

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 120/2019 OF 14TH OCTOBER 2019

BETWEEN

MADISON GENERAL INSURANCE KENYA

LIMITED.....APPLICANT

AND

KENYA BUREAU OF STANDARDS.....1st RESPONDENT

AND

Lt Col. (RTD) B. N. NJIRAINI,

THE ACCOUNTING OFFICER.....2nd RESPONDENT

AND

JUBILEE INSURANCE COMPANY

OF KENYA LIMITED.....INTERESTED PARTY

Review against the decision of Kenya Bureau of Standards in relation to Tender No. KEBS/002/2019/2020 for Provision of Staff Medical Insurance Cover.

BOARD MEMBERS

1. Ms. Faith Waigwa

-Chairperson

- | | |
|--------------------------|---------|
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Mr. Steven Oundo, OGW | -Member |
| 4. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
|-------------------------|------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

APPLICANT

1. Mr. Emmanuel Mumia
2. Mr. Moses Kahoro
3. Mr. Hezron Wambugu
4. Mr. John Muhindi

-MADISON GENERAL INSURANCE

KENYA LIMITED

- | |
|--|
| -Advocate, Mwaniki Gachoka & Co. Advocates |
| -Mwaniki Gachoka & Co. Advocates |
| -Insurance |
| -Insurance |

1ST AND 2ND RESPONDENTS

1. Mr. James Kihara
2. Ms. Ruth Mueni
3. Miss Mokeira

-KENYA BUREAU OF STANDARDS

- | |
|------------------------------------|
| -Advocate, Kihara & Wyne Advocates |
| -Advocate, Kihara & Wyne Advocates |
| -Legal |

4. Dr. John Ngeno -Head of Procurement

INTERESTED PARTY

**-JUBILEE INSURANCE COMPANY
OF KENYA LIMITED**

1. Ms. Sylvia Waiganjo -Advocate, Wambugu & Muriuki
Advocates

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Bureau of Standards (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KEBS/002/2019/2020 for Provision of Staff Medical Insurance Cover (hereinafter referred to as “the subject tender”) on 13th August 2019 in the Nation newspaper and on its website.

Bid Submission Deadline and Opening of Bids

Tenders were received and opened in the presence of tenderers and/or their representatives on Wednesday 27th August 2019 at the Procuring Entity’s conference room 1 at 10.00am by the tender opening committee. Six tenderers submitted their bids for opening. A Tender Evaluation Committee was appointed by the accounting officer to carry out an evaluation as per the letter KEBS/T002/2019/2020 dated 26th August 2019.

The following six bidders were evaluated by the committee from 5th September to 7th September 2019;

Bidder No.	Name Of Bidder	Tender Amount	Bid Security
i.	AAR Insurance	183,916,635	3,678,332.70 Stanbic Bank
ii.	Heritage Insurance company	253,499,254	5,069,985 Stanbic Bank
iii.	UAP Insurance Company Limited	246,826,955	3,500,000 Bank Of Africa
iv.	CIC General Insurance Limited	217,847,699	7,000,000 KCB Bank
v.	Madison General Insurance	163,483,219	3.600,000 CBA Bank
vi.	Jubilee Insurance	188,563,042	4,847,126 DTB (Diamond Trust Bank)

Evaluation of Bids

The tender evaluation committee (TEC) met from 5th September 2019 to 7th September 2019 and agreed that the evaluation will be done in three stages as per tender requirements as follows:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

Based on the criteria highlighted in clause 5.3 of Section V. Schedule of Requirements of the Document for Provision of Staff Medical Insurance Cover (hereinafter referred to as "the Tender Document"), the Evaluation Committee conducted preliminary evaluation on six bidders as detailed in the table below:-

