvassed by way of written submissions.

On 16th September 2022, the Respondent filed the Procuring Entity's Submissions dated 15th September 2022 and on 19th September 2022, the Applicant filed the Applicant's Submissions dated 19th September 2022.

APPLICANT'S CASE

The Applicant avers that it downloaded the Tender Document for the subject tender as advertised by the Respondent through an open tender procuring process, having considered itself financially and technically capable, and proceeded to make arrangements to submit its tender in response thereof. Further, the Applicant avers that the Respondent issued two (2) addenda namely, Addendum No. 1 and Addendum No.2.

According to the Applicant, Addendum No.2 effectively introduced a new criteria for eligibility to participate in the subject tender by specifically limiting the applicants to duly registered enterprises owned by youth group, women and people living with disability. It is the Applicant's allegations that (a) Addendum No.2 materially altered the substance of the Tender Document contrary to Section 75(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'); (b) the

decision to amend the Tender Document was unlawful, unreasonable and/or procedurally unfair contrary to Article 47 of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') for effectively disqualifying eligible candidates such as the Applicant; and (c) the decision to amend the Tender Document contravened Article 227 of the Constitution for not being fair, equitable, transparent and/or competitive.

Consequently, the Applicant avers that it has been unduly prejudiced and discriminated against as a result of the Respondent's unlawful, unreasonable, unequitable, uncompetitive and procedurally unfair actions and seeks the Board to declare the decision by the Respondent to amend the Tender Document as per Addendum No.2 illegal, null and void.

RESPONDENT'S CASE

In response, the Respondent confirms that it issued two (2) addenda namely, Addendum No.1 and Addendum No.2 and that at the time of filing the instant Request for Review, the subject tender had not closed, firms that had submitted their tenders in response thereof were yet to be determined and the tender submission deadline was subsequently extended to 29th September 2022.

The Respondent contends that in conducting the procurement process, the Procuring Entity adhered to the provisions of (a) Section 75(2) of the Act which allows for amendment of a tender document, on a procuring entity's

own initiative or in response to an inquiry by a candidate or tenderer, and issuance of the addendum modifying such document to every party to whom the tender document was issued and (b) to Section 75(4) of the Act which provides for an addendum forming part of a tender document.

Further, the Respondent contends that paragraph 10 of the Tender Document provides for amendment of the Tender Document specifically, Paragraph 10.1 which grants the Respondent the discretion to amend the Tender Document by issuing addenda and Paragraph 10.2 thereof provides for any addendum issued to be part of the Tender Document and communicated in writing to all who have obtained the Tender Document from the Respondent. Thus, the Respondent contends that the Procuring Entity was in full compliance, not only of the legal provisions, but of the terms outlined in the Tender Document.

According to the Respondent, issuance of Addendum No.2 was not and did not result in material alteration of the Tender Document as alleged by the Applicant.

It is the Respondent's case that the Tender Document ought to set out the preferences and reservations of the tender, where necessary as prescribed under Section 70(6)(e)(vi) of the Act which reiterates Section 74(1)(g) of the Act and the Respondent bears a duty to comply with Regulation 157 of the Public Procurement and Asset Disposal Regulations, 2020 (hereafter

referred to as 'the Regulations 2020') requiring an advertisement relating to an open tender under a preference and reservation scheme to indicate that such tender was open to small and micro enterprises and to disadvantaged groups.

The Respondent contends that the National Treasury issued a circular Number 14/2013 dated 25th September 2013 on a Presidential Directive to allocate 30% of all Government procurement to youth, women and persons with disability anchored on the repealed Regulation 31(1) of the Public Procurement and Disposal (Preference and Reservations)(Amendment) Regulations, 2013 which affirmed the provisions of the National Treasury circular issued earlier, Reference No. Conf. 5/4/04(24) dated 17th October 2012 outlining the mandatory reservation for youth, women, and persons with disabilities to include among others, provision of cleaning services.

The Respondent contends that the National Treasury in its circular Number 02/2016 dated 29th March 2016 on operationalization of the Act, at paragraph 5 thereof, directed accounting officers to ensure that the part of the procurement plan demonstrating application of preference and reservations schemes be submitted to the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') in accordance with Section 44(2) (c) &(i) of the Act.

