

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION No. 16/2018 OF 22ND JANUARY 2018

BETWEEN

JOHN KARANJA T/A SILKEN ENTERPRISESAPPLICANT

AND

KENYA AIRPORTS AUTHORITY PROCURING ENTITY

Review against the decision of Kenya Airports Authority in the matter of Tender Number KAA/MBD/JKIA/1267/M for Installation, Operation and Maintenance of an Automated Car Parking System at Jomo Kenyatta International Airport.

BOARD MEMBERS PRESENT

- | | |
|--------------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Nelson Orgut | - Member |
| 4. Mr. Peter Bitu Ondieki, MBS | - Member |

IN ATTENDANCE

- | | |
|---------------------|-------------------------------|
| 1. Philemon Kiprop | - Holding Brief for Secretary |
| 2. Maureen Kinyundo | - Secretariat |

PRESENT BY INVITATION

Applicant – John Karanja T/A Silgen Enterprises

1. Thomas Moindi - Advocate, Moindi & Co. Advocates

Procuring Entity – Kenya Airports Authority

1. Ettah Muango - Legal Officer, KAA
2. Joy Igandu - Legal Officer, KAA
3. Margaret Muraya - Ag. G M, Procurement

INTERESTED PARTIES

Mason Services Ltd

1. Stephen O. Oyugi - Advocate, Oyugi & Co. Associates

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 DECISION

Kenya Airports Authority (KAA) advertised the tender for Installation, Operation and Maintenance of an Automated Car Parking Management System at Jomo Kenyatta International Airport (hereinafter “the tender”) in *My.gov* publication carried in *The Daily Nation* newspaper of 19th December

2017. KAA uploaded the tender on IFMIS website and KAA website on 21st December 2017 and 22nd December 2017, respectively. Through Addendum Number 1, KAA extended the bid submission date, which was to close on 23rd January 2018 to 30th January 2018 following the request by potential bidders during the pre-bid meeting held on 9th January 2018. When this Request for Review was filed on 22nd January 2018 KAA extended further the tender submission date to 20th February 2018.

THE REQUEST FOR REVIEW

John Karanja T/A Silken Enterprises ('the Applicant') of P. O. Box 60381 - 00200 Nairobi filed this Request for Review on 22nd January 2018, in the Matter of Tender Number KAA/MBD/JKIA/1267/M for Installation, Operation and Maintenance of an Automated Car Parking System at Jomo Kenyatta International Airport for Kenya Airports Authority ("the Procuring Entity").

The Applicant sought the following orders of the Board:

1. *That the entire tender process be nullified and the respondent be ordered to re-tender afresh;*
That in the alternative and without prejudice to prayer 1 above, the Board do order for the striking out of the offending clause(s) and further direct the respondent to re-draft the affected clauses in accordance with the directions given on 25th September 2017 in Application No. 81 of 2017.
2. *That the Board do make such further order(s) as it may deem fit in the circumstances.*
3. *That the Respondent do pay the costs of the Review.*

The Procuring Entity, in its response, opposed the Request for Review and urged the Board to dismiss it with costs.

During the hearing of the Request for Review, Mr. Thomas Moindi, Advocate from the firm of Moindi & Company Advocates, represented the Applicant, Ms Joy Igandu, Legal Officer, represented the Procuring Entity, while Mr. Stephen Oyugi, Advocate represented, the Interested Party.

The Applicant raised six grounds of review, which were consolidated at the hearing and argued as hereunder.

Applicant's Case

The Applicant cited provisions of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter, "the Act") in support of the Request for Review. It stated that, under the Constitution and Section 3 of the Act, a tender must promote local industry, sustainable development and protection of the environment; and promotion of citizen contractors. It stated further that Article 227 of the Constitution requires that whenever a public organ floats a tender, it must do so under a system that is fair, equitable, transparent, competitive and cost effective.

The Applicant submitted that the Procuring Entity placed an advertisement in the *Daily Nation* newspaper on 19th December 2017 informing the public that the tender document was on the Procuring Entity's online website portal. It submitted further that when the Applicant visited the Procuring Entity's website on 19th December 2017 it did not find the tender on the portal adding that it understood that the Procuring Entity placed the information on the portal on 22nd December 2017. It also submitted that since this was the Christmas season, the Applicant left Nairobi for the festivities until 5th January 2018 when it returned arguing that by the Procuring Entity uploading the

tender document on the portal on 22nd December 2017, it reduced the period of the tender by three days.

