

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 55/2023 OF 9<sup>TH</sup> AUGUST 2023**

**BETWEEN**

**PEESAM LIMITED..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

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

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/OT/JKIA/0105/2022 –2023 for Provision of Landscaping and Environment Management Services at Jomo Kenyatta International Airport, Nairobi.

**BOARD MEMBERS PRESENT**

- |                        |   |        |
|------------------------|---|--------|
| 1. Mr. George Murugu   | - | Chair  |
| 2. Mr. Alexander Musau | - | Member |
| 3. Ms. Alice Oeri      | - | Member |
| 4. Dr. Paul Jilani     | - | Member |
| 5. Mr. Jackson Awele   | - | Member |

## **IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT - PEESAM LIMITED**

Ms. Einadine Sinyo -Advocate, Kananga & Associates Advocates

**RESPONDENTS ACCOUNTING OFFICER, KENYA AIRPORTS  
AUTHORITY  
KENYA AIRPORTS AUTHORITY**

N/A - N/A

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Airports Authority, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tender No. KAA/OT/JKIA/0105/2022 –2023 for Provision of Landscaping and Environment Management Services at Jomo Kenyatta International Airport, Nairobi restricting participation to the special group: Youth, Women and Persons Living With Disability. The subject tender submission deadline was Thursday, 23<sup>rd</sup> February 2023 at 11:00 a.m.

### **Addendum No. 1**

2. On 21<sup>st</sup> February 2023, the Procuring Entity issued addendum No. 1 extending the tender submission deadline to 9<sup>th</sup> March 2023.

### **Addendum No. 2**

3. On 7<sup>th</sup> March 2023, the Procuring Entity issued Addendum No. 2 extending the tender submission deadline to 23<sup>rd</sup> March 2023.

### **Addendum No. 3**

4. On 7<sup>th</sup> March 2023, the Procuring Entity issued Addendum No. 2 extending the tender submission deadline to 4<sup>th</sup> April 2023.

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

5. According to the Tender Opening Minutes dated 4<sup>th</sup> April 2023 under the Confidential File submitted by the Procuring Entity, the following 4 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Peesam Limited
2.	Dekings Traders Limited
3.	Dechrip East Africa Limited
4.	Afriscape Limited

### **Evaluation of Tenders**

6. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an

evaluation of the 4 tenders in the following 3 stages as captured in the Evaluation Report

- i. Preliminary Stage
- ii. Technical Stage
- iii. Financial Stage

### **Preliminary Evaluation**

7. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2 Preliminary Examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 27 to 29 of the Tender Document.
8. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.
9. At the end of the evaluation at this stage, 3 tenders were found unresponsive with only the Applicant qualifying for further evaluation.

### **Technical Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Technical Evaluation under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 30 to 31 of the Tender Document. Tenderers were required to meet



all the requirements at this stage in order to qualify for further evaluation at the Financial Stage.

11. At the end of the evaluation at this stage, the Applicant was found as the only responsive tenderer having met each of the requirements at this stage as can be gleaned from the Evaluation Report.

### **Financial Evaluation**

12. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause 3 Tender Evaluation (ITT 35) under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at page 31 of the Tender Document. The successful tenderer would be one whose tender was the lowest evaluated tender from the Technical Evaluation Stage.
13. The Applicant's tender being the only tender qualifying for evaluation at this stage was found responsive after its tender price was found to be within the approved budget for the subject tender.

### **Evaluation Committee's Recommendation**

14. The Evaluation Committee determined the tender offered by the Applicant as the lowest evaluated responsive and recommended award of the subject tender to the Applicant at the tender price of Kenya Shillings Sixty-Three Million Seven Hundred and Eighty-Three, Eight Hundred and Twenty Shillings only (Kshs. 63,783,820.00) inclusive of all taxes.

## **Professional Opinion**

15. In a Professional Opinion dated 24<sup>th</sup> July 2023 (hereinafter referred to as the "Professional Opinion"), the Acting General Manager (Procurement and Logistics) Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the termination of the subject tender on account of non-responsiveness. The Professional Opinion noted that the Applicant submitted 2 tender documents without any written notice of withdrawal, substitution and medication in contravention of ITT 26.1. The 1<sup>st</sup> Respondent concurred with said Professional Opinion and terminated the subject tender.

