

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 34/2025 FILED ON 28TH MARCH 2025

BETWEEN

NANJING LES INFORMATION

TECHNOLOGY CO. LTD.....APPLICANT

AND

DIRECTOR GENERAL,

KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT

MICRO NAV LIMITED.....INTERESTED PARTY

Review against the decision of the Director General, Kenya Civil Aviation Authority, in relation to TENDER NO. KCAA/016/2024-2025 – Supply, Delivery, Installation, Training, and Commissioning of 3D Panoramic Tower, Approach and Area Air Traffic Control Training Simulator at East African School of Aviation.

BOARD MEMBERS PRESENT

Mr. George Murugu FCIArB & IP Chairperson

Mr. Alexander Musau Member

Mr. Daniel Langat Member



IN ATTENDANCE

Ms. Sarah Ayoo

Holding brief for Acting Board
Secretary

Mr. Erickson Nani

Secretariat

PRESENT BY INVITATION

APPLICANT

**NANJING LES INFORMATION
TECHNOLOGY CO. LTD**

Mr. Alex Thangei

Advocate, Waruhiu K'Owade & Ng'ang'a
Advocates

RESPONDENT

**DIRECTOR GENERAL,
KENYA CIVIL AVIATION AUTHORITY**

Ms. Winnie Talaam holding
brief for Mr. George Mogaka

Advocate, Kenya Civil Aviation Authority

Mr. William Kitum

Procurement Manager, Kenya Civil Aviation
Authority

Mr. Job Mburu

Procurement Officer, Kenya Civil Aviation
Authority

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Ms. Alice Kandira Procurement Officer, Kenya Civil Aviation
Authority

INTERESTED PARTY MICRO NAV LIMITED

Mr. Hiram Nyaburi Advocate, Iseme Kamau & Maema
Advocates

Mr. Shane Hanham Sales Director, Micro Nav Limited

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The Kenya Civil Aviation Authority (hereinafter referred to as "the Procuring Entity") invited tenders through the open tendering method pursuant to TENDER NO. KCAA/016/2024-2025 for the Supply, Delivery, Installation, Training, and Commissioning of a 3D Panoramic Tower, Approach, and Area Air Traffic Control Training Simulator at the East African School of Aviation (hereinafter referred to as "the subject tender"). In accordance with the advertisement published in *The Star* newspaper, interested bidders were required to submit their bid documents to the specified address on or before 20th February 2025 at 11:00 a.m.



Addenda/Clarifications

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"), the Procuring Entity issued a clarification dated 10th February 2025. The said clarification addressed various issues raised by bidders and concurrently extended the tender submission deadline from 20th February 2025 to 27th February 2025 at 11:00 a.m.

Submission of Bids and Tender Opening

3. According to the Tender Opening Minutes dated 27th February 2025, submitted as part of the confidential documents, a total of four (4) tenders were received in response to the subject tender. The tenders were recorded as follows:

NO.	Tenderer
1.	Micro Nav Limited
2.	Nanjing Les Information Technology Co. Limited
3.	Simsoft Distribution SRL R028963329 JV Data Core Limited
4.	Eddah Systems AS JV Satellite Equipment Ltd

Evaluation of Bids

4. According to the Evaluation Report dated 13th March 2025, the Tender Evaluation Committee (hereinafter referred to as "the Evaluation



Committee") convened to evaluate the tenders submitted. The evaluation process was undertaken in four stages, as set out below:

- a. Preliminary Evaluation
- b. Technical Evaluation
- c. Financial Evaluation
- d. Due diligence/Post qualification

Preliminary Evaluation

- 5.** At the first stage, the Evaluation Committee assessed the tenders for responsiveness based on the mandatory requirements set out in the Tender Document. Only those tenders that fully satisfied all mandatory requirements at this stage were deemed eligible to proceed to the Technical Evaluation stage.
- 6.** Upon conclusion of this stage of evaluation, one (1) tender was found to be non-responsive. The remaining three (3) tenders, including that of the Applicant, satisfied all the mandatory requirements and were accordingly declared responsive. These tenders proceeded to the Technical Evaluation stage.



Technical Evaluation

- 7.** During the Technical Evaluation stage, the Evaluation Committee was tasked with assessing the tenders for responsiveness to the technical requirements specified in the Tender Document. Each tender was required to meet all the technical specifications for the simulator, and the evaluation was based on the bidders' responses to those specifications.
- 8.** Upon conclusion of the Technical Evaluation stage, all three (3) tenders were found to be responsive to the technical requirements and were consequently advanced to the Financial Evaluation stage.

Financial Evaluation

- 9.** At the Financial Evaluation stage, the Evaluation Committee assessed the tenders in accordance with the criteria set out in the Tender Document. Among the tenders that had qualified in the preceding evaluation stages, the bidder with the lowest evaluated tender price, as submitted and read out during the tender opening, was to be recommended for award, subject to the outcome of a due diligence exercise.
- 10.** The Evaluation Committee conducted a financial comparison of the three bidders and found no arithmetic errors in any of the submitted bids. The Committee noted that Micro Nav Limited, the Interested Party, emerged as the lowest evaluated bidder, with a quoted price of



GBP 1,534,810.00 and KES 30,561,600.00, equivalent to KES 281,670,022.33.

Due diligence/Post Qualification

- 11.** The Evaluation Committee conducted due diligence and documented its findings in a report, which was included as part of the Evaluation Report. Based on its assessment, the Committee recommended that the tender be awarded to the Interested Party, as the lowest evaluated bidder.

Evaluation Committee's Recommendation

- 12.** The Evaluation Committee noted that the estimated price provided by the user department was KES 400,000,000.00. In comparison, the lowest responsive evaluated bidder, Micro Nav Limited, quoted GBP 1,534,810.00 and KES 30,561,600.00, which, in total, amounted to KES 281,670,022.33. Consequently, the Evaluation Committee recommended awarding the subject tender to the Interested Party.

Professional Opinion

- 13.** In a Professional Opinion dated 13th March 2025 (hereinafter referred to as "the Professional Opinion"), the Procurement Manager of the Procuring Entity, Mr. William Kitum, reviewed the procurement process, including the evaluation of the tenders, and agreed with the Evaluation Committee's recommendations to award the subject tender to the



Interested Party.

Notification to Tenderers

- 14.** The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 17th March 2025.

REQUEST FOR REVIEW

- 15.** On 28th March 2025, the Applicant, through the firm of Waruhiu K'Owade & Ng'ang'a Advocates, filed a Request for Review, also dated 28th March 2025. The application was accompanied by a Statement in Support of the Review Application, signed by Xu Zeyu, the Business Representative of the Applicant, also dated 28th March 2025. The Applicant sought the following orders:

a) The Award Committee's decision be reversed and the award be nullified forthwith under Section 173 (a) of the Act.

b) The Tender be evaluated afresh on both the Technical and Financial proposals and a fresh award be made in strict compliance with the Tender documents, the Act and the Regulations therein.

c) The Tender be awarded to the Applicant as provided for under Section 173 (c) of the Act.



d) General damages for breach of the mandatory requirements.

e) Costs be awarded to the Applicant.