The Applicant averred that the Procuring Entity excluded other interested parties who may have wanted to bid by advertising in only one newspaper and thus limited competition. Averring further that the Procuring Entity did not follow the law when it advertised the tender in only one newspaper, the Applicant cited the provisions of Section 96(2) of the Act, which enjoins the Procuring Entity to advertise tenders in the dedicated government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation to stress its point. The Applicant thus contended that the Procuring Entity breached the section of the Act and the Constitution which requires that the procurement process shall be fair, transparent and competitive.

Turning to the decision of the Board in case PPARB No. 81 of 2017, the Applicant stated that Section 173(b) of the Act mandates the Board to give directions to the accounting officer of a procuring entity with respect to anything to be done adding that, in the cited case, the Board found that the Procuring Entity failed to set out the procedure, qualifications and obligations that were required to be met by the joint venture partners. It pointed out several examples, which, in its view, the tender document went against the orders of the Board issued in PPARB No. 81 of 2017 such as:

- i. **Annex 1 - Requirements for Joint Venture** - at page 18 of the tender document item (a) which states: *the Tender Form and in case of a successful tender, the Contract Agreement Form, shall be signed so as to be legally binding on all partners of the joint venture.* According to the

Applicant, the Procuring Entity was talking about the contract agreement.

- ii. On the requirement that *the Joint Venture shall be legally registered and a copy of this Joint Venture Agreement shall be submitted as part of the tender response, including evidencing effective control by the Kenyan partner through shareholding of a minimum of 51%*, the Applicant opined that the shareholding meant that the partners were coming together to form a company. It argued that the tender document was ambiguous and that it failed to set out a procedure on the joint venture agreement.
- iii. The Applicant also referred to item 18 of Annex 2 Part 1 - Preliminary Evaluation Criteria, Mandatory requirements - at page 19 of the tender document, which stated, *Firms MUST demonstrate at Least Three (03) years relevant experience in the Installation, Operation and Maintenance of an Automated Car Parking System by submitting minimum four (04) car park references*. The Applicant contended that the Procuring Entity failed to state whether it was the foreign or Kenyan company that was supposed to have three years of experience.

The Applicant submitted, in conclusion, that the Procuring Entity had failed to follow the procedure and the directions of the Board issued in case PPARB No. 81 of 2017. On the Procuring Entity's averment that the document was approved by the Director General of PPRA before the tender was advertised, the Applicant averred that the Procuring Entity failed to properly advise the Director General leading to the latter approving a document that was not in line with the ruling of the Board.

The Procuring Entity's Response

The Procuring Entity submitted in response to the Request for Review that it advertised for the subject tender through the *My.gov* publication, which was inserted in *The Daily Nation* newspaper of 19th December 2017 and followed with the uploading of the document on the IFMIS website and the Procuring Entity's website on 21st December 2017 and on 22nd December 2017, respectively. It submitted further that interested bidders were given an option to obtain a hard copy of the tender document from its premises adding no interested bidder was prejudiced in any way.

The Procuring Entity averred that it extended the closing and opening of the tender from 23rd January 2018 to 30th January 2018 thereby according ample time to interested bidders to submit bids. It averred further that the Applicant obtained a hard copy of the tender document on 19th January 2018, three weeks after the tender document was uploaded to the IFMIS and the Procuring Entity's website and therefore did not suffer any adverse effect.

The Procuring Entity stated that, in advertising for the tender the way it did, it was complying with a government circular directing government agencies and government departments, in a bid to cost cut with regard to advertisements, to advertise only through *My.gov* publication. It stated further that the said publication appeared once a week and that it had no discretion in determining to which newspaper would carry the advertisement.

The Procuring Entity submitted that under Section 96(2) of the Act which gave options on advertisements, it elected to go the way of advertising through

government tenders portals. It submitted further that the date of closing and opening of the tender was extended twice through addenda, firstly to 30th January 2018 after the pre-bid meeting on the 9th of January 2018, when interested bidders requested for extension, and secondly to 20th February 2018 after the filing of this request for review. It also submitted that no bids had been submitted as yet and concluded that equal opportunity was accorded to all the interested bidders to participate in the tender.