## **Notification to Tenderers**

16. Tenderers were notified of the termination of the subject tender vide letters dated and signed 24<sup>th</sup> July 2023 by the 1<sup>st</sup> Respondent.

## **REQUEST FOR REVIEW**

17. On 9<sup>th</sup> August 2023, the Applicant filed a Request for Review dated 9<sup>th</sup> August 2023, Statement of Claim dated 9<sup>th</sup> August 2023 and a Supporting Affidavit sworn on 9<sup>th</sup> August 2023 by Samuel Mburu Nganga, seeking the following orders from the Board in verbatim:

- a. ***That the Notice of Termination dated 24<sup>th</sup> July 2023 terminating the procurement proceedings arising from Tender No. KAA/OT/JKIA/0105/2022-2023 for the provision of landscaping and environment management services at the Jomo Kenyatta International Airport be annulled and set aside;***

- b. ***That the procurement proceedings leading to the determination by the Respondents that the Applicant's submitted tender bid was non-responsive be reviewed by this Honourable Board;***
- c. ***That the Board be pleased to order the Respondents to evaluate the Applicant's tender bid submitted on 4<sup>th</sup> April 2023 at 7.33 a.m. in accordance with the provisions of the tender documents in respect of Tender No. KAA/OT/JKIA/0105/2022-2023 together with the Public Procurement and Asset Disposal Act 2015, the Public Procurement and Asset Disposal Regulations 2020, the Fair Administrative Actions Act 2015 and the Constitution of Kenya 2010;***
- d. ***That the 2<sup>nd</sup> Respondent be ordered to pay the Applicant the full costs of and incidental to these proceedings for its noncompliance that necessitated this Request for Review.***

18. In a Notification of Appeal and a letter dated 9<sup>th</sup> August 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential



documents concerning the subject tender within five (5) days from 9<sup>th</sup> August 2023.

19. On 15<sup>th</sup> August 2023, in response to the Request for Review, the Respondents, filed an undated Response to the Notification of Appeal. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
20. Vide letters dated 16<sup>th</sup> August 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 16<sup>th</sup> August 2023 but no Interested Party filed any response.
21. On 18<sup>th</sup> August 2023, the Applicant filed a Reply dated 18<sup>th</sup> August 2023 alongside a Supplementary Affidavit sworn on 18<sup>th</sup> August by Samuel Mburu Nganga and Written Submissions dated 18<sup>th</sup> August 2023.
22. Vide a Hearing Notice dated 21<sup>st</sup> August 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 24<sup>th</sup> August 2023 at 12.00 noon, through the link availed in the said Hearing Notice.



23. When the matter came up for hearing on 24<sup>th</sup> August 2023 at 12.00 noon only a representative from the Applicant and its Advocates were present. The Board adjourned the hearing session for 5 minutes to allow the Secretariat contact the Respondents to prompt them to attend the hearing.
24. When the Board resumed its session at 12:12 p.m., the Respondents were still unrepresented. The Secretariat notified the Board that they had made a telephone call to the Respondents' representative who then declined the call and requested that to be sent a text message. The Secretariat sent a text message to the representative but still nobody was present as at the time the Board resumed from its adjournment.
25. The Board satisfied itself that the Respondents were previously served with the Hearing Notice for the hearing on 24<sup>th</sup> August 2023 directed that the hearing would proceed as earlier scheduled. Accordingly, the Board gave hearing directions allocating the Applicant's Advocates 10 minutes to highlight their Client's case.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

26. During the online hearing, Counsel for the Applicant, Ms. Sinyo submitted that the Applicant submitted its initial form of tender on 3<sup>rd</sup> April 2023 and its amended version of the form of tender on 4<sup>th</sup> April 2023 before the tender submission deadline. She indicated that the Applicant was unable to attend the tender opening session since the Respondents shared the link to the online tender opening session late at 11:46 a.m. and that the link was also not working.

