REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 108/2023 OF 13TH DECEMBER 2023

BETWEEN

TRADEWINDS AVIATION SERVICES LIMITED........................APPLICANT

AND

THE ACCOUNTING OFFICER,
KENYA AIRPORTS AUTHORITY...RESPONDENT

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/RT/MBD/0049/2023-2024 for Provision of Meet and Assist Services at Jomo Kenyatta International Airport.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCIArb. - Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT	**TRADEWINDS AVIATION SERVICES LIMITED**
Mr. S.K. Bundotich	-Advocate, Kale Maina & Bundotich Advocates
RESPONDENT	**ACCOUNTING OFFICER, KENYA AIRPORTS AUTHORITY**
Mr. Daniel Moss	-Advocate, Kenya Airports Authority
INTERESTED PARTY	**WILLIS PROTOCOL CONCIERGE LIMITED**
Mr. Kelly Lusuli Malenya	-Advocate, Malenya & Chimei Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Airports Authority, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in response to Tender No. KAA/RT/MBD/0049/2023-2024 for Provision of Meet and Assist Services at Jomo Kenyatta International Airport using a restricted tender process. The subject tender's submission deadline was Tuesday, 3rd October 2023 at 11.00 a.m.

Addenda

2. The Procuring Entity issued multiple addenda offering clarifications on various provisions of the Tender Document as requested by interested participants in the subject tender. The Addenda variously varied the tender submission deadline which was eventually set as Thursday 30th November 2023 at 11:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 30th November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 7 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Corporate Aviation Limited
2.	Willis Protocol and Concierge Services Limited
3.	Tradewinds Aviation Services Limited
4.	TAV Africa Operation Services Limited
5.	Stac International Limited
6.	Mantra Booking Services Limited
7.	Joint Billion Kenya Limited

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders. However, as at the institution of the instant Request for Review, evaluation was still underway.

REQUEST FOR REVIEW

5. On 13th December 2023, the Applicant through the firm of Kale Maina & Bundotich, filed a Request for Review dated 11th December 2023 supported by a Supporting Affidavit sworn on 8th December 2023 by Henry Lasoi, the General Manager at the Applicant, seeking the following orders from the Board in verbatim:

    1. ***A declaratory order do issue that the tender closing and opening proceedings of 30th October, 2023 and subsequent evaluation for Tender Number KAA/RT/MBD/0049/2023-2024 for provision of meet and assist services at Jomo Kenyatta International Airport contravened the mandatory provisions of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020 and are thus null and void.***
    2. ***That the procurement proceedings initiated by the Procuring Entity under Tender Number KAA/RT/MBD/0049/2023-2024 for provision of meet and assist services at Jomo Kenyatta International Airport be nullified.***
    3. ***The Procuring Entity be directed to initiate the tender proceedings afresh using restricted tender.***
    4. ***The Board gives such further orders or directions as it may deem fit.***

6. In a Notification of Appeal and a letter dated 13th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 (5) days from 13th December 2023.

7. In response to the Request for Review, on 19th December 2023, the Respondent through its General Manager, Procurement and Logistics, Mr. Vincent Korir filed an undated Memorandum of Response. The Respondent equally submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

8. Vide letters dated 19th December 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 24th 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 19th December 2023.

9. On 22nd December, 2023, Tav Operations Services communicated its satisfaction with the tender process as at the time of its letter.

10. On 27th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 29th December 2023 at 9.00 a.m. through the link availed in the said Hearing Notice.

11. On 29th December2023 at 9.00 a.m. parties through their respective Counsel joined the online hearing session.

12. The Board read out the documents that had been filed in the matter and sought parties' confirmation that all had copies of the filed documents, which they confirmed in the affirmative.

13. Thereafter, the Board gave hearing directions allocating the Applicant and the Respondent 10 minutes each to highlight their respective cases. The Applicant was also assigned an extra 2 minutes to offer any rejoinder on the Respondent's case.

14. Counsel for the Interested Party, Mr. Malenya had indicated to the Board that he would only be observing the process on behalf of the Interested Party.

PARTIES SUBMISSIONS

Applicant's Submissions

15. Counsel for the Applicant, Mr. Bundotich, submitted that the Applicant was not notified that the date of tender closing/opening had been moved. He indicated that the Applicant submitted its tender on 25th October 2023 only to be subsequently informed that the tender closing date had been extended to 2nd November 2023.

16. Mr. Bundotich contended that the Procuring Entity had made an admission that Addendum No. 4 communicating the extension of the tender closing date, was not shared with the Applicant until 25th October 2023 at 3.45 p.m. and that the lack of communication constituted a material error that went to the root of the tender. He argued therefore that the subject tender ought to be annulled.

17. Counsel argued that Addendum No. 9 amended the Tender Document and questioned how the Applicant was to amend its tender subsequent to tender closing when the law prohibits withdrawal of tenders upon tender closing. According to Counsel, the tender process was compromised by the failure to send the Applicant the Addendum extending the tender closing date.