As regards the orders of this Board of 25th of September 2017 and the recommendation of the Director General of PPRA, it was the Procuring Entity's averment that it had fully complied. It submitted that it revised the tender document after it received PPRA's comments and proceeded to advertise the tender.

On the issue of litigation history found at page 19 of the tender document the Procuring Entity submitted that it clarified through an addendum following the caution of the Director General on using litigation history against any party exercising its right that no adverse consequence to any bidder. In the Procuring Entity's opinion by having placed item no.9 under Annex 2, to duly fill the litigation history form, it was purely for information and disclosure purposes not to adversely affect or prejudice any of the interested or prospective bidders. Regarding the mandatory requirements which were eighteen in number, the Procuring Entity stated that eighteen mandatory requirements was a reasonable number considering the magnitude of the subject tender and also considering that bidders who wished to bid as joint ventures were also invited.

The Procuring Entity stated that it had gone to a great length to ensure that it complied with the direction of the Board, the comments of the PPRA, the Articles of the Constitution and Section 3 of the Act, and hence felt comfortable and confident when it floated the tender document to the public for participation in the tender. It stated further that it addressed wholly the issues that had been raised which included the evaluation criteria, the contract period, due diligence, performance security, tender security, demonstration of experience and the issue of bidders who wished to participate as joint ventures.

The Procuring Entity argued that it had provided equal opportunity to all interested bidders to participate in the subject tender and requested the Board to consider the remaining time up to the tender opening date and allow the Procuring Entity to rectify any defect that the Board may find in the tender document to enable the procurement process to continue.

The Interested Party's Response

The Interested Party, in support of the Request for Review submitted that it had compared the previous cancelled tender document with the present one and arrived at the conclusion that the Procuring Entity was defiant to the Board's decision of 25th September 2017. It cited various instances to back up its allegation that the Procuring Entity had failed to comply with the Board's orders, such as:

- i. On the criteria for assessing the methodology of joint venture, in the old tender document at page 12 same wording is contained in the current tender document in clause 2.24.2.
- ii. On methodology, the Board had advised against leaving the evaluation to evaluation officers matters which may end up being subjective rather than objective. The Interested Party stated that the current document had only reduced the marks from 40 to 30 at page 24 of the tender document that the criteria are subjective and the marks were still high and not based on financial experience.
- iii. On the issue of joint venture, the Board advised the Procuring Entity to come up with procedure, qualifications and obligations to be met by joint venture partners as well as the evaluation criteria of the tenders submitted by joint venture partners. According to the Interested Party the issue of joint venture is still ambiguous in the current document.

These are the problems the Board had identified and had given clear directions in the ruling.

The Applicant's Response

The Applicant did not make any submissions in reply save for urging the Board to allow the request for review.

THE BOARD'S FINDINGS

The Board has considered the submissions made by the parties and has further examined all the documents submitted to it and has identified the following issues for determination in this Request for Review:

- (i) Whether the Procuring Entity fully complied with the orders of the Board issued in PPARB No. 81 of 2017 - Skymasters (Kenya) Limited vs. Kenya Airports Authority and the recommendations of the Director General of PPRA when it advertised the new tender.
- (ii) Whether the Procuring Entity failed to take such steps as reasonable to bring the tender to the attention of those who may have wished to tender thereby contravening the provisions of Section 96 (1) of the Act.

The Board will now proceed to determine the issues framed for determination as follows:

1. As to whether the Procuring Entity fully complied with the orders of the Board issued in PPARB No. 81 of 2017 - Skymasters (Kenya) Limited vs. Kenya Airports Authority, and the recommendations of the Director General of PPRA when it advertised the new tender.