S/n	Requirements
1	Must be registered with the commissioner of insurance (IRA) for the year 2019 and a copy of the current license be submitted.
2	Must have done annual gross premiums in the previous financial year 2018 of at least Ksh.2.0billion on medical services
3	Must give at least 10(ten) state corporate entities and the total clients premium of at least Ksh300million for the previous year.
4	Must submit a copy of the audited accounts for the last three years.
5	Must submit current credit rating by an accredited rating facility.
6	Must have a total number of management staff of at least twenty (15) with practice specialties and gender/national outlook.
7	Pin certificate
8	Dully filled, signed and stamped tender confidential questionnaire
9	Tax compliance certificate to be verified
10	Certificate of registration/incorporation
11	NSSF evidence of compliance must be valid at the time of evaluation
12	NHIF evidence of compliance must be valid at the time of evaluation
13	Must be a member of AKI
14	Reinsurance slip/cover note for policy business for year 2019
15	Must submit evidence of use of smart cards service
16	Provide evidence that the company has been registered and in operation for at least five (5years)
17	Must provide evidence to provide country wide network coverage including border points
18	Duly filled, signed and stamped form of tender
19	Must provide two copies bid copies ,original and a copy and all pages must be serialized
20	Bid bond/security of 2% of tender price valid for 150 days
21	Reference letter from a bank

At the end of Preliminary Evaluation, **Bidder No. 2, The Heritage Insurance Company Limited and Bidder No.3 UAP Insurance Company Limited** did not meet all the mandatory requirements and therefore did not proceed to technical evaluation. Only four (4) bidders, **Bidder No. 1: AAR Insurance, Bidder No.4: CIC General Insurance, Bidder No.5: Madison General Insurance and Bidder No.6: Jubilee Insurance** met all the requirements and therefore qualified for technical evaluation.

2. Technical Evaluation

The Evaluation criteria used under this stage is expressed in Table 5. Technical Evaluation Criteria at pages 30-35 of the Tender Document. Based on the technical criteria and results from preliminary evaluation, the committee conducted technical evaluation on four (4) bidders and the results are:-

Bidder	Average score
Bidder No.1 - AAR Insurance	61.6
Bidder No.4 - CIC General Insurance Limited	71.4
Bidder No.5 - Madison General Insurance	72.6
Bidder No.6 - Jubilee Insurance	79.4

2.1. Evaluation Committee Observations

- Bidder No.1 did not specify the home care nursing to be include as part of inpatient benefit to up to 30 days per year;
- Bidder No.1 did not include the oncology tests as per the tender requirements;
- Bidder No.1 did not include the terrorism as part of the cover;
- Bidder No.1 did not include the radioactivity as part of the cover;
- Bidder No.1 did not include the Excess of loss.

2.2. Tender Evaluation Committee Remarks

Bidder No.1: AAR Insurance did not meet the minimum score of 65% thus did not qualify for financial evaluation. Three (3) bidders, **Bidder No.4: CIC General Insurance, Bidder No. 5: Madison General Insurance and Bidder No.6: Jubilee Insurance** acquired over the minimum score pass mark of 65% as detailed above and therefore qualified for financial

evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the formula under page 35 of the Tender Document and tabulated the results as follows:

3.1. Tender Prices

Description	BIDDER NUMBER		
	4	5	6
Tender Price Quoted (Kshs)	217,847,699	163,483,219	188,563,042

3.2. Financial Evaluation Results

Financial Evaluation		
Bidder Number	Financial Score: $\frac{C_{low} * X}{C}$	Max.Score
Bidder 4	15.0	20
Bidder 5	20	20
Bidder 6	17.3	20

3.3. Combination of Technical and Financial Evaluation Results.

Combination of technical and financial evaluation				
Bidders	Technical score	Financial Score	Total Score	Ranking
Bidder 4	71.4	15.0	86.4	3
Bidder 5	72.6	20.0	92.6	2
Bidder 6	79.4	17.3	96.7	1

Recommendations

The Evaluation Committee recommended **Bidder No.6: Jubilee Insurance** with the highest evaluated combined technical and financial score, at their total bid price of **Kshs. 188,563,042** to provide staff medical cover for the year 2019/2020 subject to a due diligence exercise.