- 16.** In a Notification of Appeal and a letter dated 28th March 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 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 28th March 2025.
- 17.** On 3rd April 2025, the Respondent filed a Memorandum of Response to the Request for Review, dated 2nd April 2025, along with a Notice of Preliminary Objection, also dated 2nd April 2025. On the same day, the Respondent submitted the Confidential Documents to the Board in accordance with Section 67(3) of the Act.
- 18.** On 4th April 2025, the Acting Board Secretary issued a Hearing Notice dated 4th April 2025 to the parties, notifying them that the hearing of the Request for Review would be held virtually on 8th April 2025 at 14:00 PM via the provided link.



- 19.** On 7th April 2025, the Interested Party, through the firm of Iseme Kamau & Maema Advocates, filed a Notice of Appointment, dated 7th April 2025, along with an Interested Party's Notice of Preliminary Objection, also dated 7th April 2025. Additionally, on the same day, the Interested Party filed a Replying Affidavit, sworn on 7th April 2025 by Shane Hannam, the Interested Party's Sales Director and attorney, as well as Written Submissions and a List and Bundle of Authorities, both dated 7th April 2025.
- 20.** On 8th April 2025, the hearing day, the Applicant filed its Written Submissions, dated 8th February 2025, along with a List and Bundle of Authorities, also dated 8th February 2025.
- 21.** When the Board convened for the hearing on 8th April 2025 at 2:00 p.m., the Applicant was represented by Mr. Thangei, the Respondent by Ms. Winnie, and the Interested Party by Mr. Nyaburi. The Board reviewed the pleadings filed by the parties, who confirmed that the documents had been properly filed and exchanged. The Board then allocated time to the parties to make their respective submissions.

PARTIES SUBMISSIONS

Respondent's Submissions on the Preliminary Objection

- 22.** Counsel for the Respondent submitted that the Applicant had failed to comply with the mandatory provisions of Section 167(1) of the Act, as it did not plead that it would suffer any risk, loss, or damage as a result



of the Respondent's actions.

- 23.** Counsel argued that this omission deprives the Board of its jurisdiction to consider the Applicant's Request for Review. Counsel further highlighted that the Applicant was relying on **PPARB Application No. 21 of 2025, *Precision Experts Limited vs The Accounting Officer, Kenya Bureau of Standards and Another***, where the Board stated that it is sufficient for a party to demonstrate that it will suffer prejudice. In distinguishing the present Request for Review from the aforementioned case, Counsel contended that the Applicant had failed to plead that it stands to be prejudiced.
- 24.** Counsel further relied on the case of ***Asphalt Works Investments Limited vs Kenya Ports Authority* (Judicial Review Application E022 of 2023) [2023] KEHC 27253 (KLR) (21 December 2023)**, where the Court held that, in order to file a review application, a candidate or tenderer must, at the very least, claim to have suffered or be at risk of suffering loss or damage.

Interested Party's Submissions on the Preliminary Objections

- 25.** Counsel for the Interested Party stated that their Notice of Preliminary Objection raised two grounds.
- 26.** On the first ground, Counsel argued that the Applicant lacks locus standi to file and prosecute the Request for Review, as it has failed to comply with the provisions of Section 167(1) of the Act by not specifying the



risk, loss, or damage suffered due to the alleged breach of a duty imposed on the Respondent by the Act.

27. Counsel contended that the Board lacked jurisdiction to hear and determine the Request for Review. Counsel relied on the Court of Appeal decision in ***James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR***, as well as ***PPARB Application No. 19 of 2025, Wanjohi Mutonyi Consult Ltd vs The Director, Kenya Civil Aviation Authority***.
28. On the second ground, Counsel contended that the Request for Review is defective, as it is based on confidential information in violation of Section 67, read together with Section 176(f) of the Act. Counsel further argued that no proof of compliance with Section 68 of the Act had been submitted.
29. Counsel referred the Board to paragraphs 6 and 7 of the Statement accompanying the Request for Review and contended that the allegations made therein could not have been made without accessing confidential information.
30. Counsel relied on the Board's decision in ***PPARB Application No. 21 of 2015, Thwana Building Services Ltd vs Tharaka Nithi County Government***, where it was held that an action based on the contravention of statute and the law, generally, is deemed to be against public policy and cannot support a party's case.



Applicant's Submissions on the Preliminary Objections and the Request for Review

- 31.** In response to the issue of pleading loss and damage, Counsel for the Applicant stated that Section 167(1) of the Act neither expressly nor by implication requires an Applicant to plead any risk, loss, or damage.
- 32.** Counsel argued that Section 167(1) requires an Applicant to plead and demonstrate a breach of a duty imposed on a procuring entity by the Act. Counsel contended that the Applicant had expressly pleaded the breach of the Act by the Respondent in grounds 2, 3, and 4 of the Request for Review, along with paragraphs 5, 6, 7, 8, 9, and 10 of the Statement in Support. Counsel further pointed out that, as part of its prayers, the Applicant had sought damages for the breach of the tender requirements.
- 33.** Counsel relied on the Board's decision in ***PPARB Application No. 21 of 2025, precision experts ltd vs accounting Officer KEBS & Anor***, He also invoked Article 159(1)(d) of the Constitution, which calls for the administration of justice without undue regard to procedural technicalities.
- 34.** Regarding the issue of the Request for Review being based on confidential information, Counsel stated that they had not annexed any document belonging to the Interested Party. He contended that a preliminary objection cannot be based on contested facts and, therefore, the objection should fail.



- 35.** On the substantive issues raised in the Request for Review, Counsel contended that the Respondent and the Interested Party failed to comply with the evaluation criteria outlined under Section III – Evaluation and Qualification Criteria of the Tender document, specifically Clause 21 on ‘experience’.
- 36.** The Applicant contended that the Interested Party did not meet the mandatory tender requirements under Clause 21, as it provided only four, rather than five, examples of relevant experience outside its country of domicile. Additionally, the Interested Party included a project that was still ongoing, rather than completed and operational, and failed to specify whether the experience fell within the required five-year period.
- 37.** The Applicant argued that, despite the Respondent and Interested Party claiming that the tender requirements were amended on 10th February 2023 through Clarification No. 2, the Interested Party still failed to meet the threshold. The submitted projects were not all completed and operational, and the required seven-year period was not expressly indicated.
- 38.** Counsel submitted that paragraph 4 of the Respondent’s Memorandum of Response stated that the subject tender was an international open tender pursuant to Section 89 of the Act. He specifically referred the Board to Section I, Clause 4.11 of the Tender document and submitted that the Interested Party did not meet the mandatory requirement



outlined therein.

- 39.** Counsel contended that Clause 2 of Section III of the Tender document stipulates that all tenders that do not pass the preliminary examination shall not be considered further. He submitted that the Interested Party breached the mandatory tender requirements as outlined in the Tender document and as read together with the Act.
- 40.** Counsel relied on the Board's decision in ***PPARB Application No. 7 of 2024, Emcure Pharmaceutical Limited vs Kenya Medical Supplies Authority and Another***, as well as the High Court's decision in ***JR Miscellaneous Application No. 60 of 2020, Republic vs PPARB & Another, ex parte TUV Australia Turk***.