The Board notes the facts evident in documents presented before it and uncontested submissions of the parties at the hearing of this Request for Review that the subject tender was first advertised on 27th June 2017 and attracted nine bids. The tenders were evaluated for preliminary responsiveness and for compliance with technical requirements. Request for Review PPARB No. 81 of 2017 - Skymasters (Kenya) Limited vs Kenya Airports Authority was filed with the Board on 4th September 2017 challenging the contents of the tender document on the grounds that the same contravened the provisions of the Act and the Constitution. The Board, upon hearing the matter, found merit in the application and annulled and terminated the tender. The Board issued further orders including the following:

"c) the Procuring Entity is directed to retender afresh for the procurement of the tender of the works/services which were the subject matter of the tender in question within a period of thirty days from the date hereof.

d) The Procuring Entity is further directed to prepare a fresh tender document for the purposes of carrying out the fresh tender process and further that the new tender documents shall be submitted to the Director General of the Public Procurement Regulatory Authority for approval before the same is issued to members of the public. The fresh tender document shall take into account all the matters which have been set out by the Board in this decision and all such other matters as were raised by the bidders in their requests for clarification in the terminated procurement process and must in addition comply with the provisions of the Constitution and the Public Procurement and Asset Disposal Act 2015."

It was therefore an order of the Board that the Procuring Entity retenders afresh for the procurement of the service subject of the tender. Section 175 of the Act, prescribes the procedure for handling grievances arising from the decision of the Review Board. The relevant section stipulates as follows:

Section 175 (1) *"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties."*

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(6) *“A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such a party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.”*

It is not in doubt that the Procuring Entity made attempts at compliance with the order of the Board to advertise a fresh tender in that on 19th December, 2017 it called for fresh tenders in a newspaper advertisement and went on to upload the tender document on its web portal on 22nd December 2017. It is also not in dispute that the Procuring Entity made a fresh tender document in a further attempt at compliance with a further order of the Board to prepare a fresh tender document for the purposes of carrying out the fresh tender process.

The point of departure which has arisen is whether the Procuring Entity complied fully with the directions of the Board, particularly the part that required it to submit the new tender document to the Director General of the Public Procurement Regulatory Authority for approval, before the same is issued to members of the public, and for the fresh tender document to take into account all the matters which had been set out by the Board in that decision, and all such other matters as were raised by the bidders in their requests for clarification in the terminated procurement process and must in addition comply with the provisions of the Constitution and the Act.

The Board notes that pursuant to the decision of the Board in PPARB No. 81/2017 of 4th September 2017 the Procuring Entity revised the tender document and submitted it to the Director General (DG) of Public Procurement Regulatory Authority (PPRA) for approval *vide* letter dated 24th

October 2017. The DG of PPRA responded with comments and recommendations as set out in the letter dated 20th November, 2017.

By the Procuring Entity's own admission, the PPRA found the tender document satisfactory save for a few areas in which recommendations were adopted by the Procuring Entity in its revised Tender Document. The Procuring Entity, in response to a question at the hearing admitted that the tender document it uploaded to its web portal was not submitted to PPRA for approval. In the Procuring Entity's own words, *we received the comments on that tender document and proceeded after polishing the two documents as per the recommendation of the Director General, we did advertise.*

It is clear and discernible from the Procuring Entity's own admission that whereas the Procuring Entity presented a revised tender document to the DG of PPRA, and whereas the DG made comments and recommendations on the revised tender document presented to it, the Procuring Entity did not submit the new tender document to the PPRA for approval. The Procuring Entity cannot say with certainty that the document it put out there for the public to base their tenders on had the approval of the DG of PPRA. In the same vein, the document put out there as the tender document cannot be said with any measure of certainty to have been prepared taking into account all the matters which had been set out by the Board in the case **PPARB No. 81 of 2017** and all such other matters as were raised by the bidders in their requests for clarification in the terminated procurement process and if it complied with the provisions of the Constitution and the Act.

Section 175 (6) of the Act specifies the consequences of failure to obey the orders of the Board. It states as follows:

Section 175(6) *“A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such a party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.”*

Section 175 (6) of the Act frowns upon a party that disobeys the decision of the Review Board or the High Court or the Court of Appeal. To the extent that the Procuring Entity did not submit the new tender document to the Director General of the Public Procurement Regulatory Authority for approval before the same was issued to the public, the Procuring Entity acted in disobedience of the decision of the Board. The Board finds and holds that the Procuring Entity failed to fully comply with the decision of the Board in review case PPARB No. 81/2017 - Skymasters vs Kenya Airports Authority and the action by the Procuring Entity to advertise afresh for the tender is null and void in terms of Section 175 (6) of the Act. This ground of review therefore succeeds and is allowed.

2. As to whether the Procuring Entity failed to take such steps as reasonable to bring the tender to the attention of those who may have wished to tender thereby contravening the provisions of Section 96 (1) of the Act.

