

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 53/2024 OF 11<sup>TH</sup> JUNE 2024**

**BETWEEN**

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

**AND**

**THE ACCOUNTING OFFICER**

**KENYA AIRPORTS AUTHORITY ..... RESPONDENT**

**WILLIS PROTOCOL AND**

**CONCIERGE SERVICES LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**TAV AFRICA OPERATION SERVICES LIMITED JV**

**TAV ISLETME HIZMETLETI ..... 2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/RT/MBD/0207/2023-2024 Retender for Provision of Meet and Assist Services at Jomo Kenyatta International Airport.

**BOARD MEMBERS PRESENT**

- |                               |   |             |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Dr. Susan Mambo            | - | Member      |
| 3. Eng. Lilian Ogombo         | - | Member      |



**IN ATTENDANCE**

- 1. Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary
- 2. Ms. Evelyn Weru - Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

**TRADEWINDS AVIATION SERVICES LIMITED**

Mr. Bundotich - Advocate, Kale Maina & Bundotich LLP  
Advocates

**RESPONDENT**

**ACCOUNTING OFFICER, KENYA AIRPORTS AUTHORITY**

- 1. Mr. Chris Mulili - Advocate, Kenya Airports Authority
- 2. Ms. Lilian Okidi - Manager, Projects and Tendering, Kenya Airports Authority
- 3. Ms. Umi Luhindi - Kenya Airports Authority
- 4. Mr. Cyrus Kathuri - Kenya Airports Authority

**1<sup>ST</sup> INTERESTED PARTY WILLIS PROTOCOL AND**

**CONCIERGE SERVICES LIMITED**

Mr. Malenya - Advocate, Chimei & Malenya Company  
Advocates

**2<sup>ND</sup> INTERESTED PARTY TAV AFRICA OPERATION SERVICES**

**LIMITED JV TAV ISLETME HIZMETLETI**

- 1. Mr. Cagdas Ozey - Director,
- 2. Mr. Paul Rege - Supervisor



## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Airports Authority (hereinafter referred to as "the Procuring Entity") invited, through restricted tendering method, sealed tenders in response to Tender No. KAA/RT/MBD/0207/2023-2024 Retender for Provision of Meet and Assist Services at Jomo Kenyatta International Airport (hereinafter referred to as the "subject tender"). The blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download on the Procuring Entity's website [www.kaa.go.ke](http://www.kaa.go.ke). Bidders were required to submit their bid documents online using the link provided as <https://suppliers.kaa.go.ke/irj/portal> and the tender's submission deadline was initially scheduled on 11<sup>th</sup> April 2024 at 11.00 a.m.

### **Addenda**

2. The Procuring Entity issued Addendum No. 1 dated 5<sup>th</sup> April 2024 (hereinafter referred to as "Addendum No. 1") which offered clarifications on various inquiries made by bidders with regard to certain provisions in the Tender Document and Addendum No. 2 dated 9<sup>th</sup> April 2024 which also offered a clarification to an inquiry by bidders while extending the tender submission deadline to 18<sup>th</sup> April 2024 at 11.00 a.m.

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

3. According to the subject tender's Tender/Quotation Register signed by members of the Tender Opening Committee on 18<sup>th</sup> April 2024 and which Tender/Quotation Register was part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of three (3) tenders were submitted in response to the subject tender. The three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Willis Protocol and Concierge Services Ltd
2.	TAV Africa Operations Services Ltd JV TAV Isletme Hizmetleri
3.	Tradewinds Aviation Services Ltd

### **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the three (3) tenders as captured in an Evaluation Report for the subject tender dated 21<sup>st</sup> May 2024 and signed by members of



the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

- i Preliminary Evaluation;
- ii Technical Evaluation;
- iii Financial Evaluation

### **Preliminary Evaluation**

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Part 1: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 to 22 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for registration and prequalification of the subject tender.
6. At the end of evaluation at this stage all the three (3) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to evaluate tenders using the criteria provided under Part II: Evaluation of Tenderer's Technical Requirements of Stage III – Evaluation and Qualification Criteria at page 22 to 24 of the Tender Document. Bidders were required to score a minimum of 85% so as to proceed for any

further evaluation. At the end of evaluation at this stage, one (1) tender was determined non-responsive, being the Applicant's tender, while two (2) tenders were determined responsive having met the cut-off points and proceeded to the Financial Evaluation stage.