27. She pressed on that on 27<sup>th</sup> July 2023 the Applicant was served with a notice of termination of the subject tender indicating that the Applicant's tender was non-responsive after the Applicant submitted 2 forms of tender in the subject tender without issuing a substitution or withdrawal notice.
28. Counsel argued that the Respondents breached Articles 47 and 227 of the Constitution by conducting the tender process in an unlawful, unreasonable, inequitable, uncompetitive and procedurally unfair manner.
29. She also argued that the Respondents breached sections 79(1) of the Act by determining the Applicant's tender as non-responsive when in fact the Applicant was in compliance with all the tender requirements in the subject tender.
30. It was Counsel's submission that the online platform used by Procuring Entity did not have a withdrawal or substitution function and thus it was impossible for a tenderer to withdraw or substitute their form of tender through the online platform.
31. Ms. Sinyo pointed out that on previous occasions, the Applicant had sought advice from the Respondents on withdrawal and substitution of tender documents through phone calls and the advice was that they could upload multiple tender documents with the last uploaded document being considered for purposes of evaluation.



32. Counsel pressed on that the Respondents were in breach of Section 78(4) of the act by denying the Applicants an opportunity to attend the tender opening session.
33. Ms. Sinyo also argued that the Respondents were in breach of the doctrine of legitimate expectation as they had created an expectation from past conduct with the Applicant that substitution of tender documents could be done through uploading of multiple tender documents. Counsel argued that the Respondents were estopped from taking issue with the multiple tender documents uploaded by the Applicant. Accordingly, Counsel requested the Board to allow the instant Request for Review.

### **Respondents' Case**

34. Though not represented during the online hearing, the Board has considered the Respondents' Reply to the Request for Review dated 15<sup>th</sup> August 2023. Briefly, the Respondents' case was that they complied with Articles 47(1) and 227 of the Constitution.
35. According to the Respondents, the Applicant was in breach of ITT 26.1 and Section 76 of the Act for submitting two forms of tender without issuing a Withdrawal or substitution notice. They argued that the online platform supports the substitution and withdrawal function but the Applicant failed to make use of it. The Respondents took the view that the Applicant should have uploaded the subsequent form of tender together with the notice of withdrawal or substitution.
36. The Respondents also denied having previously permitted the Applicant to issue multiple forms of tender in any tender. They pointed out that in



Tender No. KAA/OT/JKIA/0148/2021-2022 for the Provision of pest control management services, the Applicant submitted 2 forms of tender that bore an identical tender price.

37. The Respondents also affirmed that there was no legitimate expectation on the part of the Applicant as the Tender Document was clear that withdrawal or substitution of a form of tender would be through a written notice.

### **CLARIFICATIONS**

38. The Board sought clarification from the Applicant on what informed the amendment of its tender price from 51,144,55.60 to 63,783,820.00. Ms. Sinyo did not give a clear answer to this but she indicated that the Respondents ought to have considered the last form of tender to be submitted as the Applicant's tender.
39. The Board also sought clarification from the Applicant on whether they had any evidence that the withdrawal or substitution function of the Procuring Entity's online platform was not working. Ms. Sinyo informed the Board that the portal had not been working from the time the Request for Review was filed and thus it was not possible to even take a screenshot of the platform.
40. The Board observed that the Tender Document required any modification of the forms of tender to be writing and sought to understand whether the Applicant issued any such notification in writing before submitting its 2<sup>nd</sup> form of tender. Ms. Sinyo answered in the negative and indicated that



the Applicant only reached out to the Respondents through a phone call and that it was asked to proceed as usual.

41. The Board also sought to understand whether the Applicant complied with ITT No.26.1 in the Tender Document. A representative from the Applicant told the Board that the said ITT was inapplicable to online submission of tenders.
42. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 9<sup>th</sup> August 2023 had to be determined by 30<sup>th</sup> August 2023 and that the Board would communicate its decision on or before 30<sup>th</sup> August 2023 to all parties via email.