The Board notes evident facts in the documents presented before it that the Procuring Entity advertised the subject tender through the *My.gov* publication inserted in the *Daily Nation* newspaper on 19th December 2017. The tender was uploaded on the IFMIS website on 21st December 2017 and on the

Procuring Entity's website on 22nd December 2017. The tender closing/opening was initially set for 23rd January 2018 but was extended to 30th January 2018 through addendum number 1 in response to the bidders' requests made during the pre-bid meeting held on 9th January 2018. The Procuring Entity extended the tender submission date further to 20th February 2018 following the filing of this Request for Review on 22nd January 2018.

The issue which has arisen for the determination of the Board is whether the Procuring Entity failed to bring the tender to the attention of the widest possible audience so that any bidder who wished to put in a bid could do so. To resolve this issue, the Board is minded to refer to the guiding principles of public procurement found at Section 3 of the Act, which the Board reproduces as follows:

- Section 3** *"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation -*
- (a) The national values and principles provided for under Article 10;*
 - (b) The equality and freedom from discrimination provided for under Article 27;*
 - (c)*
 - (d)*
 - (e) The principles of public finance under Article 201;*
 - (f) The values and principles of public service as provided for under Article 232;*
 - (g) Maximisation of value for money..."*

In the instant tender subject of this request for review, the relevant provision that gives effect to the aforementioned guiding principles of public procurement is Section 96 of the Act, which states as follows:

Section 96 (1) *“The accounting officer of a procuring entity shall take such steps as reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.”*

(2) *“Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders’ portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.”*

(3) *“In addition to subsection (2) a procuring entity shall*
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(a) use Kenya’s dedicated tenders portal or any other electronic advertisements as prescribed; and

(b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.”

Further Section 98 of the Act provides as follows:-

Section 98 (1) *“Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website.”*

It is not in doubt that the Procuring Entity advertised the tender in *My.gov* publication inserted in the *Daily Nation* newspaper on 19th December 2017. It is further not in doubt that the Procuring Entity uploaded the tender on its website on 22nd December 2017. The Board observes that the Procuring Entity advertised for the tender on 19th December 2017 but the tender document was not available to the potential bidders until 22nd December 2017. A bidder who may have seen the advertisement was still not able to access the tender document for three days after the advertisement.

The Board has heard the Procuring Entity’s explanation that interested bidders were given an option to obtain a hard copy of the tender document from the premises of the Procuring Entity. The Board respectfully opines that the option of hard copies could not make up for the absence of the document on the website. Given that the subject tender was an international open tender, potential bidders from outside the country would have found it difficult to visit the Procuring Entity’s premises just to obtain a tender document. In the Board’s view, the advertisement of 19th December 2017 amounted to nothing since the advertisement was not accompanied by the actual tender document on the Procuring Entity’s website.

The Procuring Entity's further explanation that it advertised in one newspaper only in compliance with a government circular, which directed state agencies and government departments to advertise only through *My.gov* publication does not carry favour with the Board for the same is in conflict with Section 5 (1) of the Act which states as follows:

Section 5 (1) *"This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services."*

The Board has further heard the Procuring Entity's submissions that it made up for lost time by extending the closing/ opening date of the tender from 23rd January 2018 to 30th January 2018. This may well be so but the question begged here is for whom was the tender being extended? The purported extension was done through an addendum pursuant to a request of the bidders who attended a pre-bid conference on 9th January 2018. The addendum was directed at bidders who, somehow, managed to access the tender document and made it to the pre-bid conference. A bidder who tried to download the tender document after 19th December 2017 when the advertisement was made and prior to 22nd December 2017 will not reasonably be expected to know about the pre-bid meeting and, by extension, the postponement of the tender submission date. Such a bidder automatically gets locked out of the tender. A procurement that shuts out bidders, even if it is only one bidder, from participating in the process without reasonable cause, is tainted with irregularities and risks being annulled. In the Board's view such a procurement does not meet the constitutional and legal threshold of a

competitive process devoid of discrimination and one geared towards providing value for money to the taxpayer.