### **Financial Evaluation**

8. The Evaluation Committee was required to examine tenders using the criteria set out under Part III: Tenderer's Financial Proposal/Statement of Financial Compliance of Section III – Evaluation and Qualification Criteria at page 24 to 25 of the Tender Document.

9. Following conclusion of evaluation of bids at this stage, bids were ranked as follows as can be discerned at page 14 of 15 to page 15 of 15 of the Evaluation Report:

#### **“TENDERER'S FINANCIAL PROPOSAL/STATEMENT OF FINANCIAL COMPLIANCE**

<b>Minimum Annual Guarantee</b>	<b>Minimum Annual Guarantee (MAG) payable quarterly in advance. The applicable MAG shall be tied to the total number of airside security passes to be issued.</b>			
<b>BIDDER</b>	<b>No. passes</b>	<b>Minimum Annual Guarantee (MAG)</b>	<b>Security pass fee</b>	<b>Bidders preferred category Compliance</b>
<b>Willis Protocol &amp; Concierge Services Ltd</b>	<b>11 to 20 passes</b>	<b>Kshs. 12,000,000</b>	<b>Kshs. 300,000 per pass</b>	<b>Category 2 – 10 Passes and MAG of Kshs 12,000,000</b>

<b>TAV Africa Operations Services Ltd JV TAV Isletme Hizmetleri</b>	<b>1 to 10 passes</b>	<b>Kshs. 6,000,000</b>	<b>Kshs. 300,000 per pass</b>	<b>Category I – 10 Passes and MAG of Kshs 6,000,000</b>
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### STATEMENT OF FINANCIAL COMPLIANCE

<b>Item</b>	<b>Requirement</b>	<b>Willis Protocol &amp; Concierge Services Ltd</b>	<b>TAV Africa Operations Services Ltd JV TAV Isletme Hizmetleri</b>
<b>Annual concession fee</b>	<p><b>Payment of a fixed concession rate based on gross receipts/ sales as captured by management accounts and/ or EPOS at a fixed concession rate of 8% based on gross turnover or minimum 5USD per pax whichever is higher.</b></p> <p><b>The concession fees shall be payable quarterly in arrears based on management accounts and reconciled at the end of the financial year based on the audited accounts.</b></p> <p><b>Payments shall be made quarterly in arrears after reconciliation with minimum annual guarantee.</b></p> <p><b>The following rationale shall apply during reconciliation;</b></p> <p><b>(a) Where the concession fee is greater than the minimum annual guarantee, the Authority shall bill the concessionaire for the difference.</b></p> <p><b>(b) Where the concession fee is less than the minimum guarantee, the Authority shall take the minimum annual guarantee.</b></p>	<b>Complied</b>	<b>complied</b>

### Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the best evaluated bidders as follows:

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**1) M/s Willis Protocol and Concierge Services Limited at a MAG of Kshs 12,000,000 plus Kshs 300,000 per pass under category of 11 to 20 passes**

**2) M/s TAV Africa Operations Services Ltd JV TAV Isletme Hizmetleri at a MAG of 6,000,000 plus Kshs 300,000 per pass under category of 1-10 passes.**

### **Professional Opinion**

11. In a Professional Opinion dated 30<sup>th</sup> May 2024 (hereinafter referred to as the "Professional Opinion"), the General Manager (Procurement & Logistics), Mr. Vincent Korir, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties herein.

12. Thereafter the Professional Opinion was approved by the Ag. Managing Director/CEO, Mr. Henry Ogoye, the Respondent herein, on 30<sup>th</sup> May 2024.

## Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 30<sup>th</sup> May 2024.