18. It was argued that no prejudice would be visited upon the Respondent in the event the subject tender process was annulled. Further, that the Respondent's response in the matter did not address the key issues raised in the Request for Review.

Respondent's Submissions

19. Counsel for the Respondent, Mr. Moss, indicated that the Respondent would be relying on its filed documents.

20. He admitted that there was an inadvertence in the communication of Addendum No. 4 to the Applicant but pointed out that the said Addendum did not materially alter the Tender Document as it was merely an extension of time.

21. According to Counsel, all the received tenders were opened simultaneously and that the Applicant was invited to participate in the tender opening through a link that was shared to all the tenderers. In his view, the inadvertence omission in respect of sending Addendum No. 4 to the Applicant did not warrant the termination of the subject tender under Section 63 of the Act. He therefore sought to have the halted evaluation process under the subject tender to be allowed to continue.

Applicant's Rejoinder

22. In a brief rejoinder Counsel for the Applicant, Mr. Bundotich highlighted that Section 76(1) and (2) do not allow withdrawal of tenders after close of a tender.

23. He added that Section 63 of the Act permits termination of a tender on account of material governance issues or by operation of law.

CLARIFICATIONS

24. The Board sought confirmation from the Applicant on the time and date when the it received communication that the tender closing had been extended. Mr. Bundotich confirmed that the Applicant received the communication on 25th October 2023 at 3.45 p.m.

25. The Board also sought clarity from the Respondent whether it was tenable for the Applicant to withdraw its tender subsequent to the close of the tender in light of the provisions of Section 76(2) of the Act. Mr. Moss told the Board that the Tender Document allowed for withdrawal of submitted tenders.

26. At the conclusion of the online hearing session, the Board notified the parties that the instant Request for Review having been filed on 13th December 2023 had to be determined by 3rd January 2024. Therefore, the Board would communicate its decision on or before 3rd January 2024 to all parties via email.

BOARD'S DECISION

27. The Board has considered all documents, oral submissions and pleadings 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 failure of the Procuring Entity to communicate Addendum No. 4 lawfully to the Applicant prejudiced the Applicant in the preparation of its tender?***

II. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity's failure to communicate Addendum No. 4 to the Applicant prejudiced the Applicant in the preparation of its tender?

28. The Applicant brought the instant Request for Review taking issue with the Respondent for bringing to its attention Addendum No. 4 after the tender closing date and time. Counsel for the Applicant, Mr. Bundotich observed that the the Applicant submitted its tender on 25th October 2023 only to be subsequently informed that the tender closing date had been extended to 2nd November 2023. According to Counsel, this constituted a material error that went to the root of the tender. He argued therefore that the subject tender ought to be annulled.

29. Counsel argued that Addendum No. 9 amended the Tender Document and questioned how the Applicant was to amend its tender subsequent to tender closing when the law prohibits withdrawal of tenders upon tender closing. According to Counsel, the tender process was compromised by the failure to send the Applicant the Addendum extending the tender closing date and that this called for cancellation of the tender process.

30. On its part, the Respondent admitted that Addendum No. 4 was inadvertently communicated to the Applicant on 25th October 2023 at 3.45 p.m. after the initial tender closing time of 25th October 2023 at 11:00 a.m. The Respondent took the position that the said Addendum did not materially alter the Tender Document as it was merely an extension of time.

31. Counsel for the Respondent, Mr. Moss argued that all the received tenders were opened simultaneously and that the Applicant was invited to participate in the tender opening through a link that was shared to all the tenderers. In his view, the inadvertence omission in respect of sending Addendum No. 4 to the Applicant did not warrant the termination of the subject tender under Section 63 of the Act. He therefore sought to have the halted evaluation process under the subject tender to be allowed to continue.

32. The Board is therefore invited to interrogate the circumstances under which the Procuring Entity amended its Tender Document and issued Addenda in that regard.

33. Section 75 of the Act make provision for the Procuring Entity to modify the tender documents:

"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.

<u>(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.</u>

(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."

34. From the above, it is clear that (i) a Procuring Entity is at liberty to amend its Tender Document through an Addendum; (ii) the amendment has to be done before the tender submission deadline; (iii) the amendment can either be on the Procuring Entity's own initiative or in response to an inquiry by a tenderer or candidate; (iv) the Procuring Entity should furnish the Addendum to all participants who were previously furnished with the Tender Document; (v) the Addendum shall constitute part of the Tender

Document; and (vi) the Accounting Officer shall extend time for tender submission where an Addendum is issued when the time remaining to the close of the tender is less than a third of the time for preparation of the tender as may be necessary .

35. Central to the instant Request for Review is Section 75(3) of the Act that requires the Procuring Entity to promptly furnish the Addendum amending a Tender Document to all interested participants who were previously furnished with the Tender Document.