Respondent's Rejoinder on the Preliminary Objection and Submissions on the Request for Review

- 41.** Counsel submitted that, with regard to the alleged breach of Clause 4.11 of the Tender document, the clause was not a mandatory requirement under Section III – Evaluation and Qualification Criteria. Counsel stated that the clause merely served as a definition for a foreign tenderer, for the purposes of Clause 4.10 of the Tender document.
- 42.** Counsel submitted that a clarification was issued on 10th February 2025, modifying Clause 4.10 of the Tender document. Furthermore, she contended that the claim that the Interested Party should have been registered in Kenya is not tenable, as it was not part of the mandatory



requirements.

- 43.** In response to the issue regarding the breach of Clause 39.1 and 39.2 of the Tender document, Counsel stated that these clauses address abnormally low tenders, an issue that did not arise during the tender proceedings. Counsel further submitted that the Interested Party's bid price was within the Procuring Entity's budget and was the lowest evaluated tender.
- 44.** Counsel contended that the Respondent conducted due diligence on the Interested Party and confirmed that it could indeed deliver in accordance with the requirements of the tender.
- 45.** In relation to the breach of Clause 39(4) and (5) of the Tender document, Counsel stated that these clauses address abnormally high tenders, an issue that did not arise during the tender proceedings.
- 46.** In response to the issue regarding the Interested Party's failure to provide documents proving five years of experience as required, Counsel argued that the clarification issued on 10th February 2025, which was duly communicated to all bidders, modified the tender requirements by extending the experience period from five to seven years. Counsel further submitted that the clarification, which forms part of the tender document, specifically required proof of experience in at least three projects. She referred the Board to paragraph 24 of the Response to the Request for Review.



- 47.** In rejoinder to the preliminary objection, Counsel submitted that the Applicant had neither pleaded nor demonstrated any risk of suffering loss.

Interested Party's Rejoinder on the Preliminary Objection and Submissions on the Request for Review

- 48.** In rejoinder on the preliminary objection raised, Counsel responded asserting that it is mandatory to plead loss and damages, as required by law, and that a party who fails to do so lacks locus standi.
- 49.** In further rejoinder and in response to the issue regarding one of the prayers being for general damages, Counsel stated that this does not satisfy the requirement to plead loss and damages, as the Board lacks jurisdiction to award general damages. Counsel further submitted that a jurisdictional issue cannot be categorized as a mere technicality.
- 50.** In addressing the substantive issues, Counsel referred the Board to the preliminary evaluation criteria outlined in Section III of the Tender document. Counsel argued that the provisions in Clauses 4.10 and 4.11 of the Tender document do not form part of the evaluation criteria.
- 51.** Counsel contended that the Respondent issued a clarification regarding Clauses 4.10 and 4.11 of the Tender document. Counsel further argued that if the Applicant was dissatisfied with the clarification, they had 14 days from the date of the clarification to file a request with the Board.



- 52.** Counsel referred the Board to pages 199, 203, and 207 of the Interested Party's bid documents, asserting that these sections demonstrate that the Interested Party complied with the requirements the Applicant claims were not met.
- 53.** Counsel contended that the Applicant's submissions introduced new issues, specifically in paragraph 11 of the Applicant's Written Submissions, which were not part of the pleadings, and therefore, should not be considered by the Board.
- 54.** In response to the issues of abnormally low and high prices, Counsel argued that such pricing does not, by itself, warrant the termination of the tender proceedings.

Applicant's Rejoinder

- 55.** Counsel stated that the preliminary objections should be dismissed, and the Request for Review should be heard on its merits.
- 56.** The Applicant's Counsel referred the Board to Annexure SH-1 of the Interested Party's Replying Affidavit. Counsel argued that the clarification specified that the projects must be completed and operational.
- 57.** Counsel further argued that there was no clarification related to Clause 4.11 of the Tender document, as the clarification pertained to Clause 14.0 of the Tender document. Counsel also submitted that the



clarification did not waive the requirement for registration under Clause 4.11 of the Tender document.

- 58.** Counsel further submitted that the general damages prayed for form part of the pleadings and are sufficient to satisfy the requirement of pleading loss and damages.
- 59.** Regarding the failure to raise a complaint against the clarifications issued by the Procuring Entity, Counsel submitted that there is no estoppel against the law.

CLARIFICATIONS

- 60.** The Board sought clarification from the Respondent's Counsel on whether registration in Kenya by tenderers is a mandatory requirement.
- 61.** In response, the Respondent's Counsel stated that registration in Kenya by tenderers was not a mandatory requirement.
- 62.** The Board further sought clarification on whether the Head of Procurement was authorized to sign the notification letters on behalf of the Director General.
- 63.** In response, the Respondent's Counsel stated that the Head of Procurement was authorized to sign the notification letters on behalf of the Director General, but the authorization letter had not been filed with the Board.



- 64.** The Board directed that the authorization letter be filed immediately before the close of the proceedings which was done to the satisfaction of the Board and counsels present.
- 65.** The Board also sought clarification from the Applicant's Counsel to walk it through the criteria in Clause 2, Section III, in light of the allegation that the said criteria had not been applied.
- 66.** In response, the Applicant's Counsel stated that Clause 2 of Section III provides that any tenders failing the preliminary examination should not be considered further.
- 67.** The Board further sought clarification from the Interested Party's Counsel regarding the issue of abnormally high and low tenders.
- 68.** In response, the Interested Party's Counsel submitted that the issue was addressed in paragraph 12 of the Replying Affidavit, which was in response to the allegations of violations of Clause 39.1, 39.2, and 39.4 of Section I - Instructions to Tenderers.

BOARD'S DECISION

- 69.** The Board has considered all documents, submissions, and pleadings, including the confidential documents submitted pursuant to Section 67(3)(e) of the Act. Accordingly, the following issues arise for determination:



A. Whether the Board has jurisdiction to hear and determine the instant Request for Review

In determining the first issue, the Board will make a determination on the following sub-issues:

- i. Whether the Applicant has *locus standi* before the Board.

Depending on the finding of the first sub-issue:

- ii. Whether the Request for Review as filed is pegged on confidential information.

Depending on the second sub-issue and the first issue as a whole:

B. Whether the Procuring Entity properly evaluated the tender documents submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

C. Whether the Procuring Entity failed to take note of abnormally low or high.

D. What orders the Board should issue in the circumstance.



Whether the Board has jurisdiction to determine the instant Request for Review.

- 70.** In response to the Request for Review, the Respondent contended that the Applicant had not complied with the mandatory requirements of Section 167(1) of the Act, as it failed to plead that it would suffer any risk, loss, or damage as a result of the Respondent's actions.
- 71.** Similarly, the Interested Party filed a Notice of Preliminary Objection on two grounds: first, that the Applicant had not pleaded that it would suffer any risk, loss, or damage as a result of the Respondent's actions; and second, that the Request for Review is defective as it appears to be based on confidential information, potentially violating Section 67, read together with Section 176(f) of the Act, and that no proof of compliance with Section 68 of the Act has been submitted.
- 72.** The effect of either of the two grounds mentioned above, if proven, would strip this Board of the jurisdiction to entertain the present Request for Review. Consequently, given the preliminary nature of these objections, they must be addressed as a matter of priority.
- 73.** This Board is mindful of the well-established legal principle that courts and decision-making bodies can only adjudicate matters within their jurisdiction. When a question of jurisdiction arises, it is essential that the Court or tribunal seized of the matter addresses it as a threshold issue before proceeding further.



