

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION 81 OF 2017 OF 4TH SEPTEMBER, 2017**

**BETWEEN**

**SKYMASTERS (KENYA) LIMITED.....APPLICANT**

**AND**

**KENYA AIRPORTS AUTHORITY .....PROCURING ENTITY**

Review against the decision of the Kenya Airports Authority in the matter of Tender No. KAA/ES/JKIA/1179/M Tender for Design, Supply, Installation, Commissioning, Operation and Maintenance of an Automated Parking Management System at Jomo Kenyatta International Airport.

**BOARD MEMBERS**

- |                       |          |
|-----------------------|----------|
| 1. Paul Gicheru       | Chairman |
| 2. Hussein Were       | Member   |
| 3. Rosemary Gituma    | Member   |
| 4. Peter Bitu Ondieki | Member   |
| 5. Nelson Orgut       | Member   |
| 6. Weche Okubo        | Member   |

**Paytech Ltd**

1. Grace Nyawira

Business Development

**Express Automation**

1. Jatinder Shirpa

Regional Brand Team Leader

**BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows;

**BACKGROUND OF AWARD**

**BACKGROUND OF AWARD**

KAA seeks to appoint a service provider for the management of the parking infrastructure, revenue collection, financial transactions and parking operations for a period of seven (7) years at Jomo Kenyatta International Airport (JKIA).

The successful service provider is to:

- Provide landside parking management expertise with excellent, seamless operations being its main objective.
- Provide users of parking facilities with convenience by alleviating any parking queries and issues.
- Create good customer service and value for money with the expectation to improve Airport Service Quality (ASQ) ratings.

Nine bidders submitted their bid as detailed in Table 1.

**Table 1: List of Bidders**

<b>NO.</b>	<b>Bidder's Name</b>	<b>Tender Security</b>
1	Endeavour Africa Group	Provided
2	Mason Services Ltd/ Qntra Technology Ltd Jv	Provided
3	Paytech Ltd	Provided
4	Kenya Airports Parking Services Ltd (Kaps Ltd)	Provided
5	Jkia Parking Solutions	Provided
6	Nationwide Controlled Parking Systems Ltd/ Express Ddb Kenya Jv	Provided
7	Express Automation /Servest Jv	Provided
8	Webtribe Ltd	Provided
9	Top Choice Surveillance Ltd / Came Group Jv	Provided

## **BID EVALUATION**

Bids were evaluated based on the criteria set out in the bidding documents and addenda to the bid.

	<b>Bid Requirement</b>
10	Dully filled Litigation History,
11	Dully filled Declaration Form
12	Dully filled Self-Declaration Form
13	Dully filled Confidential Business Questionnaire
14	Provide any three consecutive Audited Accounts .
15	Data Sheets or brochures of the product(s)
16	Manufacturer's Authorization Form
17	Duly filled certificate of bidders visit to site
18	Dully filled copy of power of Attorney
19	CVs of project manager, team member and other personnel
20	Duly filled qualification forms

The following table summarizes the preliminary/mandatory evaluation results for bidder's number 1 to 5.

Bidder 3: M/s Paytech Ltd

Bidder 4: Kenya Airports Parking Service Ltd

Bidder 7: Express Automation/ Servest JV

The following five (05) bidders, did not meet all the mandatory requirements and were not considered for further evaluation

Bidder 1: M/s Endeavour Africa Group,

Bidder 5: M/s JKIA Parking Solutions,

Bidder 6: Nationwide Controlled Parking Systems Ltd /Express DDB KenyaJV

Bidder 8: Webtribe Ltd

Bidder 9: Top Choice Surveillance Ltd/Came GroupJV.

Note: Bidder no 4, M/s Kenya Airports Parking Service Ltd (KAPS Ltd) provided a bid surety of Ksh 3.5 million. This is in excess of the requirement of Ksh 800,000.