36. The Procuring Entity herein, through a restricted tendering process, invited a number of participants including the Applicant to offer their tenders in response to the subject tender. In the course of the tendering process, the Procuring Entity made a number of amendments to the Tender Document and variously issued 9 Addenda to this effect. However, of the 9 Addenda that the Procuring Entity issued, the Applicant was not furnished promptly with Addendum No. 4 until, as admitted by the Applicant and Respondent,3.45pm on the 25th of October,2023, which Addendum provided thus:

"KAA/RT/MBD/0049/2023-2024

25th October, 2023

To: Bidders,

RE: PROVISION OF MEET AND ASSIST SERVICES AT JOMO KENYATTA INTERNATIONAL AIRPORT

ADDENDUM NO. 4

The following are tender clarifications/addendum issued regarding the above tender in accordance to instructions to tenderers clause 7.1 of the bidding document for the referenced tender.

The closing/opening date is hereby extended to 2nd November, 2023 at 11:00 a.m. from 25th October 2023 at 11:00 a.m.

Kindly amend your tender accordingly and ensure the tender is valid for a period of 126 days and your tender security is valid for a period of 156 days from the NEW closing/opening date od 2nd November 2023, 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.

Signed

Lilian Okidi

Ag. GM (Procurement and Logistics)

For: MANAGING DIRECTOR/CEO"

37. From the Addendum above the following is apparent:

    i. The Procuring Entity had changed the tender closing date from 25th October 2023 at 11.00am to 2nd November 2023 at 11am.

    ii. Tenderers were required ensure that the tender is valid for 126 days.

    iii. Tenderers were required to ensure that their tender security was valid for 156 days from the new date, 2nd November 2023.

38. During the hearing, Counsel for the Respondent, Mr. Moss made an admission that the Procuring Entity inadvertently failed to bring the said Addendum to the attention of the Applicant until much later in the day on the 25th of October,2023 after the Applicant had submitted its bid according to the initial 11am on the 25th October, 2023. This constituted a tacit admission on the part of the Respondent of its breach of Section 75(3) of the Act.

39. The nature of the amendments introduced to the Tender Document by Addendum No.4 called for tenderers to make specific adjustments to the tender validity period of the tender as well as the validity period for the tender security. How was the Applicant to know this if they were belatedly furnished with the Addendum?

40. The situation is further compounded by the fact that on 26th October 2023 the Applicant wrote a letter of even date to the Procuring Entity bringing to its attention the breach that had occurred and seeking clarification on whether the tender would be allowed to continue in light of the apparent breach on the part of the Procuring Entity but the same was not replied. This letter has been annexed to the Request for Review and the Respondent did not deny having received the same or comment on the letter in its response to the Request for Review.

41. The Board is aware that Section 76 of the Act provides room for tenderers to change or withdraw withdrawal 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."

42. Section 76 of the Act provides that (i) a tenderer can only change or withdraw their already submitted tender in writing; and (ii) the change or withdrawal can only be done before the close of the tender.

43. However, in the instant case, the Applicant could not withdraw or change its tender under Section 76(2) of the Act as the subject tender had principally closed and the Applicant's letter of 26th October 2023 on the appropriate way forward in view of the Respondent's apparent breach was not responded to. The Procuring Entity's failure to ensure that Addendum No.4 was promptly furnished on the Applicant as was done with every other tenderer and the indifference to the concerns raised in the Applicant's letter dated 26th October 2023 speaks to material governance issues in respect of the conduct of the proceedings in the subject tender.

44. Article 227(1) of the Constitution espouses the principles of fairness, equity, transparency, competition and cost-effectiveness in public procurement processes. The Procuring Entity's failure to furnish the Applicant with Addendum No. 4 prior to close of the tender at 11am on the 25th of October 2023 coupled by the failure to respond to the Applicant's letter goes against the very principles as established under the Constitution as the Procuring Entity herein admittedly acted in a manner unfair, opaque and illegal with respect to the Applicant.

45. In view of the foregoing, the Board finds that the failure of the Procuring Entity to communicate Addendum No. 4 lawfully to the Applicant prejudiced the Applicant in the preparation of its tender.

What orders the Board should grant in the circumstances?

46. The Board has found that the Procuring Entity's failure to communicate Addendum No. 4 lawfully to the Applicant prejudiced the Applicant in the preparation of its tender.

47. The upshot of our finding is that the Request for Review dated 11th December 2023 in respect of Tender No. KAA/RT/MBD/0049/2023-2024 for Provision of Meet and Assist Services at Jomo Kenyatta International Airport succeeds in the following specific terms:

FINAL ORDERS

48. 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 11th December 2023:

    1. **The procurement proceedings in Tender No. KAA/RT/MBD/0049/2023-2024 for Provision of Meet and Assist Services at Jomo Kenyatta International Airport be and are hereby cancelled and annulled.**
    2. **The Respondent be and is hereby directed to commence fresh procurement proceedings in respect of Tender No. KAA/RT/MBD/0049/2023-2024 for Provision of Meet and Assist Services at Jomo Kenyatta International Airport taking in to consideration the Board's findings in this decision.**
    3. **Given Board's finding above, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 3rd Day of January 2024.

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CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**