The Respondent contends that Section 2 of the Act defines reservations as the exclusive preference to procure goods, works and services set aside to a defined target group of tenderers within a specified threshold or region. Disadvantaged groups are defined, amongst others, as persons denied by mainstream society, access to resources and tools that are useful for their survival in a way that disadvantages them, or categories of persons without regard to their individual qualities and includes enterprises in which a majority of the members or shareholders are youth, women, persons with disability or categories as shall be prescribed. Further, that Section 7(2)(i) and (j) of the Act place the responsibility of policy formulation on the National Treasury with regards to administration of preference and reservation scheme and registration of target groups under preference and reservation scheme as prescribed. The National Treasury is also mandated to facilitate affirmative action for disadvantaged groups in accordance with the Constitution and advance their participation in the procurement process. Further, the Authority under Section 9(1)(e) of the Act read with Regulation 160 of Regulations 2020 is required to monitor the implementation of the preference and reservation schemes by procuring entities and ensure that they provide data to indicate the number of disadvantaged groups that have benefitted. In addition, Section 53(6) of the Act requires all procurement and asset disposal planning to reserve a minimum of thirty percent (30%) of the budgetary allocations for enterprises owned by women, youth, persons with disability and other disadvantaged groups. This is buttressed by Part XII of the Act which details provisions on preferences and reservation in procurement. Section

157(4) of the Act recognizes the need to protect and advance categories of persons previously disadvantaged by unfair competition or discrimination including disadvantaged groups and micro, small and medium enterprises. Moreover, under Section 157(5) of the Act read with Regulation 149 of Regulations 2020, an accounting officer of a procuring entity has an obligation to reserve a prescribed percentage of a procurement budget which shall not be less than thirty per cent to the disadvantaged group and comply with the provisions of the Act with regards to preferences and reservations.

According to the Respondent, a procuring entity bears a responsibility not only as a law abiding institution but also to ensure that it promotes social development, economic progress and enhances achievement of these objectives through implementation of requisite preference and observations in its procurement process.

In conclusion, the Respondent contends that the issuance of Addendum No.2 was in absolute compliance with legal provisions and Government circulars, was not contrary to or inconsistent with legislation, the procurement process is not discriminatory as alleged by the Applicant and conversely, issuance of Addendum No.2 was legal, fair and creates an equal tendering opportunity as envisaged by the Constitution, the Act, guiding principles therein and Regulations 2020. The Respondent urges that the grounds for review are unfounded, unmerited and prays for

dismissal of the instant Request for Review, for the Respondent to be allowed to conclude the procurement process and for the Applicant to pay the costs of the review proceedings.

APPLICANT'S REJOINDER

In a rejoinder, the Applicant avers that the Respondent did not outline any applicable preferences in the Invitation to Tender advertised on 9th August 2022 as required under Section 74 (g)(h) of the Act, which requires an invitation to tender must set out (i) the applicable preferences and reservations according to the Act and (ii) a declaration that the tender is only open to those who meet the requirements for eligibility, thus the Applicant had a legitimate expectation that the subject tender was not applicable and/or subject to any preferences and reservations and it is for that reason that the Applicant obtained the Tender Document.

The Applicant avers that the Respondent did not specify in the advertisement that the subject tender was under a preference and reservation scheme making it only open to disadvantaged groups as required under Regulation 157 of Regulations 2020 thus, the Applicant had a legitimate expectation that the subject tender as advertised was in compliance with the said provisions, contained all sufficient information as required under Section 70(3) of the Act, was not applicable and/or subject to any preferences and reservations and based on the Applicant considering itself financially and technically capable to apply for the same.

It is the Applicant's rejoinder that Paragraph 10 of the Tender Document relating to amendment of the Tender Document is subject to the provisions of Section 75(1) of the Act which provides that such amendments should not materially alter the substance of the original tender and argues that Addendum No. 2 did not materially alter the substance of the Tender Document.