74. As a fundamental principle, when the issue of jurisdiction is raised before a court or decision-making body, it must be addressed as a priority before any other matters are considered. Jurisdiction is the cornerstone of adjudication, and in its absence, a court or tribunal lacks the legal authority to proceed further.

75. In *Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022)*, the Supreme Court reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process. Where a question of jurisdiction is raised, it must be addressed and resolved at the earliest stage of the proceedings.

On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In [R v Karisa Chengo](#) [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be



either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

76. This Board is a creature of statute, established under Section 27(1) of the Act, which provides:

(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.

77. Section 28 of the Act outlines the functions of the Board as follows:

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.

78. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings.



Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline the Board's powers in handling such proceedings.

- 79.** Therefore, in light of the foregoing, the Board has no alternative but to examine its jurisdiction by determining whether the Applicant has locus standi and whether the Request for Review was filed outside the mandatory statutory timeline.

Whether the Applicant has *locus standi* before the Board.

- 80.** The Respondent and the Interested Party submitted that the Applicant lacked the requisite locus standi under Section 167(1) of the Public Procurement and Asset Disposal Act to institute or sustain the administrative proceedings. Counsel argued that the Applicant had neither pleaded nor demonstrated that it had suffered, or was at risk of suffering, any loss or damage arising from an alleged breach of a duty imposed on the procuring entity under the Act or the Public Procurement and Asset Disposal Regulations, 2020.
- 81.** In response, Counsel for the Applicant submitted that Section 167(1) of the Act does not impose a requirement for a party to plead loss or damage in order to institute proceedings. He further contended that, in any event, the Request for Review included a prayer for general damages.
- 82.** In rejoinder, Counsel for the Respondent argued that the Review Board



lacks jurisdiction to award general damages. As such, the Applicant could not be said to have satisfied the requirements of Section 167(1) of the Act.

83. Section 167(1) of the Act provides:

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.

84. In essence, to properly invoke the jurisdiction of the Review Board under Section 167(1) of the Act, an applicant must satisfy the following conditions:

- (a) they must qualify as either a candidate or a tenderer, as defined under Section 2 of the Act;
- (b) they must claim to have suffered, or be at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Act or its Regulations; and
- (c) they must file the request for administrative review within fourteen (14) days from the date of notification of the award or the occurrence of the alleged breach, in accordance with Regulation 203 of the Public



- 85.** Superior courts have consistently addressed the requirement to plead loss or damage under Section 167(1) of the Act. This Board takes cognizance of the Court of Appeal's decision in ***James Ayodi t/a Betoyo Contractors & Another v Elroba Enterprises Ltd & Another*** [2019] eKLR, Mombasa Civil Appeal No. 131 of 2018 (hereinafter "the *James Ayodi* case"). In that matter, the Court considered an appeal challenging the High Court's finding that the Review Board ought to have held the appellants lacked locus standi, having failed to demonstrate that they had suffered, or were likely to suffer, loss. The Court of Appeal offered clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

" *It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;....*

...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review.



.....The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]

- 86.** In essence, the Court of Appeal held that for a candidate or tenderer to seek an administrative review before the Board, they must, at the very least, claim to have suffered or to be at risk of suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations 2020.
- 87.** In the present Request for Review, the central issue for determination by this Board is whether the Applicant, through its pleadings, has at least asserted that it has suffered, or is at risk of suffering, loss or damage due to a breach of duty imposed on the Procuring Entity by the Act or the Public Procurement and Asset Disposal Regulations, 2020. This determination is pivotal in ascertaining whether the Applicant possesses the requisite locus standi to bring the matter before the Board.
- 88.** In the case of ***Otolo Margaret Kanini & 16 others v Attorney General & 4 others*** [2022] eKLR, the Court defined *locus standi* in the following terms:

By definition in general, locus-standi is the right to bring an action before a Court of law or any other adjudicatory



forum. Such right is an entitlement created by the law.

89. The High Court in ***Alfred Njau and Others v City Council of Nairobi (1982) KAR 229*** described *locus standi* as:

...a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.

90. The import of the above holdings is that *locus standi* refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack *locus standi*, it cannot be heard, regardless of whether its case has merit. This issue alone may lead to the preliminary dismissal of the Request for Review without delving into its substantive aspects.

91. The Board has carefully reviewed the pleadings filed by the Applicant and observes that one of the prayers sought is an order for general damages arising from the alleged breach of the mandatory requirements.

92. However, the Board notes that one of the issues raised was whether it has jurisdiction to award general damages. In response, Counsel for the Applicant submitted that the term "general damages" should not be interpreted in the conventional legal sense.

93. In determining this issue, the Board adopts a broad approach,



considering a holistic reading of the pleadings filed to assess whether they demonstrate that the Applicant has pleaded a risk of suffering loss.

94. The Board observes that the Applicant has demonstrated the risk of suffering loss by pleading for general damages arising from the breach of the mandatory requirements. This conclusion is reached by considering the prayer for damages in conjunction with the other parts of the pleadings, which collectively indicate that the Applicant faces a risk of loss as a result of the Respondent's alleged actions.

95. The Board is therefore satisfied that the Applicant has sufficiently pleaded the risk of loss and damage in its Request for Review. This satisfies the locus standi requirement under Section 167(1) of the Act, allowing the Applicant to proceed before the Board.

Whether the Request for Review as filed is pegged on confidential information.

96. The Interested Party submitted that the Request for Review is defective, as it appears to be based on confidential information, potentially in violation of Section 67, read together with Section 176(f) of the Act. Additionally, the Interested Party argued that no proof of compliance with Section 68 of the Act was submitted.

97. In response, Counsel for the Applicant submitted that the Applicant had not annexed any documents belonging to the Interested Party. He further contended that a preliminary objection cannot be based on

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disputed facts and, therefore, the objection should fail.

98. The Board is mindful of the provisions of Section 67 of the Act, which mandates the confidentiality of procurement documents and proceedings by the procuring entity, subject to disclosures permitted by law. Section 67 provides as follows:

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or



the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.



99. It is evident from the above that the Act upholds the confidentiality of public procurement proceedings and related information. Specifically, a procuring entity, its officers, agents, and any other person are prohibited from disclosing procurement information that:

- (i) would be contrary to the public interest;
- (ii) could prejudice the legitimate commercial interests of tenderers;
- (iii) pertains to the evaluation and comparison of tenders; or
- (iv) reveals the contents of tenders.

Any unauthorized disclosure of such procurement information constitutes an offense, attracting criminal sanctions, as well as debarment and prohibition from working with any government entity, or entities where the government holds a share, for a period of 10 years.