Due Diligence

The Evaluation Committee conducted due diligence on 13th September 2019 which covered Mater Hospital, Mariakani Hospital, Teachers Service Commission and Jubilee Insurance.

a) Due Diligence Checklist and Findings

The Evaluation Committee held a meeting on 12th September 2019 and agreed Due diligence would be conducted through verification of the original mandatory documents, examination of records and interviews to confirm information submitted for tender evaluation by the bidder.

Based on its due diligence findings, the Evaluation Committee upheld its recommendation in the preliminary, technical, and financial evaluation report that **Bidder No.6: Jubilee Insurance** be awarded the subject tender being the evaluated bidder with highest combined score in technical and financial evaluation, at bid price amounting to **Kshs. 188,563,042**.

Professional Opinion

In his Professional Opinion dated 1st October 2019, the Head of Procurement requested the Procuring Entity's Managing Director to note that the Secretariat is in agreement with the recommendation for award to **Bidder No. 6, Jubilee Insurance Company of Kenya Limited** be awarded the subject tender being the evaluated bidder with highest combined score in technical and financial evaluation, at bid price of **Kshs. 188,563,042**. He therefore recommended the approval of the Managing Director to award M/s **Jubilee Insurance** for the provision of medical insurance cover of KEBS staff at bid price of **Kshs. 188,563,042**.

The Accounting Officer approved the above recommendation on 3rd October 2019.

THE REQUEST FOR REVIEW

M/s Madison General Insurance Kenya Limited (hereinafter referred to as "the Applicant") lodged this Request for Review on 14th October 2019 together with the Applicant's Statement dated and filed on even date. In response, the Procuring Entity lodged a Response to the Request for Review dated 23rd October 2019, a Memorandum of Response filed on 29th October 2019 together with a Preliminary Objection dated 23rd October 2019 and filed on 28th October 2019.

The Applicant sought for the following orders in the Request for Review:-

- a) An order annulling and set aside the Respondent's decision awarding Tender No. KEBS/002/2019/2020 to the alleged successful bidder;***
- b) An order annulling and setting aside the Respondent's decision notifying the Applicant that it had not been successful by way of the letter dated 1st October 2019;***
- c) The Board be pleased to review all records of the procurement process (particularly the technical evaluation thereof) relating to Tender No. KEBS/002/2019/2020 and substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant;***
- d) An order directing the Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- e) Further and/or in the alternative and without prejudice to any of the other prayers sought herein, an order directing the Respondent to undertake fresh evaluation of all bids received in Tender No. KEBS/002/2019/2020 in strict adherence to the Tender Document, the Act and the Regulations and award to the lowest competitive bidder;***
- f) Further and in the alternative, an order nullifying the entire process and directing the Respondent to re-tender afresh;***
- g) Such other or further relief or reliefs as the Board shall deem just and expedient***

The Request for Review came up for hearing on 29th October 2019. The Applicant was represented by Mr. Emmanuel Mumia on behalf of the firm of Mwaniki Gachoka & Company Advocates while the Procuring Entity was represented by Mr. James Kihara on behalf of the firm of Kihara & Wyne Advocates. The Interested Party was represented by Ms. Sylvia Waiganjo on behalf of the firm of Wambugu & Muriuki Advocates.

Upon enquiry by the Board as to whether the Applicant was ready to proceed with the hearing, Mr. Mumia submitted that he had just received the Procuring Entity's Memorandum of Response a few minutes before the hearing and would like an opportunity to study the same and file a Further Statement if the Applicant wished to do so. In that regard, he sought for adjournment of the hearing of the Request for Review. Mr. Mumia however intimated that the Applicant was ready to proceed with the hearing of the Preliminary Objection filed by the Procuring Entity which was served upon the Applicant a day before the hearing date.

In response, Mr. Kihara submitted that the Procuring Entity's Memorandum of Response only explains the issues raised in the Procuring Entity's Preliminary Objection but did not raise new issues, hence opposing the Applicant's application for adjournment. On her part, Counsel for the Interested Party, Ms. Waiganjo, associated herself with submissions by Counsel for the Procuring Entity and opposed the application for adjournment.