The Board further observes that the advertisement for the tender was made in only one newspaper, and not two, as required under Section 96 (2) of the Act. It is not lost on the Board that the Procuring Entity waited until 22nd December 2017 to upload the tender on its website. It is common knowledge that 22nd December 2017 was Friday prior to a long Christmas holiday weekend and the Procuring Entity must have known that most would-be bidders will be away for the holidays and therefore will not be able to participate in the tender. In totality, the advertisement of the subject tender, its placement on the Procuring Entity's website and the timing of activities surrounding the tender were inimical to best tender practice and, certainly, not geared to the promotion of the Constitutional principles of competition, value for money and non-discrimination. The Procuring Entity started the procurement process of the subject tender on a wrong footing and not even the attempt to extend the tender submission date could salvage a process that was already tainted with irregularities.

It is clear from the conduct of the Procuring Entity that it deliberately failed to bring the subject tender to the reach of as wide a variety of potential bidders as possible and its conduct could only have been intended to benefit a few bidders who were able to respond. The Board has observed in the past that tender documents have been prepared in the direction of a particular bidder. The most recent such observation was in the case of **AMREF Flying Doctors vs National Hospital Insurance Fund - PPARB No. 106 of 2017** - where the

Board found that the tender was prepared to favour one bidder and that it was not surprising that the Procuring Entity ended up with only one responsive tender. Needless to state here, the Board shall not close its eyes to a procuring entity that conducts itself in a manner that defeats the objective of public procurement. The Board shall not hesitate to take all necessary action, as permitted within its powers under the Act, to correct and remedy a procurement process that is clearly not in accordance with the Constitution and the Act.

In view of all the foregoing, the Board finds that the Procuring Entity failed to take such steps as reasonable to bring the subject tender to the attention of those who may have wished to tender and hence breached the provisions of Sections 96 (1) of the Act. Consequently, this ground of review succeeds and is allowed.

The Board having determined the issues framed for determination and having found merit in them, will proceed to issue orders under the powers bestowed upon it by Section 173 of the Act. The said section provides as follows:

Section 173 *“Upon completing a review, the Review Board may do any one or more of the following -*

- (a) *Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*

- (b) *Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*
- (c) *Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;*
- (d) *Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
- (e) *Order termination of the procurement process and commencement of a new procurement process."*

Under the provisions of Section 173 of the Act, the Board can assign the procurement function to another agency if it determines that the procuring entity is unable or unwilling to carry out a procurement in accordance with the Constitution and Section 3 of the Act. Section 52 of the Act provides as follows:-

- Section 52**
- (1) *"The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other circumstances as may be prescribed."*
 - (2) *"Subject to the approval of the governing body of the organ or entity, where applicable or upon recommendation of the Authority, an accounting officer shall make arrangements to enable another procuring entity to carry out the procurement or part of the procurement, on behalf of a procuring entity, in accordance with this Act."*

The Board will however not invoke the above powers at this stage.

Having outlined the authority bestowed upon it, the Board now proceeds to give its final orders in this Request for Review.

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.

- 1. The Request for Review dated 22nd January, 2018 and filed with the Board on the same date by the Applicant, John Karanja T/A Silgen Enterprises, in the Matter of Tender Number KAA/MBD/JKIA/1267/M for Installation, Operation and Maintenance of an Automated Car Parking System at Jomo Kenyatta International Airport for Kenya Airports Authority be and is hereby allowed.**
- 2. The entire procurement process of the subject tender be and is hereby annulled and set aside.**
- 3. In view of the apparent deliberate failure by the Procuring Entity to prepare a proper tender document, the Director General of the Public Procurement Regulatory Authority is directed to prepare, within 21 days of this decision, the tender document to be used in carrying out**

a fresh procurement process of the subject tender. The said tender document shall take into account Articles 201 and 227 of the Constitution, Section 3 of the Act, the previous decision of the Board in PPARB No. 81 of 2017, and the recommendations of the Director General contained in his letter dated 20th November 2017.

4. The Procuring Entity is directed to invite fresh tenders in accordance with the law within 7 days of receipt of the tender document from the Director General of the Authority.
5. In view of the sensitive nature of the service being procured, the Procuring Entity is directed to take steps to extend the contract of the current service provider for such time until a new provider is procured.
6. Considering that the Procuring Entity is responsible for the reviews in the subject tender, the Procuring Entity shall pay costs of the review to the Applicant in amounts to be agreed or taxed.

Dated at Nairobi on this 12th day of February, 2018.


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CHAIRMAN
PPARB


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SECRETARY
PPARB