## REQUEST FOR REVIEW NO. 53 OF 2024

14. On 11<sup>th</sup> June 2024, Tradewinds Aviation Services Limited, the Applicant herein filed a Request for Review dated 5<sup>th</sup> June 2024 together with an Affidavit of Support of Request for Review sworn on 6<sup>th</sup> June 2024 by Henry Lasoi, its General Manager and an Applicant's List and Bundle of Documents dated 5<sup>th</sup> June 2024 (hereinafter referred to as the 'instant Request for Review') through Kale Maina & Bundotich LLP Advocates seeking the following orders from the Board in verbatim:

***a) A declaratory order that the evaluation for Tender Number KAA/RT/MBD/0207/2023-2024 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 null and void.***

***b) An order directing the Procuring Entity to constitute a separate evaluation team to evaluate the tenders***



***afresh taking into account that Clause (i) (b) and (ii) of Part II of the tender document is optional to Clause (i) (a).***

***c) In the alternative to Prayer (b), the procurement proceedings initiated by the Procuring Entity under Tender Number KAA/RT/MBD/0207/2023-2024 for provision of meet and assist services at Jomo Kenyatta International Airport be nullified.***

***d) In the alternative to Prayer (b), the Procuring Entity be directed to initiate the tender proceedings afresh using restricted tender.***

***e) The Board gives such further orders or directions as it may deem fit.***

15. In a Notification of Appeal and a letter dated 11<sup>th</sup> June 2024, Mr. James Kilaka, the Acting Board Secretary of 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 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 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 11<sup>th</sup> June 2024.

16. On 14<sup>th</sup> June 2024, the Respondent filed through Vincent Korir, General Manager (Procurement and Logistics), a Reply by the Procuring Entity dated 14<sup>th</sup> June 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

17. *Vide* email dated 19<sup>th</sup> June 2024, 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 three (3) days.

18. *Vide* a Hearing Notice dated 21<sup>st</sup> April 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 25<sup>th</sup> June 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.

19. On 21<sup>st</sup> June 2024, the 1<sup>st</sup> Interested Party filed through its advocates a Notice of Appointment dated 20<sup>th</sup> June 2024 together with an

Interested Party's Replying Affidavit sworn on 20<sup>th</sup> June 2024 by Willis Otieno Ochola.

20. On 21<sup>st</sup> June 2024, the 2<sup>nd</sup> Interested Party filed through its advocates a Replying Affidavit sworn on 21<sup>st</sup> June 2024 by Cagdas Ozey.

21. Vide email dated 25<sup>th</sup> June 2024, the Board Secretary advised parties that the hearing of the instant Request for Review had been rescheduled for 27<sup>th</sup> June 2024 and issued parties with a new link to join the said virtual hearing.

22. At the hearing of the instant Request for Review on 27<sup>th</sup> June 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

23. In his submissions, counsel for the Applicant, Mr. Bundotich, relied on the Request for Review dated 5<sup>th</sup> June 2024 together with an Affidavit of Support of Request for Review sworn on 6<sup>th</sup> June 2024 by Henry Lasoi, its General Manager and an Applicant's List and Bundle of Documents dated 5<sup>th</sup> June 2024 filed before the Board.

24. Mr. Bundotich submitted that pursuant to the technical and financial evaluation of bids in the subject tender, the Applicant was notified vide letter dated 30<sup>th</sup> May 2024 that its tender was unsuccessful for the reason that it did not submit recommendation letters from at least 3 meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender. Counsel further submitted that the Applicant is still the current service provider and has been providing the said services for the past 10 years.

25. He submitted that the substratum of the instant Request for Review lies on the interpretation of Clause 1 under Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document. Counsel pointed out that Clause 1 as worded provided the word 'or' in capital letters before sub clause (b) and that after the word 'or' was sub clause (b) and sub clause (ii) which was a clear indication that the tender document was misleading because it was prepared in a manner to suggest that sub clause (b) and sub clause (ii) were optional to sub clause clause (ii).

26. Mr. Bundotich submitted that the Applicant while relying on the Tender Document submitted five (5) valid meet and assist passes for its own personnel for operations at JKIA. He argued that the Procuring Entity is bound by the Tender Document as drawn and the Evaluation Committee could not find that the Applicant did not comply with the said requirement which was optional.