The Applicant avers that the Respondent exceeded the 30% threshold provided by subjecting all four (4) lots in the subject tender, being 100% of the subject tender, to the said preferences and reservations and in that regard, the Respondent violated the 30% prescribed threshold.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- i. Whether Addendum No. 2 materially altered the substance of the Tender Document contrary to the provisions of Section 75(1) of the Act;**
- ii. What appropriate orders should the Board grant in the circumstances?**

Whether Addendum No. 2 materially altered the substance of the Tender Document contrary to the provisions of Section 75(1) of the Act;

The Applicant argues that the Respondent in issuing Addendum No.2 on 25th August 2022, effectively introduced a new criteria for eligibility to participate in the tendering process by specifically limiting the tenderers for the subject tender to duly registered enterprises owned by youth group, women and people living with disability. According to the Applicant, such limitation and/or reservation materially altered the substance of the Tender Document because it sought to lock out the Applicant and other previous eligible tenderers who were never informed of such limitation and/or reservation on eligibility as at the time of advertisement of the subject tender through an invitation notice as an open tender on 9th August 2022 and was therefore an afterthought, null and void for having breached Section 75(1) of the Act.

In response, the Respondent argues that the limitation and/or reservation on eligibility to firms that may participate in the subject tender as contained in Addendum No.2 was issued on 25th August 2022 pursuant to provisions of the Act, the Tender Document and various circulars issued by the National Treasury, the same did not materially alter the substance of the Tender Document but was legal, fair, procedural and that the Procuring Entity did not breach any provisions of Regulations 2020, the Act and the Constitution while issuing Addendum No.2.

Addendum No.2 annexed to the Applicant's Supporting Affidavit reads as follows as prepared on the Procuring Entity's letterhead:

"KAA/OT/JKIA/0018/2022-2023

25th August, 2022

To: All Tenderers

RE: PROVISION OF CLEANING SERVICES GENERAL AREAS AND TOILETS T1A-JOMO KENYATTA INTERNATIONAL AIRPORT (LOT 1)

(Eligibility Duly Registered Youth Group, Women and People Living with Disability Owned Enterprises)

PROVISION OF CLEANING SERVICES GENERAL AREAS AND TOILETS AT T1BCD AND VIP 3-JOMO KENYATTA INTERNATIONAL AIRPORT (LOT 2)

(Eligibility Duly Registered Youth Group, Women and People Living with Disability Owned Enterprises)

PROVISION OF CLEANING SERVICES GENERAL AREAS AND TOILETS AT CARGO FREIGHT TERMINAL, OLD TRAINING SCHOOL M- STATION, PABX, MAIN FIRE AND SUBSTATIONS (NOVEMBER & 24), HQ PARKING, APRONS/AIRSIDE, CARGO VILLAGE, ALL PARKINGS, STATE PAVILION, PARKING GARAGE & ALL HAND WASHING POINTS- -JOMO KENYATTA INTERNATIONAL AIRPORT (LOT 3)

(Eligibility Duly Registered Youth Group, Women and People Living with Disability Owned Enterprises)

PROVISION OF CLEANING SERVICES GENERAL AREAS AND TOILETS AT TERMINAL 2-JOMO KENYATTA INTERNATIONAL AIRPORT (LOT 4)

(Eligibility Duly Registered Youth Group, Women and People Living with Disability Owned Enterprises)

TENDER NO.KAA/OT/JKIA/0018/2022-2023

ADDENDUM NO.2

The following are tender clarification/addendum issued regarding the above tender in accordance to instructions to tenderers clause 10.3 of the bidding document for the referenced tender.

Kenya Airports Authority hereby amends tender document be eligible to a duly Registered Youth Group, Women and People Living with Disability Owned Enterprises and the criterion requirements as provided in the table below:

No.	Criterion requirements	Compliance
1.	Tender Security of Kshs.500,000 (Lot I), Kshs.200,000.00 (Lot 2),	Provide duly Filled, signed and stamped Tender Securing Declaration Form.

	<i>Kshs.400,000.00 (Lot 3) and Kshs. 100,000.00 (Lot 4)</i>	
<i>2</i>		<i>Provide a copy of a valid AGPO/YAGPO Certificate from National Treasury for Enterprise Registered under the preferences and reservation regulations 2013 - Registered Youth Group, Women Group or People Living with Disability Group Category.</i>
<i>3</i>		<i>Provide proof of existing account with a Bank or Financial Institution where the mandatory signatory is the youth, woman of person living with disability.</i>

The closing/opening date remains 6th September, 2022 at 11.00 a.m.