100. However, Section 67(3) of the Act outlines instances where the disclosure of confidential information is permitted, such as when disclosure is necessary for the purposes of a review under the Act. Specifically, a person submitting a tender is entitled to receive a summary of the proceedings related to the opening of tenders, the evaluation and comparison of tenders, proposals, or quotations, including the evaluation criteria used, as prescribed. This entitlement, however, only arises when the tenderer requests such information from the Procuring Entity.

101. Notably, all communication and inquiries between parties in procurement proceedings must be in writing, as mandated by Section 64(1) of the Act. It follows that a tenderer must formally request, in writing, that the accounting officer provide a summary of the



proceedings related to the evaluation and comparison of tenders, among other procurement records. Such information can only be disclosed by the accounting officer of the procuring entity.

102. In the present Request for Review, the Interested Party referred the Board to paragraph 4 of the Request for Review and paragraphs 6 and 7 of the Statement in Support of the Review Application.

103. The Board has perused the aforementioned paragraphs and proceeds to reproduce the relevant portion for clarity. Paragraph 4 of the Request for Review states as follows:

"(4) The procuring entity failed to apply the criteria provided for in Clause 2 (Section III) in the tender documents in evaluation thereby arriving at an unfair and wrong decision for the reasons that they failed to provide documents pursuant requirement No. 21 to wit that they had over 5 years of experience in a similar project."

104. Paragraphs 6 and 7 of the Statement in Support of the Request for Review provide as follows:

(6) THAT further to the above, the Procuring Entity was in utter breach of Clauses 4.11, 39.1, 39.2, 39.4, 39.5, 41.1 (Section I) of the tender documents as it used other criteria and/or considerations other those set out in the tender documents in the evaluation of the tenders thereby acting



in breach of the said mandatory requirements of the Act regulations and the tender documents in that;

a) The interested party's bid ought to have been rejected from the onset.

b) The foreign tenderer was not registered in Kenya as the point of bidding for the subject tender.

c) The procuring entity failed to adhere to the requirements provided for in the tender document with regard to high or low tenders.

7. THAT the procuring entity failed to apply the criteria provided for in Clause 2 (Section III) in the tender documents in evaluation thereby arriving at an unfair and wrong decision for the reasons that they failed to provide documents pursuant requirement No. 21 to wit that they had over 5 years of experience in a similar project.

105. The Board notes that the Applicant did not annex any document that can be deemed confidential within the meaning of the Act and the Public Procurement and Asset Disposal Regulations, 2020. In the absence of such documentation, the Applicant's assertions may only be regarded as speculative.

106. In view of the foregoing, the Board finds that the Applicant did not



rely on any confidential document as contemplated under Section 67 of the Act.

- 107.** Accordingly, the Board finds that it has jurisdiction to hear and determine the Request for Review. This determination confers upon the Board the requisite authority to proceed with consideration and determination of the substantive issues raised.

Whether the Procuring Entity properly evaluated the tender documents submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

- 108.** The Applicant contended that the Procuring Entity violated Section 2 and Section 80 of the Act, read together with Regulations 74 and 75 of the Public Procurement and Asset Disposal Regulations, 2020. In particular, the Applicant alleged that the Procuring Entity applied evaluation criteria and/or considerations that were not set out in the tender documents when evaluating the tenders.

- 109.** The Applicant further submitted that the Procuring Entity breached Clauses 4.11, 39.1, 39.2, 39.4, 39.5, and 41.1 of Section I of the Tender Document. Additionally, the Applicant contended that the Procuring Entity failed to apply the evaluation criteria set out under Clause 2 of Section III of the Tender Document, asserting that the Interested Party did not submit documentation in compliance with Requirement No.21.



110. The Board understands the Applicant's case to be premised on two primary grounds: first, the alleged improper evaluation of all the bids; and second, the alleged failure to consider abnormally high and low bids. The first issue concerning bid evaluation shall be addressed under this section, while the second issue shall be considered in the subsequent sub-heading.

111. In response to the issues raised regarding the evaluation of bids, the Respondent submitted that the Applicant failed to specify the particulars of the alleged breach of Section 2 and Section 80 of the Act, read together with Regulations 74 and 75 of the Public Procurement and Asset Disposal Regulations, 2020.

112. In response to the allegations that the evaluation was not conducted in accordance with Clause 4.11 of the Tender document, the Respondent contended that the Applicant failed to specify which evaluation criteria, if any, were applied contrary to those set out in the Tender document.

113. In response to the Applicant's assertion that the foreign tenderer was not registered in Kenya at the time of bidding for the subject tender, the Respondent stated that the Tender document, specifically on page 33 of 205 under requirement no. 4, outlined the requirement for company registration and provided clear instructions regarding the evidence needed to demonstrate such registration.

114. In response to the allegation that the Interested Party failed to

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provide documents pursuant to requirement no. 21, specifically regarding the requirement for over five years of experience in similar projects, the Respondent stated that it issued a clarification on the subject tender on 10th February 2025, which amended clause no. 21.

115. The Respondent emphasized that no evaluation criteria other than those provided in the Tender document were used.

116. In response to the allegations that the Respondent breached Sections 2 and 80 of the Act, as well as Regulations 74 and 75 of the Act, the Interested Party stated that the Applicant had not specified with precision how these provisions were breached.

117. In response to the allegations of a breach of Clause 4.11 of the Tender document, the Interested Party stated that the clause was amended by the Respondent through Clarification No. 5.

118. In response to the allegation that the Interested Party was not registered in Kenya at the time of bidding for the subject tender, the Interested Party asserted that there was no requirement for registration in Kenya at the time of bidding. The Interested Party referred the Board to Clause 2, which specifies that the tender was an international tender, as well as to Clause 4.6 of the Instructions to Tenderers (ITT).

119. In response to the allegation that the Respondent breached Clause 2, Section III of the Tender document, specifically Requirement No. 21, the Interested Party submitted that it provided documents

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demonstrating its capacity to deliver and its experience in Part A: Commercial Volume, Section J of its bid documents. The Interested Party referred the Board to pages 189 to 211 of its Commercial Volume.

120. Having considered the parties' submissions and all documents filed, we note that the central issue in this part revolves around the evaluation of the bids, particularly that of the Interested Party, as it is alleged that the Interested Party did not meet some of the evaluation criteria outlined in the Tender document.

121. The starting point in determining this issue is Article 227 of the Constitution, which outlines the objective of public procurement—ensuring the provision of quality goods and services within a framework that upholds the principles enshrined therein. Article 227 states 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...

d...

122. The above section of the law provides that, inter alia, when a State organ or public entity procures goods or services, the process must adhere to specific standards, one of which is competitive fairness. In this context, competitive fairness means that the procurement process must offer all qualified suppliers an equal opportunity to compete for the contract, free from bias or favoritism. It ensures that no bidder is unfairly advantaged or disadvantaged and that selection is based on objective criteria. This fosters integrity, value for money, and public trust in the procurement system.

123. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 80 of the Act provides guidance on the evaluation and comparison of tenders 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,...

(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)

124. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document. The Board interprets a fair evaluation system as one that ensures equal treatment of all tenders based on transparently defined criteria in the Tender Document.

125. During the hearing of the Request for Review, the Applicant contended that the evaluation of the bids was not conducted in



accordance with the criteria outlined in the Tender document. To support its case, the Applicant's Counsel referred the Board to Clause 4.11 – Section I of the Tender document and Clause 2 – Section III, specifically requirement no. 21 of the Evaluation and Qualification Criteria.

- 126.** The Board has thoroughly reviewed the Tender document, specifically Clause 4.11 and 41.1 – Section I, Instructions to Tenderers, as well as Clause 2 – Section III, Evaluation and Qualification Criteria, with particular reference to requirement no. 21. The relevant sections of the document are reproduced below:

Clause 4.11:

4.11 Pursuant to the eligibility requirements of ITT4.10, a tender is considered a foreign tenderer if it is registered in Kenya, has less than 51 percent ownership by nationals of Kenya and if it does not subcontract foreign contractors more than 10 percent of the contract price. JVs are considered as foreign tenderers if the individual member firms are registered in Kenya less than 51 percent ownership by nationals of Kenya. The JV shall not subcontract to foreign firms more than 10 percent of the contract price.

....

Clause 41.1:

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41.1 The Procuring Entity shall determine to its satisfaction whether the Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender is eligible and meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

...

...

Clause 2 requirement no. 21:

2 Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria (including requirements in the qualification forms, tenderer's eligibility- confidential business questionnaire) and other requirements in the ITT and that the tender is complete in all aspects in meeting the requirements of "Part 2 - Procuring Entity's Requirements", including checking for tenders with unacceptable errors, abnormally low tenders, and abnormally high tenders. The Standard Tender Evaluation Report for Goods and Works provides clear guidelines on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will not be considered further.

The following criteria will be used to determine preliminary responsiveness of the bidders.



No.	Documents to be submitted
21.	<p><i>Experience</i></p> <p><i>The vendor or the manufacturer of the equipment shall prove that they have supplied, installed and commissioned similar equipment in five areas outside the domiciled Country. Attach copies of contracts and reference and or recommendation letters.</i></p> <p><i>Provide proof that the bidder has specific experience in the supply, delivery, installation, training and commissioning of 3D panoramic Tower, Approach and Area Air Traffic Control Training Simulator in at least three projects each of a value of Kshs. 300 million or more within the last five (5) years as follows: -</i></p> <p><i>i The projects shall have been implemented in a country outside the state of manufacture.</i></p> <p><i>ii The project must be complete and operational.</i></p> <p><i>iii At least one the projects should have been implemented within the AFI region.</i></p> <p><i>iv Evidence of all previously and successfully accomplished integration services undertaken for a similar system.</i></p>

127. The sections of the Tender document cited above provide the eligibility and evaluation criteria, highlighting that a tenderer is



considered foreign if it is registered in Kenya with less than 51% Kenyan ownership and does not subcontract more than 10% of the contract to foreign firms. This also applies to joint ventures whose member firms individually fall below the 51% Kenyan ownership threshold. Further, a bidder must demonstrate international experience by having supplied, installed, and commissioned similar equipment in at least five countries outside their own. Specifically, they must have completed at least three projects within the last five years involving 3D panoramic Air Traffic Control Training Simulators, each valued at a minimum of KES 300 million. One of these projects must be within the AFI region, and all must be complete, operational, and supported by evidence of successful system integration.

128. In response to the foregoing, the Respondent and the Interested Party referred the Board to requirement no. 4 on page 33 of the Tender document, Clarification no. 5 issued on 10th February 2025, and Clause 4.6 of the Instructions to Tenderers (ITT) in the Tender document.

129. The Board has thoroughly reviewed the Tender document, specifically requirement no. 4 on page 33, Clarification no. 5, and Clause 4.6 of the Instructions to Tenderers (ITT), which are reproduced below, starting with requirement no. 4 as follows:

<i>No.</i>	<i>Document to be submitted</i>
<i>4.</i>	<i>Provide documentary evidence of the company's registration details /certificate of incorporation (legal structure) by a recognized body in the domiciled</i>



	<i>Country (including for members of joint venture where applicable).</i>
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130. The above section of the Tender document requires bidders to submit official proof of their legal registration, such as a certificate of incorporation, issued by a recognized authority in their home country. This requirement also applies individually to each member of a joint venture, if applicable.

131. Clarification no. 5 provides as follows:

<i>No.</i>	<i>Clarification Sought</i>	<i>KCAA's response to the clarifications</i>
<i>5.</i>	<i>The bidders sought clarifications on page 7 item 4.10 Foreign tenderers are required to source at least forty (40%) percent of their contract inputs (in supplies, subcontracts and labour) from national suppliers and contractors. To this end, a foreign tenderer shall provide in its tender documentary evidence that this requirement is met. Foreign tenderers not</i>	<i>KCAA has reviewed this requirement and has noted that it will not apply absolutely since this is specialized Aviation Systems/ Equipment where most of the targeted firms are Original Equipment Manufacturers (OEM) and none is available locally. As a result, interested</i>



<p><i>meeting this criterion will automatically disqualified. Information required to enable the Procuring Entity determine if this condition is met shall be provided in 'SECTION III – EVALUATION AND QUALIFICATION CRITERIA, Item 9'</i></p> <p style="text-align: center;">Question</p> <p><i>The vast majority of the Air Traffic Control Training Simulator hardware and software are of a very specific nature developed for the ATM industry. Therefore, they are sourced from the foreign market. Consequently, it's not possible to meet the requirement of sourcing 40% of the contract inputs in from local suppliers and contractors. We kindly request you to waive this requirement.</i></p>	<p><i>bidders should proceed to prepare their tender documents indicating the OEM country of Origin and that due to the specialty of the equipment/system proposed it is not possible to source to a local company at least forty percent (40%) of their contract inputs.</i></p>
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132. The above section of Clarification no. 5 provides that bidders sought clarification on the requirement that foreign tenderers must source at least 40% of their contract inputs—such as supplies, subcontracts, and labour—from local suppliers. They explained that due to the specialized nature of Air Traffic Control Training Simulator hardware and software, which are typically developed specifically for the aviation industry, it would not be feasible to meet this requirement locally. In response, the Procuring Entity acknowledged that the requirement would not apply absolutely, given that most of the targeted suppliers are Original Equipment Manufacturers (OEMs) and are not available locally. The Procuring Entity advised that bidders should proceed with their submissions by indicating the OEM's country of origin and explaining that, due to the specialized nature of the equipment or system proposed, local sourcing of at least 40% of contract inputs is not possible.

133. Clause 4.6 ITT of the Tender document provides as follows:

4.6 A Tenderer may have the nationality of any country, subject to the restrictions pursuant to ITT 4.9. A Tenderer shall be deemed to have the nationality of a country if the Tenderer is constituted, incorporated or registered in and operates in conformity with the provisions of the laws of that country, as evidenced by its articles of incorporation (or equivalent documents of constitution or association) and its registration documents, as the case may be. This criterion also shall apply to the determination of the



***nationality of proposed subcontractors or sub-consultants
for any part of the Contract including related Services.***

- 134.** The above section of the tender document specifies that a tenderer may have the nationality of any country, provided it complies with the restrictions outlined in ITT 4.9. A tenderer is considered to have the nationality of a country if it is constituted, incorporated, or registered in that country and operates in accordance with the country's laws. This must be evidenced by the tenderer's articles of incorporation (or equivalent documents) and registration documents. The same criterion applies to determining the nationality of proposed subcontractors or sub-consultants for any part of the contract, including related services.
- 135.** The Board has carefully considered the aforementioned sections of the Tender document, along with the Clarifications provided, which the parties have requested the Board to focus on in determining the issues surrounding the evaluation of the bids.
- 136.** The Applicant contended that the Interested Party failed to meet the mandatory requirement under Clause 4.11, as it did not submit evidence of registration in Kenya.
- 137.** The Board notes that this was an international open tender. Further, an analysis of Clause 4.6 ITT of the Tender document suggests that the registration requirement pertains to the country of domicile.