27. Counsel questioned the qualifications of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in the subject tender considering that the first option under Clause 1 of the Technical Evaluation required a bidder to provide passes for at least five (5) employees and in view of the fact that this service was currently being provided by the Applicant and not the other two bidders. He argued that if every bidder was required to submit five passes, this effectively meant that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not technically qualify on the face of the Tender Document in view of the scoring sheet requiring a bidder to score a minimum of 85%.

28. Mr. Bundotich submitted that had the Tender Document explicitly stated that bidders were to provide both the passes and recommendation letters and had not been worded as seen at pages 22 and 23, the Applicant would have easily submitted the recommendation letters needed as it had been operating at JKIA for the last 10 years and as such, the purported rejection of the Applicant's bid on that basis was erroneous and the Board ought to cancel the procurement proceedings and award of the subject tender and direct for a fresh tender to be issued by the Procuring Entity.

29. Mr. Bundotich urged the Board to allow the instant Request for Review as prayed.

## **Respondents' submissions**

30. In his submissions, counsel for the Respondent, Mr. Mulili relied on the Reply by the Procuring Entity dated 14<sup>th</sup> June 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act filed before the Board.
31. Mr. Mulili submitted that the instant Request for Review was premised on two grounds touching on the evaluation criteria provided in the subject tender's Tender Document. Counsel pointed out that the Applicant's contention was that the evaluation criteria was flawed in view of the requirement for bidder's experience which it claimed to be ambiguous.
32. Mr. Mulili referred the Board to page 60 of its documents containing the evaluation criteria provided at page 22 and 23 of the Tender Document and pointed out that the Applicant's argument was that a bidder was required to demonstrate compliance with the requirement under Clause 1 or any other requirements yet Clause 1 required bidders to demonstrate that they had been providing meet and assist services at an international airport which would be demonstrated by (i) documentary evidence of copies of (a) at least five (5) valid meet and assist airport passes for its own personnel for operations at JKIA or (b) at least two valid meet and assist contracts/licenses/agreements signed between the bidder or its subsidiary company with an international airport showing a minimum 5 years' experience in



providing meet and assist services and the requirements under (ii) being recommendation letters from at least three meet and assist corporate clients addressed to the Respondent.

33. Counsel argued that provisions under Clause 1 roman (i) and (ii) were expressly distinct which was obvious noting that roman (i) would be awarded 50 marks and roman (ii) 30 marks and as such, the Applicant's argument was unfounded and ought to be dismissed.
34. Mr. Mulili referred to paragraph 25 of the Applicant's Supporting Affidavit on allegation made by the Applicant that the other two (2) bidders did not submit their documents and couldn't have met the requirements as they were not providing services to JKIA and submitted that this was incorrect since under the requirement for experience, the subject tender was open to bidders who had previously provided the services to the airport and elsewhere in international airports. He further submitted that bids were to be submitted online as outlined in the Tender Document
35. He urged the Board to dismiss the instant Request for Review with costs for lacking in merit and an attempt to delay the procurement process.
36. At this juncture, Ms. Lilian Okidi referred the Board to Addendum No. 1 and submitted that it was responding to all the bidders participating

in the procurement process in the subject tender and a clarification was issued under Clause 2 of Addendum No. 1 whereby the Procuring Entity explained how the total sum scoring would be done under Part II: Evaluation of Tenderer's Technical Requirements and for the Experience, roman (i) was issued 50 marks while roman (ii) was issued 30 marks; the Business Plan would be issued 10 marks and Personnel 10 marks which would add up to a total of 100 marks. Ms. Okidi pressed on that roman (i) and (ii) were clear and distinct criteria which bidders needed to meet so as to be scored under the subject tender.