### **BOARD'S DECISION**

43. The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

***i. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act thereby ousting the jurisdiction of the Board;***

*Depending on the determination of the first issue;*

***ii. Whether the Applicant in submitting a second tender document in the subject tender without a written notice of substitution or withdrawal rendered its tender document non-responsive?***

**iii. What orders should the Board grant in the circumstances?**

**Whether the Procuring Entity terminated the subject tender in accordance with section 63 of the Act thereby ousting the jurisdiction of the Board?**

44. Though none of the parties addressed the Board on its jurisdiction over the instant Request for Review, this Board has *suo moto* formulated it as an issue in view of the fact that the Request relates to termination of tenders which is under Section 167, one of the matters outside the jurisdiction of the Board.
45. This Board appreciates that it is now a settled principle that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence dictates that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter as was espoused by Nyarangi J.A. in the leading authority of **The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1:**

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of***

***proceedings pending other evidence. A court of law  
downs tools in respect of the matter before it the  
moment it holds that it is without jurisdiction."***

46. See also the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, where the Court of Appeal while emphasizing on the centrality of the issue of jurisdiction held that:

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

47. Section 167 of the Act affords room to candidates and tenderers disgruntled in the manner in which a tender by a Procuring Entity has been undertaken to approach the Board for redress. However, subsection (4) of the Section divests the jurisdiction of the Board on a myriad of instances including the termination of a procurement process in the following terms:

***"167. Request for a review***



**(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) ...**

**(3) ...**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**

**(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and**

**(c) where a contract is signed in accordance with section 135 of this Act.”**

48. Termination of public procurement proceedings is governed by Section 63 of the Act which provides as follows:

***"63. Termination or cancellation of procurement and asset disposal Proceedings***



**(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

***(a) ...***

***(b) ...***

***(f) all evaluated tenders are non-responsive;***

49. Our interpretation of section 63 of the Act is that for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.
50. Effectively, a Procuring Entity is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.

51. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) as to why a tender has been terminated and the facts that support such termination.
52. On the other hand, the procedural requirements involve (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
53. There is a large body of case law of the applicability of section 63 of the Act and the ousting of the jurisdiction of the Board under section 167(4) Act.
54. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a proposal process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to establish whether the preconditions for termination under section 63 have been met before downing its tools:

***"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a***

**statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...**

***See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants***

55. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority and PPARB Application No. 9 of 2022; Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor.***
56. Drawing from the above judicial pronouncements, this Board will now interrogate the termination of the subject tender to establish whether both the substantive and procedural requirements under section 63 of the Act were satisfied in the termination of the subject tender. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter.





57. The Respondents attributed the termination of the subject tender to the finding that none of the tenders submitted in the subject tender was responsive. This is one of the grounds for termination of a tender enumerated under section 63(1) of the Act and thus the Respondents have satisfied the substantive requirement under the Act.
58. However, it remains unclear whether the Respondents fulfilled the procedural requirements under section 63 of the Act. Though the Respondents issued the tenderers, a letter of notification of termination of the subject tender, there was no evidence that a Written Report was made to the Public Procurement Regulatory Authority on the termination of the said tender.
59. The Board has keenly perused the documents constituting the Confidential File submitted to it by the Respondents and has not seen any document addressed to the Authority on the termination of the subject tender. Further, the absence of the Respondents' representatives during the online hearing made it impossible for the Board to ascertain whether any Written Report to the Authority on the termination of the subject tender, was ever prepared. In the circumstance there is no evidence before the Board to demonstrate that the Written Report to the Authority was prepared.
60. In view of the foregoing, the Board finds that the Procuring Entity did not terminate the subject procurement process in accordance with section 63 of the Act and thus this Board has jurisdiction over the instant Request for Review.