- 138.** Furthermore, the Board acknowledges the explanation provided by the Respondent during the hearing that Clause 4.11 was intended solely to clarify Clause 4.10. A plain reading of Clause 4.11 supports this, indicating that it was merely intended to amplify the provisions of Clause 4.10.
- 139.** Indeed, Clause 4.11 begins with the words, "Pursuant to the eligibility requirements of ITT 4.10, a tender is considered a foreign tenderer...". Based on this structure, the Board finds no difficulty in concluding that this Clause was intended solely to provide guidance and clarification for Clause 4.10.
- 140.** Additionally, having established that Clause 4.11 was intended to amplify the contents of Clause 4.10, the Board notes that Clause 4.10 was subsequently amended by Clarification no. 5. In accordance with Section 75 of the Act, this amendment rendered Clause 4.11 irrelevant, as it specified that Clause 4.10 would not be considered in the evaluation.
- 141.** Consequently, with regard to the evaluation of the Interested Party's bid in relation to its non-registration in Kenya, the Board finds that this claim is without merit.
- 142.** Another issue raised by the Applicant under this heading pertains to Section III – Evaluation and Qualification Criteria, specifically requirement no. 21. The Applicant alleged that the Interested Party failed to provide the necessary documentation required under



requirement no. 21, specifically demonstrating that they had over five years of experience in a similar project.

143. In response to the above, the Respondent stated that the requirement was amended by Clarification no. 2. The Board has reviewed the clarification and confirms that; indeed, requirement no. 21 was amended by Clarification no. 2.

144. The Board notes that Clarification no. 2 specified that tenderers were required to provide evidence of at least three projects, each with a value of KES 250 million or more, completed within the last seven years.

145. Furthermore, the Board reviewed the Interested Party's bid documents and observed that they had provided the necessary documentation that aligned with the requirements set forth by the Procuring Entity.

146. Based on the foregoing, the Board finds that the Applicant's allegation, claiming that the Interested Party failed to provide documents demonstrating over five years of experience in a similar project as per requirement no. 21, lacks merit. The Board reaches this conclusion because the allegation does not consider the effect of Clarification no. 2. Additionally, upon reviewing the Interested Party's bid documents, the Board finds that there was compliance with the specified requirements.

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147. Lastly, the Board notes that the Applicant contended there was a breach of Section 80 of the Act, which governs the evaluation of tenders, as well as Regulations 74 and 75 of the 2020 Regulations. These regulations address the preliminary evaluation of open tenders and the issue of non-responsiveness to tenders, respectively.

148. In light of the general allegations regarding the evaluation process, the Board proceeded to review how both the Applicant's and the Interested Party's bids were evaluated, starting from the preliminary evaluation stage.

149. The Board observes that the Applicant was deemed non-responsive at the preliminary evaluation stage, as it submitted projects that did not meet the required value of KES 250 million. For instance, the Applicant provided a set of six 3D visual display systems for the Tower Simulator at the Hong Kong Civil Aviation Institute, valued at KES 120 million, which falls below the required threshold of KES 250 million. Additionally, one set of the Panoramic Tower Training Display at Nanjing University was valued at KES 203 million, also below the KES 250 million threshold stipulated.

150. The Board also observed that some of the projects submitted by the Applicant lacked the required completion certificates. For example, with regard to the Angola Luanda International Airport project, the Applicant submitted a Site Acceptance Test dated 14th June 2023, but failed to provide a Completion Certificate to demonstrate the completion of the project. Additionally, for the CA Operation Management System, the



Applicant only provided a Site Acceptance Report without a corresponding Completion Certificate. Similarly, the Applicant submitted a Site Acceptance Report for the Hong Kong Aviation Academy Simulator upgrade, which was also below the required KES 250 million threshold, but did not provide the Completion Certificate.

151. Similarly, the Board reviewed the bid submitted by the Interested Party and found that it met all the criteria set out during the preliminary evaluation stage.

152. The Board notes that, despite the aforementioned, the Applicant's bid progressed to the financial stage, which will be addressed separately in the next issue for determination.

153. In summary, the Board's findings under this issue are that, aside from the issues identified concerning the Applicant's bid documents, the Procuring Entity evaluated the tenders in accordance with the tender document, as amended by the clarifications issued.

Whether the Procuring Entity failed to take note of abnormally low or high

154. The Applicant contended that the Procuring Entity failed to comply with the requirements outlined in the tender document regarding the evaluation of high and low tenders. To support this assertion, the Applicant referenced Clause 39.1, 39.2, 39.4, and 39.5 of Section I of the tender document.



- 155.** In response, the Respondent asserted that the tender document did not include provisions for evaluating high or low tenders. Instead, the Respondent emphasized that the tender document stipulated that the lowest evaluated bidder would be recommended for the award of the contract, in accordance with Section 79 of the Act.
- 156.** In response, the Interested Party submitted that the tender price it had submitted was not abnormally low. Counsel referred the Board to Clauses 21 and 23 of the Preliminary Evaluation Criteria, which indicated that the estimated cost of the aviation systems was approximately KES 300 million. Counsel further argued that this cost was reduced to approximately KES 250 million through Clarification No. 2.
- 157.** The Board has reviewed Clauses 39.1, 39.2, 39.4, and 39.5 – Section I of the Tender document and has reproduced them as follows:

39. Abnormally Low Tenders and Abnormally High Tenders

39.1 An Abnormally Low Tender is one where the Tender price, in combination with other elements of the Tender, appears so low that it raises material concerns as to the capability of the Tenderer to perform the Contract for the offered Tender Price or that genuine competition between Tenderers is compromised.

39.2 In the event of identification of a potentially



Abnormally Low Tender, the Procuring Entity shall seek written clarifications from the Tenderer, including detailed price analyses of its Tender price in correlation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tendering document.

...

39.4 An abnormally high price is one where the tender price, in combination with other constituent elements of the Tender, appears unreasonably too high to the extent that the Procuring Entity is concerned that it (the Procuring Entity) may not be getting value for money or it may be paying too high a price for the contract compared with market prices or that genuine competition between Tenderers is compromised.