37. When asked by the Board to clarify on its interpretation of use of the words 'or' and '/and' with reference to the requirement for experience under the Tender Document, Mr. Mulili submitted that the requirements under roman (i)(a) and (i)(b) were alternatives while the requirement under roman (ii) was a separate requirement and as such, the use of the word 'or' was to provide bidders with an option of either providing at least five valid meet and assist airport passes for its own personnel for operations at JKIA or at least two (2) valid meet and assist contracts between the bidder or its subsidiary company with an international airport.

38. When asked to clarify the stage at which the Applicant's tender was disqualified, Ms. Okidi submitted that the Applicant was disqualified at the Technical Evaluation stage having not been able to meet the requirements under experience.



39. When asked by the Board to expound on whether the Procuring Entity received any feedback from any bidder on Addendum No.1 issued specifically on the requirement for experience in contest, Ms. Okidi submitted that the Procuring Entity clarified at Clause 2 of Addendum No. 1 on the scoring to be used under Part II: Evaluation of Tenderer's Technical Requirements total sum which was to enable bidders to understand that they would get 50 marks under roman (i) while under roman (ii), they would be issued 30 marks; the Business Plan would be issued 10 marks and Personnel 10 marks which would add up to a total of 100 marks. She further submitted that the Procuring Entity did not get any further request for clarification on this addendum.

### **1<sup>st</sup> Interested Party's submissions**

40. In his submissions, counsel for the 1<sup>st</sup> Interested Party, Mr. Malenya relied on the Interested Party's Replying Affidavit sworn on 20<sup>th</sup> June 2024 by Willis Otieno Ochola filed before the Board.

41. Counsel associated himself with submissions made by the Respondent and submitted that there was no ambiguity under provisions of Clause 1 at pages 22 to 23 of the Tender Document as alleged by the Applicant since the word 'or' is a conjunction in English and connects two sentences or provides an alternative.

42. Counsel further submitted that Clause 1 consisted of provisions under roman (i) whereby there was sub-article (a) or (b) indicating an

alternative making the said provisions under roman (i) and roman (ii) distinct and every bidder was required to meet roman (i) and roman (ii).

43. At this juncture, the Board asked Mr. Malenya to read out the provisions in contest on the requirement for Experience under Part II: Evaluation of Tenderer's Technical Requirements.

44. Mr. Malenya reiterated that the 1<sup>st</sup> Interested Party's contention was that the inclusion of the word 'or' is only between roman (i)(a) and (i)(b) meaning that roman (ii) was not an alternative since it was a separate condition or requirement to be met.

45. Counsel submitted that there was an admission by the Applicant that it did not provide the recommendation letters which is a key requirement and as such, even if re-evaluation was carried out, it would still not qualify.

46. Mr. Malenya further submitted that it was not true that the Interested Party had not provided the service in the subject tender pointing out that the subject tender was restricted to specific entities ear marked as having offered the services albeit on an ad hoc basis.

47. Counsel pointed out that this was the third time an application for review had been lodged before the Board with regard to the subject



tender with the last review having been lodged by the Applicant herein and a decision rendered by the Board directing that the procurement process be conducted afresh. He argued that the Applicant wanted to have a second biting at the cherry having not submitted the required documents and was a vexatious litigant.

48. He urged the Board to dismiss the instant Request for Review with costs for lacking in merit

## **2<sup>nd</sup> Interested Party's submissions**

49. In his submissions, Mr. Ozey relied on the Replying Affidavit sworn on 21<sup>st</sup> June 2024 by Cagdas Ozey filed before the Board.

50. Mr. Ozey associated himself with submissions made by the Respondent and the 1<sup>st</sup> Interested Party and submitted that it was a mandatory requirement for a bidder to provide the recommendation letters under Clause 1(ii) at page 23 of the Tender Document noting that roman (i) and (ii) had different evaluation points and it was clear on what was required from a bidder when submitting its bid documents.

51. Mr. Ozey indicated that he was in disagreement with the Applicant's argument on the 2<sup>nd</sup> Interested Party's qualification noting that it duly complied with the second requirement whereby a bidder was required to demonstrate that it had at least two valid meet and assist contracts



signed between the bidder and its subsidiary company with an international airport showing a minimum of 5 years' experience in providing the services.