The Board having considered parties' submissions on the Applicant's application for adjournment, proceeded to hear the Procuring Entity's Preliminary Objection but indicated that if the Preliminary Objection is dismissed, the Board would hear and determine the Request for Review at a later date to be communicated to the parties.

The Procuring Entity's Preliminary Objection was lodged under Regulation 77 and 73 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") on the grounds that:-

"The Board has no jurisdiction to entertain the Review as the same is filed outside the statutory period allowed by law"

The Board having considered parties' submissions on the Preliminary Objection found one sole issue for determination, that is:-

"Whether the Applicant filed its Request for Review outside the statutory period imposed under section 167 (1) of the Act thus ousting the jurisdiction of this Board"

The Board found that the Applicant learnt of the alleged breach by the Procuring Entity on 9th October 2019, being the date when the Applicant

received a summary of the Evaluation Report, evidencing the award criteria used by the Procuring Entity.

Accordingly, the Board held that it has the jurisdiction to entertain the Request for Review since it was filed within the statutory period under section 167 (1) of the Act, dismissed the Preliminary Objection and proceeded to hear the substantive Request for Review.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Emmanuel Mumia, fully relied on the Request for Review, the Applicant's Statement and Further Statement together with the documents attached thereto.

Mr. Mumia submitted that the Procuring Entity advertised the subject tender on 13th August 2019 and that upon concluding evaluation, the Procuring Entity found the Applicant's bid non-responsive as communicated in the letter dated 9th October 2019 found at page 44 of the Applicant's Request for Review.

Upon receipt of this letter of notification, Mr. Mumia submitted that the Applicant addressed a letter dated 7th October 2019 to the Procuring Entity requesting for particulars of the evaluation process which had led to the

Procuring Entity declaring the Applicant's bid non-responsive. In response, the Procuring Entity, in a letter dated 9th October 2019 explained the basis of the decision made concerning the Applicant's bid as can be seen on the summary of evaluation report attached to the Applicant's Request for Review at pages 46 to 51 thereof.

In that regard, Mr. Mumia submitted that the Request for Review is premised on the question whether the Procuring Entity utilized the correct method of procurement in selecting the successful tenderer. Secondly, whether the Procuring Entity breached the law in the manner in which it conducted the evaluation process.

On the first issue framed by Counsel, he submitted that the award criteria as pleaded at paragraph 16 (a) of the Request for Review, that is, as expressed in clause 2.25.1 of the Tender Document. In Counsel's view, the tenderer to be awarded the subject tender was the one found to have submitted the lowest evaluated bid since the Procuring Entity applied the open method of tendering. On the question whether the subject tender was an open tender, Counsel referred the Board to paragraph 3 of the Procuring Entity's Response where he alleged an admission was made that the subject tender is an open tender, hence making section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). Mr. Mumia therefore urged the Board to consider the fact that the Applicant passed the Preliminary and Technical Evaluation stages and had

the lowest evaluated price at Financial Evaluation, hence ought to have been awarded the subject tender.

On the second issue framed by Counsel, he submitted that the Applicant would like the Board to interrogate the manner in which the Procuring Entity conducted Technical Evaluation of bids, in order to determine whether such evaluation was fair. To buttress this point, Counsel urged the Board to examine how each assessor of the Procuring Entity conducted evaluation and address the question as to how assessors evaluate the same documents submitted by the Applicant but arrive at different scores at the end of evaluation as can be seen in the summary of Evaluation Report submitted to the Applicant by the Procuring Entity.

Upon being prompted by the Board to point out the specific criterion or sub-categories that the Applicant was of the view evaluation was not conducted in a fair manner, Mr. Mumia submitted that the Applicant did not know the areas it lost scores in the evaluation criteria but that the different scores awarded to the Applicant by the different assessors was conclusive evidence that evaluation was neither objective nor quantifiable.