## **REASONS FOR NON-RESPONSIVENESS**

M/s Endeavour Africa Group – bidder no. 1

- The manufacturer's authorization was granted by M/s BPT Middle East, an entity different from the manufacturer M/s Parkare Group SL. The manufacturer did not provide authorization to the bidder M/s Endeavour Africa Group.

Top Choice Surveillance Ltd / Came GroupJV – bidder no 9

- Certificate of incorporation of the JV Partner was not availed in the language of the tender.

**TECHNICAL CRITERIA**

The technical evaluation was based on the following criteria and sub criteria. Only bidders who scored a minimum of 75 points were to be considered for further evaluation.

The following table has the evaluation results.

**TABLE 5: Technical Evaluation Results.**

<b>Tenderers Experience</b>		
<b>Past Experience</b>		<b>50 Points</b>
Provide relevant experience in relation to two (2) projects in Automated Parking Management System carried out in a commercial environment by the Tenderer in the past five (5) years (in form of either award letters, contracts) and complete table 1 below.	<b>Management of Parking Spaces - Number of Parking Spaces. (6 Points per Project)</b>	
	If <250.	(1 Point per Project)
	if >250 and <500.	(2 Points per Project)
	If >500 and <1,500.	(4 Points per Project)
	If >1,500.	(6 Points)

	1 Site.	(3 Points)
	2 Sites.	(6 Points)
	e. Management and Operation of Automatic Number Plate Recognition Readers (ANPR). (3 Points Per Project/Site)	
	0 ANPR Site.	(0 Points)
	1 Site.	(3 Points)
	2 Sites.	(6 Points)
	f. Management and Operation of Closed-Circuit Television (CCTV). (3 Points Per Project)	
	0 CCTV Site	(0 Points)
	1 Site.	(3 Points)
	2 Sites.	(6 Points)
<b>Experience of Key Personnel</b>		<b>10 Points</b>
<b>Relevant Experience of Key Personnel</b>		
Provide comprehensive CV's and supporting documentation Table 2 below.	Relevant / similar experience by each of the following personnel in a commercial environment.	

	responsibilities.	
	Provide a complete organogram.	(2 Points)
c)	Business Continuity Plan	(8 Points)
	Risk Management and Control.	(4 Points)
	Equipment Failure.	(2 Points)
	Industrial disputes.	(2 Points)
d)	Standard Operating Procedures (SOP's) of a 24 hour operation	(8 Points)
	Cash and banking management.	(4 Points)
	Security & Safety management.	(2 Points)
	Parking segmentation and access Control.	(2 Points)
e)	Customer Care Strategy.	(5 Points)
	Effective management and resolution of customer/client issues.	(3 Points)
	Customer satisfaction plan	(2 Points)
f)	Revenue enhancement initiatives	(4 Points)
<b>TOTAL SCORE (out of 100)</b>		



		relationship who the bidder was not demonstrated. Consequently, the third party was not taken into account thereby limiting parking management experience of the bidder.
<b>Bidder 7</b>	<ul style="list-style-type: none"> <li>• Extensive parking management experience</li> <li>• Standard Operating Procedures (SOPs) over cash &amp; banking management, security &amp; safety were well articulated</li> <li>• Relevant revenue enhancement proposals</li> </ul>	<ul style="list-style-type: none"> <li>• Reliance on offshore support solutions to address business continuity challenges local</li> </ul>

## RECOMMENDATIONS

Based on the evaluation results as set out above, the Evaluation Committee hereby recommends the following four (04) bidders proceed to the financial evaluation stage and their financial bids be opened.

Bidder 2: M/s Mason Services Ltd/ Qntra Technology LtdJV

Bidder 3: M/s Paytech Ltd

Bidder 4: Kenya Airports Parking Service Ltd

Bidder 7: Express Automation/ Servest JV

- by the Accounting Officer of the Procuring Entity in contravention of the Constitution, the Act and the impugned tender document;*
- 2. The Board in exercise of its discretion to give directions to the Accounting Officer of the Procuring Entity to redo anything within the entire procurement process found to not have been properly done to ensure compliance with the law and tender documents;*
  - 3. Further or in the alternative, the entire tender proceedings be nullified and the Respondent be ordered to re-tender afresh;*
  - 4. 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.*

#### **THE PARTIES SUBMISSIONS**

As already adverted to above, the Applicant in this Request for Review was represented by Mr. Samuel O. Muga Advocate who relied on the Applicant's Request for Review together with the supporting statement of Laban Mbithi Maingi. Counsel for the Applicant also relied on the contents of the original tender document supplied to the Board by the Procuring Entity.