### **Applicant's Rejoinder**

52. In a rejoinder, Mr. Bundotich submitted that the question that the Board ought to consider in view of provisions of the Act and Regulations was why the Applicant's tender was not disqualified at the Technical Evaluation stage if indeed that latter requirement was not an alternative. He further submitted that the Act requires a procuring entity to prepare a clear tender document and that if the Procuring Entity intended the word 'or' is alternative to 1(a), it would have been a continuous paragraph and as such this provision was not compliant with the Act since it was not clear.
53. Counsel submitted that the Act and Regulations 2020 did not intend that a prospective bidder be denied an opportunity for its tender to be fairly evaluated on the basis of ambiguous and contradictory document. He pressed on that there is no requirement for a bidder to come once before the Board and as long as there is any irregularity, it can approach the Board as many times as necessary.
54. When asked by the Board to clarify whether the Applicant submitted the three (3) meet and assist recommendation letters as required in the Tender Document and whether it sought any clarification on the



experience under the requirement on roman (i) and (ii) were exclusive, Mr. Bundotich submitted that the Tender Document as drawn speaks for itself and the Applicant did not need to seek a clarification and neither did it submit the recommendation letters from at least three (3) meet and assist corporate clients addressed to the Respondent. He reiterated that the word 'or' is separate and was not a continuation of roman (i)(a) and that roman (ii) is under the path where it has distinguished roman (i)(a) against roman (b) and roman (ii).

55. When asked by the Board whether it would have made any difference if the disjunction 'or' would have been placed after the requirement under roman (i)(b) and what the distinction would have been and if the weighting attached to roman (i) and (ii) for purposes of interpreting the placement of the word 'or' have made any difference, Mr. Bundotich submitted that if the Procuring Entity intended that roman (ii) was a continuation of roman (i), it ought to have ensured that after the word '*Jomo Kenyatta International Airport*' under roman (i) it would have continued with the 'or' in lowercase followed by the requirement under (b) and after the word 'services' under (b), it ought to have indicated 'AND' in uppercase followed by the requirement under roman (ii) for submission of the recommendation letters from at least three corporate clients addressed to the MD. He stated that at least in this way, it would have been clear to bidders that roman (i) and (ii) were mandatory which was how the Applicant interpreted the said provisions. He further

submitted that there were 45 marks allocated for criteria under roman (i)(a) and 20 marks for roman (ii) which would have made a difference since on the basis of the interpretation of the Tender Documents, none of the bidders would have achieved the marks under roman (i)(a) and in any event no marks were allocated to roman (i)(b) as marks were only allocated to roman (ii).

56. When asked to expound on why the Applicant failed to attach the recommendation letters if the same were in its possession at the time of submission of its bid document, counsel submitted that the Applicant having rendered the same services for the last 10 years, it did not think that it was necessary to add the three letters having rendered the service for the last 10 years through various tenders advertised by the Procuring Entity and this was not an issue of overlooking the requirements and would have availed the same had the tender document been clear.

57. The Board informed parties that the instant Request for Review having been filed on 11<sup>th</sup> June 2024 was due to expire on 2<sup>nd</sup> July 2024 and the Board would communicate its decision on or before 2<sup>nd</sup> July 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

58. The Board has considered each of the parties' cases, documents, pleadings, oral submissions, list and bundle of authorities together



with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

**A. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender with regard to Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020;**

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

**As to whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender with regard to Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020;**

59. We understand the Applicant's case on this issue to be that its bid document was disqualified on the basis of an incorrect factual position as regards the requirement for experience under Clause 1(ii) of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23

of the Tender Document requiring bidders to submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender.

60. The Applicant contends that that its bid document was responsive and complied with all the eligibility and other mandatory requirements in the Tender Document in line with Section 79 of the Act and that the requirements under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document were ambiguous leading the Evaluation Committee to evaluate its tender on a wrong interpretation of the said provision thereby arriving at a wrong finding contrary to the provisions of the Tender Document read with the Constitution, the Act and Regulations 2020.