He then referred the Board to section 80 (3) of the Act that states the evaluation criteria must be objective and quantifiable and that such threshold was not met by the Procuring Entity in its evaluation process. The Board prompted Counsel as to whether the Applicant desires the Board to turn into

an Evaluation Committee and decide why each individual evaluator awarded certain scores. In response, Mr. Mumia submitted that the Applicant did not wish for the Board to turn into an evaluation committee, but to address its mind on the question whether the Evaluation Committee discharged its duty in law to conduct evaluation in an objective and quantifiable manner.

In conclusion, Mr. Mumia urged the Board to allow the Request for Review as prayed by the Applicant.

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. James Kihara, fully relied on the Procuring Entity's Response and the attachments thereto.

Mr. Kihara submitted that the Applicant could not approach the Board claiming not to be aware of the evaluation criteria used by the Procuring Entity, noting that the Applicant received the Tender Document by 13th August 2019. Mr. Kihara submitted that the Tender Document for the previous procurement process by the Procuring Entity had the same Financial Evaluation Criteria where the Applicant participated, was evaluated on the said criterion, became a successful bidder but did not complain of the evaluation method used.

Mr. Kihara referred to section 80 (2) and (3) of the Act to support his view that the two provisions do not state a procuring entity has to evaluate tenders in a particular mode, so long as such evaluation at the Technical and Financial stages is objective and quantifiable. He referred the Board to section 70 (6) of the Act requiring a procuring entity to disclose the evaluation criteria, which the Procuring Entity did.

On the meaning of "lowest bidder", Mr. Kihara submitted that the construction given by the Act is that a successful bidder or tenderer, is one with the lowest bid after evaluation, but not a person who quoted the lowest tender amount. According to Mr. Kihara, the lowest evaluated bidder was arrived at by the Procuring Entity after applying the formula provided for in the Tender Document. Mr. Kihara further made reference to section 75 (1) of the Act which allows a procuring entity to amend a standard Tender Document issued by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") to support his view that the Procuring Entity exercised this discretion to amend Standard Tender Documents by the Authority to suit its circumstances.

Upon enquiry by the Board on the difference between the award criteria in section 86 (1) (a) and (b) of the Act, Mr. Kihara submitted that section 86 (1) (b) of the Act which specifies that award criterion for Request for Proposals, does not preclude a procuring entity from specifying in the Tender

Document the award criterion to be used by it to arrive at the successful bidder.

It was Counsel's submission that despite the Procuring Entity having floated an open tender, it was allowed to tailor the Tender Document to suit its own circumstances, such as to award based on a combined technical and financial scores provided that evaluation is objective and quantifiable.

Mr. Kihara prayed that the summary of Evaluation Report forwarded to the Applicant by the Procuring Entity be expunged from being part of the Applicant's pleadings. He submitted that such summary was given in error to the Applicant and that the Applicant should not have an opportunity to rely on the said information.

In conclusion, Mr. Kihara urged the Board to dismiss the Request for Review with costs in favour of the Procuring Entity.

Interested Party's Submissions

In her submissions, Counsel for the Interested Party, Ms. Sylvia Waiganjo, fully relied on the Replying Affidavit and List of Authorities.

Ms. Waiganjo submitted that the Interested Party would associate itself with submissions by the Procuring Entity but in the following specific ways:-

Counsel referred the Board to the correspondences between the Applicant and the Procuring Entity and submitted that it has emerged the Applicant was found non-responsive for its failure to attain the highest combined technical and financial scores pursuant to the evaluation criteria outlined at page 35 of the Tender Document. In Counsel's view, even if that formula provided for financial evaluation was used, the Procuring Entity evaluated and compared tenders in accordance with procedures and criteria set out in the tender documents as stated by section 80 of the Act.

On the issue that the Interested Party was awarded the subject tender as a cost of approximately Twenty-Five Million more than the Applicant, Ms. Waiganjo submitted that price was not the only consideration by the Procuring Entity during evaluation of tenders. In her view, all factors including price were taken into consideration in arriving at the decision of awarding the subject tender to the Interested Party.