It was the Applicant's case as advanced by Counsel for the Applicant that pursuant to the invitation published by the Procuring Entity, the Applicant obtained the tender document from the Procuring Entity and attended the mandatory pre-bid meeting in preparation for the submission of its tender and was accordingly issued with a certificate of attendance of the pre-bid

to respond to all the clarifications sought by bidders including the Applicant at any time before the closing/opening date for the tender. It was the Applicant's case that there was no requirement in the tender document providing for a time frame within which the Procuring Entity was to respond to any request of clarification from the bidders.

By way of illustration, Counsel for the Applicant cited several provisions of the tender document which he considered ambiguous, uncertain and contradictory.

The first example of the contradiction cited by the Applicant in furthering its case before the Board was that set out under the award criteria in the tender document.

It was the Applicant's case based on the criteria set out under item 2.27.4 and pages 24 and 25 to the tender document that the Procuring Entity had set out two contradictory award criteria in its tender document. Counsel for the Applicant submitted that whereas clause 2.27.4 at page 12 of the tender document provided that the tender in question would be awarded to the lowest evaluated bidder in terms of price, the formula at pages 24 and 25 of the tender document provided that the tender would be awarded to the bidder who scored the highest combined technical and the financial scores. Counsel for the Applicant stated that the two criteria were mutually exclusive and that the first criteria related to the award of a

guarantee derived from 10% of the contract price which was distinct from the provisions relating to the minimum Annual Guarantee. Counsel for the Applicant therefore submitted that in so far as the tender document set out more than one formula for determining the applicable performance guarantee, the provisions of the tender document relating to the amount of the performance guarantee were uncertain and contradictory.

The third illustration of the defective nature of the tender document which was relied upon by Counsel for the Applicant was that relating to the data analysis for entry and exists recorded for the Procuring Entity's staff members, Customs Officials, the Kenya Police Officers, Immigration Officers and Metrological Officers. Counsel for the Applicant stated that while purporting to respond to the inquiry made by various bidders on the above matter, the Procuring Entity issued addendum number 3 where the Procuring Entity sought to provide the data requested for under item number 3 of the said clarification.

It was however the Applicant's case that the figures provided by the Procuring Entity were either vague, generalized or did not contain the particulars sought for in order to enable bidders submit a competent bid to the Procuring Entity.

Counsel for the Applicant also raised several other issues that in his view rendered the tender document used in this procurement defective. Some of

applicable to the particular procurement method adopted by the Procuring Entity but not another method.

The second decision which Counsel for the Applicant relied upon was the High Court decision in the case of **Republic =vs= Public Administrative Review Board exparte Kenya Ports Authority Limited & 2 Others (Nai JR Appl. No. 525 of 2016)** where the court held that a tender document has to conform to both the provisions of the constitution and the Act and that where a tender document fails to do so, the Board has the power to nullify the entire procurement process and order for a retender.

Counsel for the Applicant finally relied on the case of **Republic -vs- Public Procurement Administrative Review Board Exparte Chico Group Limited & 3 Others (Nai HC JR Appl. NO. 116 of 2017)** where the High Court held that the only option open to the Board where it finds that a tender document is defective is to terminate the entire procurement process and order for a retender.

At the conclusion of his submissions, Counsel for the Applicant urged the Board to allow the Request for Review and direct the Procuring Entity to tender a fresh for the subject procurement on the basis of a tender document that complies with the provisions of the Constitution and the Act.

document left room for a possible abuse of discretion by members of tender evaluation committee in the apportionment of the marks.