Kindly amend your tender accordingly and ensure the tender is valid for 126 days from the closing/opening date of 6th September, 2022 at 11.00 a.m.

This addendum forms part of the bidding document and is binding on all bidders.

All other conditions remain the same.

[Signature]

Lilian Okidi

Ag. GM (PROCUREMENT AND LOGISTICS)

For: MANAGING DIRECTOR/CEO" [Emphasis our]

We note Addendum No.2 clearly indicates that it amends the Tender Document to limit the eligibility to participate in the subject tender to only enterprises duly registered as owned by youth groups, women or people living with disability. Put otherwise, Addendum No.2 effectively amended the Tender Document to reserve the subject tender to duly registered youth groups, women and persons living with disability owned enterprises.

We have carefully studied the Tender Advertisement Notice published in MyGov Newspaper on 9th August 2022, the Tender Document issued to prospective tenderers via the Procuring Entity's website and Public Procurement Information Portal on 9th August 2022 and note that the subject tender was initially an open tender without any applicable

preferences or reservations being spelt out in either the Tender Advertisement Notice or Tender Document.

It is an undisputed fact that the amendments to the Tender Document introduced by Addendum No.2 effectively amended the eligibility of those who could participate in the subject tender by limiting the eligibility to only duly registered youth groups, women and people living with disability owned enterprise. Simply put, Addendum No.2 amended the subject tender from an open tender to an open tender reserved for only duly registered youth group, women and people living with disability owned enterprises.

What is in dispute is whether such amendment materially altered the substance of the Tender Document.

Amendments of Tender Documents is governed by Section 75 of the Act which reads as follows:

"75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.”[Emphasis ours]

Section 75(1) of the Act allows for amendments of tenders by a procuring entity at any time before the tender submission deadline as long as such amendments do not materially alter the substance of the Tender Document.

We understand material alteration to denote a change made to an instrument/document which affects the rights and obligations of a party to the said instrument/document. Put differently, an alteration is said to be

material when it affects, or may possibly affect, the rights of the persons interested in an instrument/document. On the other hand we understand the substance of an original tender to denote a necessary component of the original tender as distinguished from a matter of form.

With the aforementioned understanding, we deduce an amendment that materially alters the substance of an original tender is one that changes a necessary component of the original tender, as distinguished from a matter of form, and such change affects, or may possibly affect, the rights of persons interested in the original tender.

Turning to the circumstances of the instant Request for Review, Addendum No.2 amended the Tender Document by effectively amending the eligibility criteria of those who may participate in the subject tender by reserving the subject tender for duly registered youth groups, women and people living with disability owned enterprises only.

Clause 4.1 of Section I – Instructions to Tenderers of the Tender Document provides as follows in part:

"4. Eligible Tenderers

4.1 A Tenderer may be a firm that is a private entity, a state owned entity or institution subject to ITT 4.6, or any combination of such entries in the form of a Joint Venture (JV) under an existing agreement or with the intent to enter into such an agreement supported by a Form of intent.....”

Clause ITT4.1 of Section II- Tender Data Sheet (TDS) of the Tender Document provides as follows:-

“Maximum number of joint ventures shall be: N/A”

The aforementioned provisions of the Tender Document shows that an eligible tenderer with respect to the subject tender, before issuance of Addendum No.2 by the Procuring Entity, was a firm that was privately or state-owned entity or institution or a joint venture. The eligibility of tenderers for the subject tender was not open to natural persons (individuals) nor was it reserved for duly registered youth groups, women and people living with disability owned enterprises. This clearly shows that the eligibility of a tenderer in the subject tender was a necessary component of the Tender Document thus forms part of the substance of the Tender Document.

Further, the following Sections of the Act shows how eligibility of a tenderer is a necessary component of a tender document:

"74. Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(g) applicable preferences and reservations pursuant to this Act;

(h) a declaration that the tender is only open to those who meet the requirements for eligibility;

(2) All tender documents shall be sent out to eligible bidders by recorded delivery.