39.5 In case of an abnormally high tender price, the Procuring Entity shall make a survey of the market prices, check if the estimated cost of the contract is correct and review the Tender Documents to check if the specifications, scope of work and conditions of contract are contributory to the abnormally high tenders. The Procuring Entity may also seek written clarification from the tenderer on the reason for the high tender price. The Procuring Entity shall



proceed as follows:

i. If the tender price is abnormally high based on wrong estimated cost of the contract, the Procuring Entity may accept or not accept the tender depending on the Procuring Entity's budget considerations.

ii. If specifications, scope of work and/or conditions of contract are contributory to the abnormally high tender prices, the Procuring Entity shall reject all tenders and may retender for the contract based on revised estimates, specifications, scope of work and conditions of contract, as the case may be.

158. The above clauses of the Tender document provides that the Procuring Entity considers a tender to be abnormally low if the price, along with other elements, appears so low that it raises concerns about the tenderer's ability to perform the contract or suggests that genuine competition may be compromised. In such cases, the Procuring Entity is to request for written clarification from the tenderer, including a detailed price analysis addressing the scope, methodology, schedule, risk allocation, and other relevant aspects of the contract. Similarly, an abnormally high tender price is one that appears excessively high in relation to market rates, prompting concerns about value for money or the integrity of competition. If such a tender is identified, the Procuring Entity will review market prices, reassess the contract's estimated cost, and examine whether the specifications or scope contributed to the



inflated pricing. Depending on the findings, the Procuring Entity may accept or reject the tender based on budget constraints or, where tender conditions are found to have caused the high prices, cancel all bids and retender with revised terms.

- 159.** The Board also reviewed the Financial Evaluation Criteria outlined on page 52 of the Tender document, which provided as follows:

GENERAL NOTES ON FINANCIAL EVALUATION

Upon completion of the technical evaluation the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

The evaluated price for each bid shall be determined by: - a taking the bid price in the tender form; b taking into account any minor deviation from the requirements accepted by a procuring entity c where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date; d applying any margin of preference indicated in the tender document.

Note: Any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects



the substance of the tender and shall lead to disqualification of the tender as non-responsive.

Ranking of Tenders

Tenders shall be ranked according to their evaluated price and the successful tender shall be the lowest evaluated tender.

160. The above financial evaluation criteria stipulate that the process involves extracting the bid price from the tender form, accounting for any minor deviations accepted by the Procuring Entity, converting all prices to a common currency using the Central Bank of Kenya's exchange rate as of the tender opening date, and applying any specified margin of preference. It further states that any errors arising from miscalculations in unit prices, quantities, subtotals, or the total bid price will be treated as major deviations, leading to disqualification for non-responsiveness. Lastly, tenders will be ranked based on their evaluated prices, with the contract being awarded to the lowest evaluated tender.

161. Having stated as above, the Board observes that the issue of abnormally high or low tenders can only be examined in relation to the estimated budget of the Procuring Entity and the standard market price. This evaluation can be informed by the respective experience submitted by the bidders in performing similar tasks.

162. The Board notes that the Procuring Entity's estimated budget was



KES 400 million. The Board further observes that the issue which led to Clarification no. 2 stemmed from bidders expressing concerns that the KES 300 million threshold was restrictive, as they believed they could deliver better value at a significantly lower cost. In response, the Procuring Entity reduced the amount from KES 300 million to KES 250 million.

163. In light of the above, the Board now narrows down the issue to determining the bid price submitted by the Interested Party, in order to assess whether the tender can be considered abnormally high or low.

164. The Board has reviewed the Evaluation Report presented by the Respondent, along with the Interested Party's bid documents, and notes that the Interested Party's bid price was KES 281,670,022.33.

165. The Board observes that the Interested Party's bid price was above the lower limit of KES 250 million, as specified in Clarification no. 2, and did not exceed the estimated budget of KES 400 million as submitted by counsel for the Respondent and which was not contested,. The Board reiterates the significance of Section 75 of the Act regarding clarifications and addenda, and their impact on the Tender document.

166. Furthermore, the Board notes that the value of similar experience submitted by the Applicant ranged from KES 120 million to KES 25 billion. This range clearly demonstrates that the Interested Party's bid is neither abnormally low nor high, as it falls, partly, within the range provided by the Applicant.



167. The Board is mindful of the provisions of Section 107(1) of the Evidence Act, which states that:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

168. The above provision of the law indicates that any party seeking a judgment regarding a legal right or liability that depends on the existence of certain facts bears the burden of proving those facts. In the context of procurement proceedings, this principle ensures competitive fairness by requiring that allegations, such as claims of abnormally low or high tenders, must be substantiated with credible evidence.

169. It is a well-established principle of law that he who alleges must prove. In the present Request for Review, the Board finds that the Applicant has failed to substantiate any claims of abnormally low or high tenders. In reaching this conclusion, we note that the documents as submitted by the parties do not support the allegation of abnormally low or high tenders.

170. The weight of an allegation lies not in its assertion, but in the strength of the evidence supporting it. He who asserts must bear the

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burden of proof. In the present Request for Review, the Board finds that the Applicant has failed to discharge this burden with respect to the allegations raised.

- 171.** In light of the foregoing observations, the Board concludes that there is insufficient evidence to establish that the Procuring Entity failed to consider abnormally low or high tenders.

What orders the Board should issue in the circumstance.

- 172.** The Board finds that it has jurisdiction over the present Request for Review, as the Applicant has demonstrated the risk of suffering loss and damage. Additionally, the Applicant's Request for Review is not based on confidential documents, as none of such documents were annexed.
- 173.** Consequently, having heard the parties and evaluated all the evidence presented, the Board finds that there is no evidence of failure to apply the evaluation criteria provided in the Tender documents with regard to the evaluation of tenders. The only exceptions being the errors noted in the evaluation of the Applicant's bid, which was not supposed to proceed past the preliminary evaluation stage.
- 174.** Furthermore, the Board finds that the issue of abnormally low or high tenders did not arise during the tender proceedings, as the Interested Party's bid price fell within the range anticipated by the Procuring Entity.



175. Consequently, the Request for Review dated 28th March 2025, concerning TENDER NO. KCAA/016/2024-2025 – Supply, Delivery, Installation, Training, and Commissioning of 3D Panoramic Tower, Approach and Area Air Traffic Control Training Simulator at East African School of Aviation, is hereby dismissed on the following specific grounds:

FINAL ORDERS

176. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 28th March 2025:

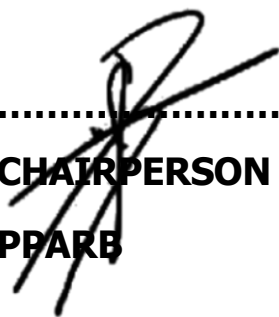
- 1. The Respondent's Preliminary Objection dated 2nd April 2025 and the Interested Party's Preliminary Objection dated 7th April 2025 be and are hereby dismissed.**
- 2. The Request for Review dated 28th March 2025 be and is hereby dismissed.**
- 3. The Respondent, Director General of the Kenya Civil Aviation Authority, be and is hereby directed to oversee the tender proceedings for TENDER NO. KCAA/016/2024-2025 – Supply, Delivery, Installation, Training, and Commissioning of 3D Panoramic Tower, Approach and Area Air Traffic Control Training Simulator at East African School**



of Aviation to their logical and lawful conclusion; and


4. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this 17th day of April 2025.



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CHAIRPERSON
PPARB



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SECRETARY
PPARB