**Whether the Applicant in submitting a second tender document in the subject tender without a written notice of substitution or withdrawal rendered its tender document non-responsive?**

61. During the hearing the Applicant's Counsel, Ms. Sinyo assailed the Respondents' finding that the Applicant's tender was unresponsive on account of the fact that the Applicant had submitted 2 forms of tender in the subject tender. Counsel pointed out that the Respondents were estopped from taking issue with the 2 forms of tender i.e. one for Kshs. 51,144,955.60 (hereinafter "**Original Tender**") and the one for Kshs. 63,783,820.00 (hereinafter "**Subsequent Tender**").
62. According to Counsel, the Respondents had in the past permitted the Applicant to submit multiple tender documents and that the Respondents used the last submitted tender document for purposes of evaluation of the Applicant's tender. Ms. Sinyo argued that this past conduct on the part of the Respondents created a legitimate expectation on the part of the Applicant when it submitted 2 tender documents in the present tender. Counsel argued that the Respondents' online platform did not have a function for substitution or withdrawal of an already uploaded tender. The Applicant therefore took the view that the Respondents' ought to have evaluated it on the basis of the Subsequent Tender.
63. On the other hand, the Respondents through their Reply to the Request for Review took the view that the Applicant's tender was unresponsive as it submitted 2 separate tender documents in the subject tender without issuing a withdrawal or substitution notice. The Respondents' position as



can be gleaned from their Reply is that their online platform for submission of tenders has a function that supports the withdrawal and substitution of tenders and which function, the Applicant failed to utilize when uploading the Subsequent Tender. The Respondents also refuted the Applicant's allegations that it had in the past permitted the Applicant to submit multiple tender documents in separate tenders. They indicated that the tender referred to by the Applicant, the Applicant submitted 2 identical tender documents bearing the same tender price.

64. This Board is therefore called upon to establish whether the Respondents were correct in finding the Applicant's tender as non-responsive on account of the submission of multiple tender documents without a written notification of withdrawal or substitution of tender.

65. Section 79 of the Act provides guidance on the responsiveness of tenders submitted in any procurement proceedings in the following terms:

***"79. Responsiveness of tenders***

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

***(2) A responsive tender shall not be affected by—***

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

***(b) errors or oversights that can be corrected without affecting the substance of the tender.***

***(3) A deviation described in subsection (2)(a) shall—***

***(a) be quantified to the extent possible; and***



***(b) be taken into account in the evaluation and comparison of tenders***

66. A reading of the above yields that responsiveness of a tenderer's submitted tender is gauged from its compliance with the requirements enumerated in the Tender Document.
67. Central to the instant Request for Review is whether the Applicant submission of 2 tender documents absent a written notice rendered its tender non-responsive. In the present case, ITT 26.1 of the Tender Document provides as follows:

***"26 Withdrawal, Substitution and Modification of Tenders***

***26.1 A Tenderer may withdraw, substitute, or modify its Tender after it has been submitted by sending a written notice, duly signed by an authorized representative, and shall include a copy of the authorization (the power of attorney) in accordance with ITT 21.3, (except that withdrawal notices do not require copies). The corresponding substitution or modification of the Tender must accompany the respective written notice. All notices must be:***

- a) Prepared and submitted in accordance with ITT 21 and ITT 22(except that withdrawal notices do not require copies), and in addition, the respective envelopes shall be clearly marked "WITHDRAWAL, "SUBSTITUTION" or "MODIFICATION" and***
- b) Received by the Procuring Entity prior to the deadline prescribed for submission of Tenders in accordance with ITT 23."***





68. From the above tender provision, any tenderer intending to withdraw, substitute or modify its tender had to accompany such a withdrawal, substitution or modification with a written notice signed by an authorized representative and that such notice was to be accompanied by a Power of Attorney.

69. This Board is also mindful of Section 76 of the Act which speaks to modification of tenders in the following terms:

***"76. Modification of bids***

***(1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—***

***(a) the change or withdrawal shall be in writing; and***

***(b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.***

***(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender."***

70. From the above, the Act requires that any changes or withdrawal of a tender should (i) be done before the tender submission deadline; and (ii) should be in writing.

71. Turning to the facts at hand, it is not in dispute that the Applicant submitted 2 tender documents bearing different tender prices, one for



Kshs. 63,783,820 (Subsequent Tender) and the other for Kshs. 51,144,955.60 (Original Tender).