79. Responsiveness of tenders

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

93. Pre-qualification

**(4) The invitation referred to in paragraph (2) shall include—
(g) declaration that it is open to bidders who meet the eligibility criteria;**

119. Notice inviting expressions of interest

(2) The notice inviting expressions of interest shall set out the following—

(c) eligibility and the qualifications necessary to be invited to submit a proposal; and

157. Participation of candidates in preference and reservations

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

Upon issuance of Addendum No. 2 by the Procuring Entity, the substance of the Tender Document was materially altered. We say so because, the eligibility of a tenderer with respect to the subject tender ceased being open to a firm that is a private entity, such like the Applicant herein, a state-owned entity or institution or a combination of such entities in form of a joint venture to **only** duly registered youth groups, women and people living with disability owned entities. In effect, Addendum No. 2 issued by the Procuring Entity locked out the Applicant and other entities that were not duly registered youth groups, women and people living with disability owned enterprises from participating as tenderers in the subject tender. Further, Addendum No.2 affected the rights of the Applicant who was interested in the Tender Document as published on 9th August 2022 considering itself financially and technically capable to submit a tender in response to the subject tender and was subsequently locked out from participating in the subject tender for not being a duly registered youth group, women and people living with disability owned enterprise.

The Respondent in an attempt to justify the issuance of Addendum No.2 by the Procuring Entity, relied on various Circulars issued by The National Treasury and provisions of the law which we now proceed to analyze.

First, Circular dated 25th September 2013, Ref: NT/PPD/1/3/26(24) anchored on the repealed Regulation 31(1) of the Public Procurement and Disposal (Amendment) Regulations, 2013 (as rightly contended by the Respondent) which specifically directed, *inter alia*, that provision of cleaning services be reserved and preferred for youth, women and persons with disability owned enterprises. Strictly speaking, since this Circular was anchored on a subsidiary legislation that was repealed, the said Circular cannot be said to be legally in operation.

Second, Circular dated 29th March 2016, Ref: NT/PPD.1/2/02/PART III(75) on operationalization of the Act, directed accounting officers to ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and submit them to the National Treasury and for the part of the procurement plan demonstrating application of preference and reservations schemes submitted to the Authority. The Procuring Entity did not adduce evidence of, neither did it furnish the Board with, the procurement plan submitted to the Authority for the Board to establish whether provision of cleaning services, such like the subject tender, was reserved and preferred for duly registered youth

groups, women and people living with disability owned enterprises. In the absence of such a procurement plan the Procuring Entity cannot argue that it is under a duty to specifically reserve and prefer provisions of cleaning services to enterprises owned by women, youth, persons with disabilities and other disadvantaged groups to meet its statutory obligation of reserving a minimum of thirty percent (30%) of the budgetary allocations to such categories as provided in Section 53(6) of the Act.

Third, Section 2 of the Act defines "**reservations**" to mean exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region. Duly registered youth groups, women and people living with disability owned enterprises would ordinarily fit the description of target group of tenderers. The registration of these target group of tenderers is undertaken by the National Treasury as required under Section 7(2)(i) and (j) of the Act which mandates the National Treasury to develop policy on the administration of preference and reservations scheme and registration of target groups under preference and reservations scheme as prescribed; and facilitate affirmative action for disadvantaged groups in accordance with the Constitution and advance their participation in the procurement process.

Section 9 (1)(e) and (r) of the Act read with Regulation 160 of Regulation 2020 obligates the Authority to monitor the implementation of the preference and reservation schemes by procuring entities; ensure the

Procuring Entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted. The Procuring Entity did not furnish the Board with data it has provided the Authority indicating the number of disadvantaged groups which have benefited from preference and reservation for the Board to establish whether provision of cleaning services, such like the subject tender, must of necessity be reserved for the target group of tenderers.

Section 53(6) of the Act read with Section 157(4) and (5) of the Act and Regulation 149 of Regulations 2020 provide for procurement and asset disposal planning to reserve a minimum of thirty per cent (30%) of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups and for the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations and preferences shall apply to, *inter alia*, candidates such as disadvantaged groups. However, these provisions do not specifically state that such reservation must be achieved or can only be achieved by reserving procurement of cleaning services, such like the subject tender.