Counsel for the above interested party further submitted that the Procuring Entity breached the provisions of Article 227 of the Constitution and Section 3 of the Act by failing to provide information. He stated that the two provisions of the law envisaged a system which was fair, equitable, transparent and cost effective. He stated that by failing to answer the several requests for clarification, the Procuring Entity failed to act transparently and as such the Board ought to find that the entire procurement process herein was flawed.

Mr. Oyugi finally submitted that he had looked at all the three authorities relied upon by Counsel for the Applicant and stated that the same represented the correct legal position.

M/s Ettah Mwago advocate who appeared on behalf of the Procuring Entity opposed the Applicant's Request for Review and relied on the Procuring Entity's reply dated 11<sup>th</sup> September, 2017 together with all the documents which were filed by the Procuring Entity with the Board on 11<sup>th</sup> September, 2017.

It was the Procuring Entity's position that the procurement process herein was conducted fairly and that the tender document was clear and

In response to the question whether the Procuring Entity had issued any addendum or clarification relating to the award criteria in view of the contradiction in the tender document, Counsel for the Procuring Entity stated that the Procuring Entity did not specifically clarify the issue by way of a formal clarification or an addendum. She however stated that the applicable award criteria was that which provided that the tender would be awarded to the bidder with the highest combined technical and financial score and not the one that provided that the tender would be awarded to bidder who was determined to be the lowest evaluated bidder in terms of price.

On the issue of the performance guarantee, Counsel for the Procuring Entity submitted that the Procuring Entity had sufficiently clarified the issue in the clarification dated 21<sup>st</sup> August, 2017. She further stated that the Procuring Entity had clarified that the performance security would be for a sum equivalent to three months Minimum Annual Guarantee. She therefore stated that the tender document was sufficiently clear contrary to the assertions made by Counsel for the Applicant.

While responding to the question raised by the Board on whether the tender document contained sufficient particulars governing the requirements which ought to have been met by bidders wishing to submit tenders in joint venture, Counsel for the Procuring Entity acknowledged that although the tender in question was a security related tender, the

quantifiable and stated that the said criteria was clear, quantifiable and it did not leave room for any abuse of discretion by members of the tender evaluation committee.

At the conclusion of the Procuring Entity's submissions before it, the Board allowed M/s Margret Muraya the Procuring Entity's Acting Procurement Manager to make representations before the Board. M/s Muraya in her submissions stated that she had gone through the tender document and had noted that there were several instances where the tender document was contradictory or did not accurately give the data requested for by bidders who sought clarifications. M/s Muraya attributed this to lack of coordination between the various departments of the Procuring Entity which prepared the tender document and expressed her frustration with the inability of the various departments of the Procuring Entity to work together in harmony.

M/s Muraya further stated that the tender document in question was largely prepared by the Procuring Entity's ICT and Finance Departments but she admitted that there were several security related features in this procurement process such as the presence of CCTV camera's and the detection system for motor-vehicle registration number plates which required input from the Procuring Entity's security department.



tender document were not sufficiently clear to enable bidders fairly participate in the procurement process. He therefore urged the Board to allow the Request for Review and direct the Procuring Entity to retender.

Mr. Jatinder Shipra who appeared on behalf of Express Automation Limited which was one of the bidders in this procurement process stated that the procurement process herein was fair and that the tender document was comprehensive. He stated that the company which he represented had gone through the entire tender document and had understood it and that it had consequently submitted its bid in joint venture with its International Partners who he declined to name.

He therefore urged the Board to dismiss the Applicant's Request for Review and allow the Procurement process to proceed. He however admitted that the company which he was representing had not rendered the services sought to be procured by the Procuring Entity to any other entity and stated that the company would rely on its joint venture partner to render the services if it was awarded the tender.

Mr. Dhariwal who appeared on behalf of Express Ddb Kenya Limited associated himself with the submissions made by Counsel for the Procuring Entity and denied that there were any defects in the tender document. He stated that the contents of the tender document were sufficiently clear and that the company which he was representing together

On the issue of the clarifications that the Applicant had sought in its letter dated 21<sup>st</sup> August, 2017, Counsel for the Applicant submitted that the Procuring Entity did not dispute the fact that it had not responded to the said request. He further stated that by failing to respond to the said request, the Procuring Entity had breached the provisions of Section 75(1) of the Act which required the Procuring Entity to respond to any request for clarifications before the date of closure of the tender. He finally stated that the provisions of Section 75(1) of the Act did not set out a specific time frame within which a Procuring Entity was to respond to a request for clarification.

In conclusion, Counsel for the Applicant urged the Board to allow the Applicant's Request for Review as prayed.

### **THE BOARD'S DECISION**

It is clear from the submissions made by all the parties who appeared before the Board in this matter that the Applicant was challenging the contents of the tender document on the grounds that the same contravened the provisions of the Act and the Constitution.

The Board has perused the tender document used in this procurement process against the provisions of the Act and the Constitution and the complaints raised by the Applicant and the other bidders who sought for clarifications from the Procuring Entity and is of the view that the tender

procurement method which the Procuring Entity opted to use for the procurement.

Closely related to the issue of the award criteria, the Board notes that the Procuring Entity adopted a two envelope system of submission in this tender where the technical and the financial proposals were to be submitted separately. The Board however notes that this mode of submission is not appropriate where the procurement method adopted by the Procuring Entity is that of an open tender.

The Board wishes to state that where the procurement method used in a procurement process is that of an open tender, all the tender documents containing the technical and the financial proposals must be bound together as one document and must be submitted in one envelope and not in more than one envelope as was the case in this procurement.

The provisions of the Public Procurement and Asset Disposal Act 2015 and more particularly Section 78 of the said Act set out an elaborate procedure of what is supposed to take place during tender opening where the procurement method used is that of an open tender.

Section 78(6) of the Act stipulates as follows:-

**78(6): As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register:-**

**(a) The name of the person submitting the tender;**

The third fundamental defect in this procurement process relates to the submission of bids by joint venture partners. The Board notes from the tender documents which were submitted before it that several bidders submitted their tenders in joint venture with foreign companies. The Board however further notes that the Procuring Entity failed to set out the procedure, the qualifications and the obligations that were required to be met by the joint venture partners on the Section of the tender document headed "instructions to tenderers".

The Procuring Entity however opted to set out a few requirements relating to tenders submitted in joint venture under the appendix to the instructions to tenderers appearing at page 15 of the tender document. A perusal of clause 2.1.3(a)- (f) of the appendix to instructions to tenderers which provides for the submission of tenders in joint venture. A perusal of the requirements under clause 2.1.3(a) – (f) however shows that the Procuring Entity did not set out the qualifications and the manner of evaluation of tenders which were to be submitted by the joint venture partners.

The Board further wishes to state that it is clear from the tender document that the tender in question bears several hallmarks of a security related tender. This fact is borne out by the fact that the tender document makes provision for the existence of CCTV camera's and a system for the detection of motor vehicle registration number plates among other security features. The Board wishes to additionally observe that owing to the security nature of the procurement in question, the Procuring Entity ought

In addition to the foregoing concern, the Board wishes to additionally note that the tender in issue is for a period of seven (7) years. A tender covering such a long period of time also carries with it other related concerns such as that relating to the issuance of work permits for the foreign employees employed in the management of the system among other aspects that make it absolutely necessary for the Procuring Entity to make elaborate provisions relating to the qualifications and the manner in which a joint venture would operate.

The Board further wishes to note that the provisions of clause 2.1.3(a) to (f) have the potential of hindering the promotion of local industry and the related benefits that are likely to accrue from a joint venture such as the creation of employment opportunities.

The fourth defect that is apparent on the face of the tender document used in this procurement process is that which relates to the nature and the requirements of the performance security. This defect comes out clearly from the requirements at page 24 of the tender document as read together with clarification number 1 dated 21<sup>st</sup> August, 2017 and the standard tender forms appearing at clauses 8.1 and 8.5 of the tender document.