61. We understand the Respondent's case on this issue to be that the Evaluation Committee complied with provisions of the Constitution, the Act, Regulations 2020 and the Tender Document in evaluation of the Applicant's bid submitted in the subject tender and that the requirement for Experience under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document was clear and not ambiguous as alleged in view of clarifications issued by the Procuring Entity under Addendum No. 1 pertaining to weightage.



62. On its part, the 1<sup>st</sup> Interested Party associated itself with submissions made by the Respondent and submitted that the requirement for Experience under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document were distinct and clear and that bidders were required to comply with the same to be determined responsive.
63. On its part, the 2<sup>nd</sup> Interested Party fully associated itself with submissions made by the Respondent and the 1<sup>st</sup> Interested Party and submitted that it was mandatory for bidders to submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender as stipulated under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document.
64. Having considered parties' submissions herein, we note that the bone of contention in the instant Request for Review is on the interpretation of the provisions of Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document.
65. The Applicant argued that the Tender Document was ambiguous in view of the interpretation of the provisions under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document which in its opinion meant that it was optional

for a bidder to submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender under the criteria under Clause 1(ii) since the word 'or' as used in this criteria is not a continuation of the criteria under Clause 1(i)(a) and confirms that the criteria under Clause 1(i)(b) and Clause 1(ii) are alternative to Clause 1(i)(a) and if the Procuring Entity intended for the criteria under Clause 1(i)(b) to be an alternative, it ought to have inserted the word 'or' in lowercase as a continuation to the criteria under Clause 1(i)(a).

66. The Respondent and Interested Parties on their part contend that the evaluation criteria under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document was distinct in that the criteria under Clause 1(i) was different from Clause 1(ii) as each had independent scoring as evidenced by the clarifications provided under Addendum No. 1.

67. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

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

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***



**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

- a) .....**
- b) .....**
- c) ..... and**
- d) ....."**

68. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

**"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.**

**(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."**



69. Further Section 60(1) provides:

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."***

70. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."***

71. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

***"80. Evaluation of tender***

***(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the***

***responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

***(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

***(a) the criteria shall, to the extent possible, be objective and quantifiable;***

***(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and***

(4) .....

72. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

73. The Board has carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender as set out under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document provides as follows:

<b>1</b>	<b>Experience</b>	<b><i>Firms MUST demonstrate they have been providing meet and assist services at an international airport</i></b>  <b><i>This shall be demonstrated by the following:</i></b>	<b>50</b>
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		<p><b>i. Documentary evidence such as copies of (45 marks)</b></p> <p><b>a) At least FIVE (5) valid meet and assist airport passes for its own personnel for operations at Jomo Kenyatta International Airport</b></p> <p><b>OR</b></p> <p><b>b) At least TWO (2) valid meet and assist contracts/ licenses/ agreements signed between the bidder or its subsidiary company with an international airport showing a minimum 5 years' experience in providing meet and assist services.</b></p> <p><b>30</b></p> <p><b>ii. Recommendation letters from at least THREE (3) meet and assist corporate clients addressed to the MD/ CEO KAA and specific to this tender (30 marks)</b></p>	
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74. We note that the Procuring Entity issued a clarification pertaining the above criteria in Addendum 1 where it amended the weightage as follows:

<b>No.</b>	<b>Inquiry</b>	<b>Response</b>
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.....	.....	.....
<b>2.</b>	<p>.....</p> <p><b>2. Under "Part II: Evaluation of Tenderer's Technical Requirements" total sum is 90% and not 100%. Kindly advice on how you will distribute the 10% difference.</b></p>	<p>.....</p> <p><b>2. Part II: Evaluation of Tenderer's Technical Requirements" total sum Experience</b></p> <p><b>i) 50 marks</b></p> <p><b>ii)30 marks</b></p> <p><b>Business Plan – 10 marks</b></p> <p><b>Personnel – 10 marks</b></p>

75. In interpreting the above provisions under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document we deem it fit to understand the meaning of the word 'OR' as used between Clause 1(i)(a) and Clause 1(i)(b) above and the meaning of the word 'ambiguous' as used by the Applicant in advancing its case in the instant Request for Review.

76. Oxford Dictionary, Eight Edition defines the word 'or' as disjunctive in that it is used to introduce another possibility. The aforesaid Oxford Dictionary defines the word 'ambiguous' to mean one that can be understood in more than one way; having different meanings.

77. With the foregoing definitions in mind, our interpretation of the above provisions pertaining the requirement for Experience under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document is that it was a mandatory requirement for a bidder to demonstrate that it had been providing meet and assist services at an international airport which would be evidenced by (a) documentary evidence such as copies of at least five (5) valid meet and assist airport passes for its own personnel for operations at Jomo Kenyatta International Airport or at least two (2) valid meet and assist contracts/ licenses/agreements signed between the bidder or its subsidiary company with an international airport showing a minimum 5 years' experience in providing meet and assist services, and (b) Recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender.

78. In our considered view, the requirement for '*at least two (2) valid meet and assist contracts/ licenses/agreements signed between the bidder or its subsidiary company with an international airport showing a minimum 5 years' experience in providing meet and assist services'*' was provided as another possible way for a bidder to demonstrate its documentary evidence other than having the '*five (5) valid meet and assist airport passes for its own personnel for operations at Jomo Kenyatta International Airport'*' and a bidder who met this criteria would be scored 50 marks as seen from Addendum 1 which clearly set



out that the experience under Clause 1(i) would score 50 marks while the experience under Clause 1(ii) would score 30 marks. As such, the criteria under Clause 1(ii) for *'recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender'* was distinct and independent of the criteria mentioned above under Clause 1(i) of the Tender Document. The above evaluation criteria were therefore not ambiguous as alleged by the Applicant and had only one interpretation.

79. It is not in dispute that the Applicant did not submit the recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender as admitted in the instant Request for Review rendering its tender non-responsive to the evaluation criteria under Clause 1(ii) of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document.

80. We have studied the Evaluation Report submitted as part of the confidential documents by the Respondent pursuant to Section 67(3)(e) of the Act and note that the Applicant's tender was determined non-responsive at the Technical Evaluation stage since it *'did not submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to this tender'*.



81. Section 79 of the Act provides for responsiveness of tenders as follows:

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

82. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Miscellaneous Civil Application No. 85 of 2018, Republic V Public Procurement Administrative Review Board Ex Parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, (hereinafter referred to as "Application No. 85 of 2018") the High Court held that:

***"Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover,***



***they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***

83. Considering the above, we are left with the inevitable conclusion that the Applicant's tender failed to satisfy Clause 1(ii) of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document requiring bidders to submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender so as to proceed for further evaluation.

84. In the circumstances, the Board finds that the 2<sup>nd</sup> Respondent's Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

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

85. We have found that the evaluation criteria under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of



the Tender Document was unambiguous and that the Applicant's tender in the subject tender was evaluated in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution with respect to Clause 1(ii) of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document requiring bidders to submit recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender so as to proceed for further evaluation.

86. The upshot of our findings is that the instant Request for Review fails.

### **FINAL ORDERS**

87. 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 5<sup>th</sup> June 2024 and filed on 11<sup>th</sup> June 2024:

**A. The Request for Review dated 5<sup>th</sup> June 2024 and filed on 11<sup>th</sup> June 2024 be and is hereby dismissed for lacking in merit.**

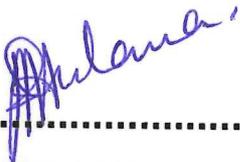
**B. The Respondent is hereby ordered to ensure that the procurement process with respect to Tender No. KAA/RT/MBD/0207/2023-2024 Retender for Provision of Meet and Assist Services at Jomo Kenyatta International Airport proceeds to its lawful and logical**

**conclusion taking into consideration the Board's findings herein, the Tender Document and the provisions of the Act, the Constitution and Regulations 2020.**

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

**Dated at NAIROBI this 2<sup>nd</sup> Day of July 2024.**

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

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