Section 70(6)(e)(vi) of the Act read with Section 74(1)(g) of the Act and Regulation 157 of Regulations 2020 requires a tender document to set out instructions for the preparation and submission of tenders including the

procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the tendering documents and the accounting officer to ensure the preparation of an invitation to tender that sets out the applicable preferences and reservations pursuant to the Act. We note neither the subject tender's Tender Advertisement Notice (Invitation to Tender) nor the Tender Document spelt out the applicable preferences and reservations. Put differently, no applicable preferences and reservations were spelt out in the Tender Document or the Tender Advertisement Notice for the subject tender.

Having analyzed the provisions of the Circulars by the National Treasury and the provisions of the law relied upon by the Respondent, and established (a) none of the Circulars by the National Treasury is legally in operation that specifically requires tenders for provision of cleaning services be reserved for duly registered youth groups, women, people living with disability owned enterprises, (b) no provision of law specifically requires tenders for provision of cleaning services be reserved for duly registered youth groups, women, people living with disability owned enterprises, (c) there is no evidence that the Procuring Entity's procurement plan submitted to the Authority, if any, reserved provision of cleaning services for duly registered youth groups, women people living with disability owned enterprises. However, in the event that there is such a procurement plan, then failure by the Procuring Entity to clearly set out the applicable preference and reservation with respect to the subject tender at the onset in the Tender Document and the Tender Advertisement

Notice (Invitation to Tender) would amount to material governance issues detected on the part of the Procuring Entity.

We appreciate the good intention the Procuring Entity may have had in mind when issuing Addendum No. 2 to recognize the need to protect and advance categories of persons previously disadvantaged by unfair competition or discrimination including disadvantaged groups. However, having established the amendments of the Tender Document as contained in Addendum No.2 materially altered the substance of the Tender Document; the same was issued in breach of the provisions of Section 75(1) of the Act and is therefore null and void.

What appropriate orders should the Board grant in the circumstances?

Having held that Addendum No. 2 materially altered the substance of the Tender Document contrary to the provisions of Section 75(1) of the Act, we find it fit and just to nullify and set it aside.

We noted that the Procuring Entity issued Addendum No.3 during the pendency of the instant Request for Review when the procurement proceedings of the subject tender had been suspended pursuant to Section 168 of the Act. In the circumstances, we deem it fit to nullify and set aside Addendum No.3.

The upshot of our decision is that the instant Request for Review succeeds in terms of 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, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 1st September 2022: -

- 1. The Addendum No. 2 dated 25th August 2022 and the Addendum No. 3 dated 5th September 2022 issued by the Procuring Entity in relation to Tender No. KAA/OT/JKIA/0018/2022-2023 for Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C,D, and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M- Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets, Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4) be and are hereby nullified and set aside.**

2. The Respondent is at liberty to extend the tender submission deadline for Tender No. KAA/OT/JKIA/0018/2022-2023 for Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C, D, and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M-Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets, Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4).
3. Given the findings herein, each party will bear its own costs in the Request for Review.

Dated at NAIROBI this 22nd Day of September, 2022.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB

2. The Respondent is at liberty to extend the tender submission deadline for Tender No. KAA/OT/JKIA/0018/2022-2023 for Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C,D, and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M-Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets, Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4).
3. Given the findings herein, each party will bear its own costs in the Request for Review.

Dated at NAIROBI this 22nd Day of September, 2022.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB

2. The Respondent is at liberty to extend the tender submission deadline for Tender No. KAA/OT/JKIA/0018/2022-2023 for Provision of Cleaning Services General Areas and Toilets T1A at Jomo Kenyatta International Airport (Lot 1); Provision of Cleaning Services General Areas, Toilets at T1B, C, D, and VIP 3 at Jomo Kenyatta International Airport (Lot 2); Provision of Cleaning Services General Areas and Toilets at Cargo Freight Terminal, Aprons/Airside, Old Training School M-Station, PABX, Main Fire and Substations, Cargo Village, all Parkings, State Pavilion, Parking Garage at Jomo Kenyatta International Airport (Lot 3); and Provision of Cleaning Services General Areas and Toilets, Pest Control Terminal 2 at Jomo Kenyatta International Airport (Lot 4).
3. Given the findings herein, each party will bear its own costs in the Request for Review.

Dated at NAIROBI this 22nd Day of September, 2022.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB

