

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 78/2024 OF 13TH AUGUST 2024

BETWEEN

RESQTEC ZUMRO.....APPLICANT

AND

**THE MANAGING DIRECTOR,
KENYA AIRPORTS AUTHORITY.....RESPONDENT**

AND

**INTERNATIONAL PARTNERSHIP
SERVICES EAST AFRICA LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Airports Authority in respect of Tender No. KAA/RT/JKIA/0199/2023-2024 Retender for the Procurement of Aircraft Recovery System for Kenya Airports Authority.

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCI Arb - Chairperson
2. Mr. Jackson Awele - Member
3. CPA Alexander Musau - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat
Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

RESQTEC LIMITED

Ms.Kuchio

Advocate, Kounah & Company Advocates

RESPONDENT

**THE MANAGING DIRECTOR, KENYA
AIRPORT AUTHORITY**

Mr. Chris Mulili and Ms.Lilian Okidi Advocate, Kenya Airports Authority

INTERESTED PARTY

**INTERNATIONAL PARTNERSHIP
SERVICES EAST AFRICA LIMITED**

Prof. Mumma And Albert Ochieng Prof Mumma & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Airports Authority, the Procuring Entity and the Respondent herein, using the restricted tendering method sent out invitations to bid to 6 suppliers inviting them to electronically submit their bids in response to Tender No. KAA/RT/JKIA/0199/2023-2024 Retender for the Procurement of Aircraft Recovery System for Kenya Airports Authority (herein "the subject tender"). Interested suppliers were required to submit their bids before the tender closing date of Thursday, 21st March 2024 at 11:00 a.m.

Addenda

2. Subsequently, on various dates between 19th March 2024 and 22nd March 2024, the Procuring Entity issued 2 addenda offering clarifications to various inquiries that were made by different suppliers who had expressed

interest in participating in the tender. The tender closing date was also rescheduled to 28th March 2024.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 28th March 2024, submitted under the Confidential File submitted by the Procuring Entity, the following two (2) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Resqtec Zumro B.V.
2.	International Partnership Services East Africa 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 in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary examination

for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the pages 31 to 33 of the Tender Document .

6. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 1 tender being that of the Applicant was disqualified with only the Interested Party's tender qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Stage 2-b) Technical Evaluation under Section III-Evaluation under Section III Evaluation and Qualification Criteria at pages 33 to 39 of the Tender Document.
9. The evaluation was to be on a Compliant/Not Compliant basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
10. At the end of the evaluation at this stage, the Interested Party's tender which was the only tender evaluated at this stage, was found responsive and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out in Stage 3- Financial Evaluation under Section III-Evaluation and Qualification Criteria at page 40 of the Tender Document.
12. The evaluation was to be on the basis of a comparison of tender prices indicated in the tenders at this stage. The successful tender would be that established as bearing the lowest evaluated price.
13. At the end of the evaluation at this stage the Interested Party's tender price of USD 2,238,730.40 (which translated to Kshs. 195,064,666.72) was established as the lowest evaluated price being that it was the only the Interested Party's tender that qualified for evaluation at this stage. The tender price was also established as falling within the Procuring Entity's budget under the subject tender.

Evaluation Committee's Recommendation

14. The Evaluation Committee through an Evaluation Report dated 15th April 2024 forming part of the Confidential File, recommended the award of the subject tender to the Interested Party at its tendered price of United States Dollar Two Million Two Hundred and Thirty-Eight Thousand Seven Hundred and Thirty and Forty Cents (USD 2,238,730.40) subject to due diligence in accordance with the Act.

Due Diligence

15. The Evaluation Committee through a Due Diligence Report dated 11th June 2024 indicates that the Procuring Entity sent out letters to the



Interested Party's past clients including AMS Aircraft Recovery Limited and Bristol Airport to verify whether the Interested Party offered them satisfactory services during their engagement. The outcome of the due diligence was positive.

Professional Opinion

16. In a Professional Opinion dated 12th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's General Manager Procurement and Logistics, Mr. Vincent Korir reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee
17. Subsequently on the same day, 22nd June 2024, the Accounting Officer, Mr. Henry Ogoye, concurred with the Professional Opinion.

Notification to Tenderers

18. Accordingly, the tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 12th June 2024.

REQUEST FOR REVIEW

19. On 13th August 2024, the Applicant through the firm of Kounah & Company Advocates filed a Request for Review dated 12th August 2024 supported by a Statement dated 12th August 2024 by Dennis Beck, the Applicant's Global Sales Director, seeking the following orders from the Board in verbatim:

a) An order declaring that the Accounting Officer of the Procuring Entity's decision to award Tender No.



KAA/RT/JKIA/0199/2023-2024 for the Procurement of Aircraft Recovery System for Kenya Airports Authority is null and void;

- b) A declaration that the Applicant's bid was responsive at the Financial Evaluation Stage in accordance with section 80(3) and 86(1)(a) of the Act, thus was the lowest evaluated responsive bidder qualified for award of Tender No. KAA/RT/JKIA/0199/2023-2024 for the Procurement of Aircraft Recovery System for Kenya Airports Authority;***
- c) An order cancelling and setting aside the letter dated 12th June 2024 notifying the Applicant that its bid was unsuccessful thereby awarding Tender No. KAA/RT/JKIA/0199/2023-2024 for the Procurement of Aircraft Recovery System for Kenya Airports Authority to another bidder;***
- d) An order directing and compelling the Procuring Entity to bear the costs of this Request for Review;***
- e) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

20. In a Notification of Appeal and a letter dated 12th August 2024, Mr. James Kilaka, the Ag. 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 said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12th August 2024.

21. On 16th August 2024, the Respondent filed their Memorandum of Response dated 16th August 2024 through Mr. Vincent Korir, the Procuring Entity's General Manager Procurement and Logistics. The Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.
22. On 23rd August 2024, the Ag. Board Secretary forwarded to the Interested Party a copy of the Request for Review while inviting it to offer information in respect of the subject tender.
23. On the same day, 23rd August 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 28th August 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.
24. On 27th August 2024, the Interested Party through the firm of Prof. Albert Mumma & Company Advocates filed a Notice of Appointment of Advocates, Memorandum of Response and Written Submissions, all dated 26th August 2024 alongside a Replying affidavit sworn on 26th August 2024 by Hezron Arunga, the Interested Party's Managing Director.
25. On 28th August 2024 at 2:00 p.m., when the Board convened for the online hearing, all parties were present and represented by their various Advocates. The Board observed that only the Interested Party had filed

their Written Submissions in the matter and inquired from the parties present whether they were amenable to filing their Written Submissions and thereafter the Request for Review stand canvassed by way of Written Submissions to which all Counsel were agreeable.

26. Accordingly, the Board directed the Applicant and the Respondent to file their respective Written submissions on both the Request for Review and the Preliminary Objection raised by the Interested Party. Further that the Board would render a Decision on both the Request for Review and Notice of Preliminary Objection on or before 3rd September 2024 by way of email to the parties.
27. Later on the same day, 28th August 2024, the Applicant filed their Written Submissions of even date.
28. On 29th August 2024, the Respondent filed their Written Submissions of even date.
29. Below is a summary of each party's case as can be discerned from their filed Written Submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

30. The Applicant while making reference to the case of the ***Owners of the Motor Vessel Lilian S v Caltex Oil (Kenya) Ltd*** and Section 167(1) of the Act argued that the instant Request for Review was timeously filed. An argument was made on behalf of the Applicant that the 14 days statutory time under Section 167(1) of the Act, begins to run only when



the Applicant has actual notice of the breach complained of. Accordingly, it was argued that the Notification Letter dated 12th June 2024 was sent to the Applicant was received on 18th July 2024 but was postmarked 20th June 2024.

31. It was argued that the Procuring Entity used an incorrect email address when sending emails to the Applicant with the result that the Applicant was deprived timely notice of breaches by the Procuring Entity. Accordingly, the Applicant maintained that it only received notices through the physical mode of service because of the Respondent.
32. The Applicant contended that Article 159(2)(d) of the Constitution of Kenya 2010 enjoined courts to determine cases without undue regard to procedural technicalities. Reliance was also placed on the Court of Appeal case of ***Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & Others [2013]eKLR*** for the proposition that where a procedural infraction causes no injustice by way of injurious prejudice to a person such an infraction should not have an invalidating effect.
33. The Applicant submitted that the Procuring Entity failed to conduct the procurement process in a manner that was fair, equitable transparent and cost effective while citing:
 - i. The Procuring Entity consistently used an incorrect email address "martijn@resqtech.com" instead of "info@resqtec.com" when sending emails to the Applicant. The Applicant argued that this affected its receipt of communication in respect of the subject tender.

- ii. The Procuring Entity allegedly breached section 68(3) of the Act read with Regulations 50 and 52 of the Regulations 2020 for failing to provide adequate clarifications on critical aspects of the tender. An example was given of how the Procuring Entity did not sufficiently explain why key requirements such as audited financial statements, references for past projects and proof of experience for training instructors were removed from the subject tender.
34. It was argued that the evaluation process was conducted in an inconsistent fashion with the Procuring Entity selectively enforcing the requirements of the Tender Document. Reference was made to the Procuring Entity's refusal to allow minor corrections while allowing significant non-compliance such as submission of tender prices in a foreign currency.
35. The Applicant maintained that it submitted a responsive bid and that any minor non-compliance or clerical errors should have been corrected under Section 79(2) of the Act.
36. The Applicant argued that its bids in Tenders 1,2 and 3 were responsive and met the substantive requirements outlined in the tender documents. Further that the only issues identified in the Applicant's bid in Tender 3 was a failure to tick a box on the Certificate of Independent Tender Determination.
37. It was contended that the Procuring Entity's actions undermined the principles of fair competition and transparency and thus the Request for Review ought to be allowed.

Respondents' Submissions

38. The Respondent argued that the Applicant participated in the subject tender and was disqualified at the Preliminary Stage after it was established that the Applicant failed to duly fill its Certificate of Independent Tender Determination. That the Applicant was subsequently notified of the unsuccessfulness of its bid through a letter dated 12th June 2024.
39. Relying Section 167(1) of the Act and Regulation 203 of the Regulations 2020 it was argued that the instant Request for Review was time-barred. Further, that though the Applicant maintained that it received the Notification Letter on 18th July 2024, the Request for Review was only filed on 13th August 2024, which date was outside the 14 days contemplated under Section 167(1) of the Act.
40. It was contended that Section 79 of the Act considers a tender as responsive only if it conforms to all eligibility and other mandatory requirements in the Tender Document. That the Applicant through paragraph 16 of the Statement in Support of the Request for Review made an admission that it failed to tick the applicable items between items 5 (a) and 5 (b) of the Certificate of Independent Tender Determination and thus the Applicant was correctly disqualified for failing to meet a mandatory requirement.
41. The Respondent pleaded for the Board to dismiss the Request for Review and extend the tender validity for the subject tender

Interested Party's Submissions

42. The Interested Party contended that following the evaluation of the tenders received in the subject tender it emerged that the Applicant failed to duly fill its Certificate of Independent Tender Determination and that this fact was admitted at paragraph 16 of the Applicant's Statement in support of the Request for Review.
43. Relying on Supreme Court decisions in ***Albert Chaurembo Mumba & 7 Others v Maurice Munyao & Others*** and ***Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 Others*** it was argued that a court can only exercise jurisdiction conferred upon it by the Constitution or other written law. Accordingly the Board could only invoke its jurisdiction under the provisions of the Act, whose Section 167(1) and Regulation 203 limited the time for filing Request for Review to 14 days from the date of the breach complained of.
44. The Interested Party contended that the Applicant through paragraph 22 of its Statement in Support of the Request for Review that it received the Notification Letter dated 12th June 2024 and thus the Applicant should have brought the Request for Review by 26th June 2024. It was alternatively argued that going by the Applicant's contention that it received the Notification Letter on 18th July 2024 the Request for Review ought to have been filed by 1st August 2024. It was therefore argued that the Request for Review was time-barred and therefore the Board lacked jurisdiction over the same.
45. Further relying on Section 79(1) of the Act and this Board's Decision in ***PPARB Application No. 21 of 2008; MFI Office Solutions Limited***



***v Central Bank of Kenya and PPARB Application No. 9 of 2010;
Infozillion (K) Limited v Communications Commission of Kenya***

that a tender is only responsive if it conforms to the all the Evaluation and Qualification Criteria outlined in the Tender Document. Further, that having admitted that the Applicant's tender was unresponsive to a mandatory requirement, the Applicant's tender could not be subjected to any correction under Section 79(2) of the Act.

BOARD'S DECISION

46. The Board has considered all documents, 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 instant Request for Review was filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020?***

Depending on the Board's finding on Issue (1) above:

II. ***Whether the Applicant's tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?***

III. ***Whether the Interested Parties herein were properly awarded the subject tender?***

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

Whether the instant Request for Review was filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020?

47. Following the filing of the present Request for Review, the Interested Party fronted a challenge to the Board's jurisdiction in a Preliminary Objection embedded through paragraphs 15, 17 and 19 of the Memorandum of Response dated 26th August 2024 . The Interested Party contended that the present Request for Review was time-barred within the provisions of Section 167(1) of the Act and Regulation 203 of the Regulations 2020.
48. The Interested Party argued that the Notification Letter in the subject tender was issued on 12th June 2024 and thus any Request for Review ought to have been filed by 26th June 2024. Alternatively, it was argued that even if the 14 days statutory timeline was to be counted from 18th July 2024, the date the Applicant avers is the date it received the Notification Letter, the Request for Review ought to have been filed by 1st August 2024 and was therefore time-barred having been filed on 13th August 2024.
49. The Respondent took a similar position to that of the Interested Party in affirming that the Request for Review was time-barred. It was contended that the Request for Review was filed more than 14 days after the breach complained of.
50. In contrast, the Applicant contended that the Request for Review was timeously filed and thus the Board was clothed with the requisite jurisdiction over it. It was argued that the Procuring Entity consistently used an erroneous email address when sending out communication to the Applicant with the result that the Applicant only learnt of the issuance of



a Notification Letter in the matter when it received its physical copy of the Notification Letter dated 12th June 2024 on 18th July 2024.

51. For starters, this Board recognizes the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

52. The Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

53. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

54. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

"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."

55. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized the centrality of the issue of jurisdiction and 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...."

56. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

57. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

58. Further, a reading of section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

59. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

Request for a review

1)A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

2)The request referred to in paragraph (1) shall—

a)state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b)be accompanied by such statements as the applicant considers necessary in support of its request;

c)be made within fourteen days of —

i)the occurrence of the breach complained of, where the request is made before the making of an award;

ii)the notification under section 87 of the Act; or

iii)the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder

60. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

61. It is therefore clear from a reading of Section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of

intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

62. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
63. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
64. The centrality of the time of knowledge of the breach complained of was emphasized by the High Court in ***Kingsway Business System Limited Vs National Government Constituencies Development fund Board & Agile Business Solutions; Nairobi High Court Judicial Review Application No. E155 of 2024*** in the following words:

28. My understanding of the phrase "fourteen days of notification of award or date of occurrence of the alleged breach" in section 167 (1) is that, the time for filing of the request for review starts running once the aggrieved party has been notified of the award or the date of the occurrence of the alleged breach. In either case, knowledge, on the part of the aggrieved party, is critical; the timing that counts is when the notification of the award or the alleged breach is brought to the attention of the aggrieved party or when he became aware of the notification or the breach. It is not necessarily the date indicated on the notification or when the alleged breach occurred. Certainly, it is logical and stands to reason that an aggrieved party cannot be expected to commence action on a notification or breach that he is not aware of and, in my humble view, it would be absurd to interpret section 167(1) as saying so.

29. In short, the clock for the applicant to file the request for review under section 167(1) of the Act started ticking on 28 June 2024 when the email of the notification of the award was sent to it and not on 14 June 2024, the date indicated on the notification. That being the case, there is no plausible reason why the applicant could not file the request for review as it was obligated to but, instead, chose to invoke the judicial review jurisdiction of this Honourable Court.

65. Turning to the present case, the instant Request for Review challenges the evaluation process that culminated in the disqualification of the Applicant from the subject tender and the award of the tender to the



Interested Party. It is not in dispute that the Procuring Entity sent out to the tenderers in the subject tender a Notification Letters dated 12th June 2024 communicating the outcome of the subject tender. It is equally not in dispute that physical copies of the Notification Letters were subsequently dispatched to the tenderers.

66. Below is an excerpt of the Notification Letter dated 12th June 2024 that was sent to the Applicant:

12th June 2024

M/s Reqtec Zumro

(Address details withheld)

***RE: RE-TENDER FOR THE PROCUREMENT OF AIRCRAFT
RECOVERY SYSTEM FOR KENYA AIRPORTS AUTHORITY***

TENDER NO: KAA/RT/JKIA/0199/2023-2024

***We refer to your bid submitted on 28th March, 2024 on the
above subject tender.***

***The Evaluation process for the subject tender has been
finalized and we regret to inform you that your bid was
unsuccessful.***

***From your bid, we noted that the submitted certificate of
independent tender determination was not duly filled as you
did not disclose item 5.***

***The bidder who was determined to be the lowest evaluated
and therefore successful tenderer is M/s International
Partnership Services East Africa Limited at their quoted bid
price of USD 2,238,730.40 only inclusive of VAT.***

We wish to thank you for the interest in our organization and look forward to doing business with you in the future.

This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015.

Signed

Vincent Korir

GM (PROCUREMENT & LOGISTICS)

For: AG. MANAGING DIRECTOR/CEO

67. From the above Notification Letter sent through email on 12th June 2024 and thereafter a physical copy delivered to the Applicant on 18th July 2024, it is apparent that the Applicant was notified:

- i. That its tender was unsuccessful for the reason on account that its Certificate of Independent Tender Determination was not properly filled;
- ii. That the Interested Party herein was the successful tenderer in the subject tender at the tender price of USD 2,238,730.40

68. The Applicant contended before the Board that the Notification Letter dated 12th June 2024 was sent to an incorrect email address i.e. martjn@resqtech.com instead of "info@resqtec" and thus it was only until 18th July 2024 that the Applicant sighted the Notification Letter when a physical copy was delivered to it. The Respondent did not dispute this and in fact admitted that it was an inadvertent error on its part to send the Notification Letter to an erroneous address that did not belong to the Applicant.



69. In view of the Respondent's admission of the error in respect of the Applicant's email address, the Board is of the considered view that the Applicant became knowledgeable of the outcome of the evaluation process of the subject tender on 18th July 2024, which is the date that the Applicant received a physical copy of the Notification Letter dated 12th June 2024. Our finding is based on this Board's long strand of Decisions to the effect that though Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 outlines multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given candidate or tenderer is the date they first learnt of the breach being complained about.

70. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time”

71. When computing time when the Applicant ought to have sought administrative review before the Board, 18th July 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt or ought to have learnt of the occurrence of the alleged breach. This means time started to run on 19th July 2024 and lapsed on 1st August 2024. In essence, the Applicant had between 18th July 2024 and 1st August 2024 to seek administrative review before the Board. The instant Request for Review was filed on 13th August 2024 which was 26 days from the date of learning of the breach in question and therefore outside the statutory timelines. Consequently, this ground of the Interested Party's Notice of Preliminary Objection succeeds.

72. In view of the foregoing the Board finds that the Request for Review was not filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020 and thus time-barred. Accordingly, the Board is divested the jurisdiction to hear and determine the instant Request for Review.

Whether the Applicant's tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?

73. In view of the Board's finding that it is divested of the jurisdiction to hear and determine the Request for Review, it shall not delve in to an analysis of this issue.

Whether the Interested Parties herein were properly awarded the subject tender?

74. In view of the Board's finding that it is divested of the jurisdiction to hear and determine the Request for Review, it shall not delve in to an analysis of this issue.

What orders the Board should grant in the circumstances?

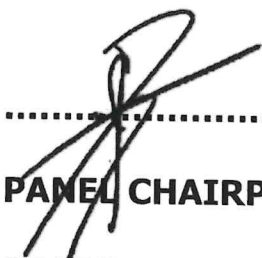
75. The Board has found that the instant Request for Review is time-barred and thus it is divested the jurisdiction to hear the same.
76. The upshot of our finding is that the Request for Review dated 12th August 2024 in respect of Tender No. KAA/RT/JKIA/0199/2023-2024 Retender for the Procurement of Aircraft Recovery System for Kenya Airports Authority fails in the following specific terms:


FINAL ORDERS

77. 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 12th August 2024:

1. The Notice of Preliminary Objection raised through the Interested Party's Memorandum of Response dated 16th August 2024 be and is hereby upheld.
2. The Request for Review dated 12th August 2024 be and is hereby struck out.
3. The Respondent be and is hereby directed to proceed with Tender No. KAA/RT/JKIA/0199/2023-2024 Retender for the Procurement of Aircraft Recovery System for Kenya Airports Authority to its lawful and logical conclusion in accordance with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.
4. The tender validity period be and is hereby extended for a period of sixty (60) days to allow the conclusion of the tender
5. Each party shall bear its own costs in the Request for Review.

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


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PANEL CHAIRPERSON
PPARB


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SECRETARY
PPARB