The said clauses and forms provide as follows:-

**ii) Mandatory financial requirement**

**On performance security**

**Page 24**

It is clear from the above excerpts from the tender document and the clarification number 1 issued by the Procuring Entity that the tender document, the clarification and the standard tender forms 8.1 and 8.5 do not speak to each other or give a clear direction as to the amount that a bidder should provide as its performance guarantee.

It is noted that whereas the clarification talks of 3 month's equivalent of the minimum Annual Guarantee, the forms prescribe a figure derived from the minimum annual guarantee upon the signing of the contract. This uncertainty in the tender document, the clarification and the forms therefore not only makes it difficult for a bidder to fill in and submit a proper tender, but also makes the Procuring Entity unable to determine with any degree of certainty its expected performance security from the bidders to guarantee its performance during the contract period. The contradiction is also likely to lead to different interpretations from one bidder to another.

The fifth area of lack of clarity in the Procuring Entity's tender document and which appears at pages 20, 21 and 22 of the tender document headed the implementation methodology and the percentage rating is that the manner of apportionment of the marks is not objective and leaves the determination of the marks to be awarded to individual bidders entirely to the discretion of the individual evaluators. The marks set out under the said criteria are also indicated as fixed figures and are not graduated as would ordinarily be the case in a technical evaluation criteria.

prohibited both by the provisions of the Constitution and the Public Procurement and Asset Disposal Act 2015.

It is abundantly clear from the above illustrations that the tender document prepared by the Procuring Entity for the purposes of carrying out the subject procurement is incurably defective in the above respects among many others. Mrs. Margaret Muraya the Procuring Entity's Ag. General Manager Procurement acknowledged the existence of the several defects and contradictions during the hearing of this Request for Review and attributed the existence of the defects and contradictions to lack of coordination between officers from the Procuring Entity's IT and Finance Departments who prepared the tender document.

The nature of the defects and contradictions is further exemplified by the numerous requests for clarifications that were submitted by various bidders before the closing date of the subject tender. Where a tender attracts a high number of clarifications, the Board cannot avoid the conclusion that the tender document is defective.

In addition to the above, the Board has perused the requests for clarification raised by various bidders and the answers given and notes that the questions and the issues raised were substantive in nature and the answers given and would materially alter the substance of the original tender. The said questions and issues ought not to have been raised by way of requests for clarification. What Procuring Entity therefore ought to have done is to prepare a proper tender document substantively

**“If indeed the Review Board had found that there was a problem with the tender document, it ought to have asked the Procuring Entity to retender. You cannot use a faulty tender document to award a tender. Therefore if the Board found that the clause in the tender dealing with the survey on the prevailing market prices was vague, one wonders on what basis it proceeded to award the subject tender to the 2<sup>nd</sup> interested party. Such decision can as rightly contended by the Applicant, be termed as being wednesbury irrational as there is not a rational basis upon which such a decision could be arrived at”.**

**The High Court held similarly in the case of Republic -vs- The Public Administrative Review Board & 3 Others Exparte Chico Group Limited (Nai HC JR Appl. No. 116 of 2016) which was relied upon by Counsel for the Applicant.**

**The upshot of all the above findings is therefore that the Applicant’s Request for Review has merit and the same is allowed in terms of the following final orders.**

### **FINAL ORDERS**

**In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders on this Request for Review.**

- a) The Applicants Request for Review dated 4<sup>th</sup> September, 2017 and which was filed with the Board on the same date in respect of**

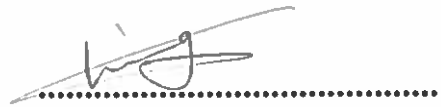


e) In view of the nature of the orders issued above and in further view of the fact that the Applicant and the other bidders who participated in this procurement process will have a second opportunity to participate in the fresh tender process, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 25<sup>th</sup> day of September, 2017.



**CHAIRMAN**  
**PPARB**



**SECRETARY**  
**PPARB**