72. This Board has keenly studied the Confidential File submitted to it and notes that during tender opening the Tender Opening Committee read out and recorded Kshs. 51,144,955.60 as the Applicant's tender price. However, upon evaluation, the Evaluation Committee recommended the award of the subject tender to the Applicant at the tender price of Kshs. 63,783,820.00
73. On 14<sup>th</sup> July 2023 the Ag. General Manager (Procurement and Logistics) sent a Memo to Chairperson of the Tender Opening Committee inquiring on (i) whether there was any clarification by the Applicant and (ii) whether there was a written notice by the Applicant in the change of form of tender.
74. On 17<sup>th</sup> July 2023 the Chairperson of the Tender Opening committee sent a Memo confirming that (i) the Applicant was not represented during tender opening on 4<sup>th</sup> April 2023 but its representative sent an email on 5<sup>th</sup> April 2023 seeking to be supplied with the Tender Opening Register. The register was shared on 14<sup>th</sup> April 2023 bearing the Applicant's recorded tender price as Kshs. 51,144,955.60 and the Applicant never challenged the recorded tender price;(ii) the Applicant did not supply any notice of change or substitution of tender.
75. Article 227 of the Constitution enjoins state organs and public entities whenever contracting for goods and services to so under a system that with a system that is fair, equitable, transparent, competitive and cost-



effective. The competitive dimension extends to tenderers being at liberty to quote their own tender prices in the hope that they end up as the lowest evaluated tender.

76. Tender price is a sensitive element of any tender as it usually has a bearing on whether one's tender is selected as the successful tender. This informs why tenderers are required to submit one tender price which is usually read out and recorded during tender opening. The award of the tender is also usually as per the tender price as submitted.
77. Notwithstanding the foregoing, Section 76 of the Act contemplates scenarios where a tenderer may wish to substitute or withdraw their previously tender before the tender submission deadline. In this regard, tenders are permitted to substitute or withdraw their tenders on the condition that they give a written notice. The net effect of this notice is the avoidance of a scenario where different tender prices are associated with a particular tenderer as this will undermine the competitiveness of the tender exercise.
78. In the instant Request, the Applicant submitted 2 tenders i.e. Original Tender and Subsequent Tender without issuing a written notice of withdrawal or substitution. The said tender documents also bear different tender prices. Which of these tender prices could validly be taken to be the Applicant's tender price in the subject tender in the absence of a notice of withdrawal of substitution.
79. Both the Act and ITT 26.1 required a tenderer desirous of changing their already submitted tender to issue a written notice of substitution or



withdrawal but none was issued in the present case. The effect of the multiple tenders without a substitution or withdrawal notice is the confusion that arose on the Applicant's tender price. Whereas the Tender Opening Committee picked the tender price in the Original Tender Document, the Evaluation Committee picked the tender price in the Subsequent Tender. This sort of scenario undermines the competitiveness of any tender since different tender prices are associated with one tenderer to the disadvantage of the other tenderers participating in the same tender.

80. Accordingly, the Board finds that the Applicant in submitting a second tender document in the subject tender without a written notice of substitution or withdrawal rendered its tender document non-responsive.

**What orders the Board should grant in the circumstances?**

81. The Board has found that the Procuring Entity did not terminate the subject procurement process in accordance with section 63 of the Act and thus this Board has jurisdiction over the instant Request for Review.
82. The Board has also found that the Applicant in submitting a second tender document in the subject tender without a written notice of substitution or withdrawal rendered its tender document non-responsive.
83. The upshot of our finding is that the Request for Review dated 9<sup>th</sup> August 2023 in respect of Tender No. KAA/OT/JKIA/0105/2022 –2023 for Provision of Landscaping and Environment Management Services at Jomo Kenyatta International Airport, Nairobi fails in the following specific terms:

## **FINAL ORDERS**

84. 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 9<sup>th</sup> August 2023:

- 1. The Request for Review dated 9<sup>th</sup> August 2023 be and is hereby dismissed.**
- 2. The 1<sup>st</sup> Respondent be and is hereby directed to prepare and submit a Written Report on the termination of the subject tender to the Director General of the Public Procurement Regulatory Authority in accordance with Section 63(2) of the Act within the next 7 days of this Decision, if it has not done so already.**
- 3. Given the Board's finding above, each party shall bear its own costs.**

**Dated at NAIROBI, this 30<sup>th</sup> Day of August 2023.**



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**CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**