In the tender for the financial year 2018/2019 referred to by the Procuring Entity, it was Counsel's position that the Applicant submitted a bid price higher than that of the Interested Party's bid by Twelve Million but at the time the Applicant did not raise issues on prudent use of tax payer's money as it has done in the instant case.

Ms. Waiganjo then referred the Board to the issue of award of scores at the Technical stage as challenged by the Applicant. She submitted that the subject tender had three evaluation stages; Mandatory, Technical and Financial Evaluation and that to qualify to Financial Evaluation, a bidder needed to achieve a score of 65 marks and above. She submitted that the Applicant achieved a score of 72.6% but now challenges the score awarded by individual assessors. In her view, by the Applicant taking issue with the scores awarded by individual assessors does not disclose a breach of duty on the part of the Procuring Entity as required by section 167 of the Act.

She then referred the Board to the prayers sought by the Applicant and submitted that the Applicant urged the Board to grant an order directing the Procuring Entity to re-evaluate bids at the Technical stage whereas in the Further Statement, the Applicant submitted that the Procuring Entity had no option to combined technical and financial scores. In Counsel's view, the Applicant has intimated to the Board that the Tender Document is defective and the same ought to be declared null and void.

In Counsel's view, it appears that there are two successful bidders, that is, one who is the lowest evaluated bidder, and the other, who is the bidder with the highest combined technical and financial scores, hence the Board should direct the Procuring Entity to retender, use Standard Tender Documents issue by the Authority as required by section 58 of the Act. According to Ms. Waiganjo, that is the only way the Board would ensure that

the procurement process is fair to every bidder who participated in this process.

Upon enquiry by the Board on which award criterion applies to open tenders, Ms. Waiganjo submitted that section 86 (1) (a) of the Act applies in this instance and that a combined technical and financial scores is only used in Request for Proposals. She reiterated that the Procuring Entity advertised an open tender on further enquiry by the Board.

Applicant's Rejoinder

In a rejoinder, Mr. Mumia referred to the summary of Evaluation Report given to the Applicant by the Procuring Entity. According to Counsel, the Applicant requested for reasons why its bid was declared non-responsive which reasons were demonstrated in the summary forwarded to the Applicant.

Regarding references that were made on the tender for the financial year 2018/2019, Counsel urged the Board to note that the tender before it is that of 2019/2020 and that issues regarding the former tender for the last financial year as have been raised are mere speculations on matters not before the Board.

Counsel directed the Board to the award criteria under clause 2.25.1 of the Tender Document and the criteria for Financial Evaluation under page 35 of the Tender Document and submitted that the Board had the obligation to restate the law as guided by section 86 (1) of the Act on the correct award criterion to be applied where open method of tendering has been used.

Mr. Mumia further submitted that the Applicant would like the Board to address its mind on how evaluation ought to be conducted where several assessors are appointed by a procuring entity to evaluate a bidder solely on the basis of bid documents submitted by such bidder. In doing so, it was Counsel's view that the Board would ensure the principles under Article 227 (1) of the Constitution are adhered to by procuring entities.

In conclusion, Counsel reiterated his prayer that the Request for Review be allowed with costs to the Applicant.

BOARD'S DECISION

Upon hearing all parties' submissions before it and upon considering all the documentation submitted to it including the confidential documents submitted pursuant to section 67 (3) (e) of the Act, the Board has identified the following issues for determination:-

- I. Whether the Procuring Entity evaluated the Applicant's bid at the Technical stage in accordance with the Technical***

Evaluation Criteria at page 34 of the Tender Document, the provisions of section 80 (3) (a) of the Act and Article 227 (1) of the Constitution; and

II. Whether the Procuring Entity awarded the subject tender in accordance with the applicable award criterion under section 86 (1) of the Act.

Before addressing our minds on the above issues, the Board would like to dispense with a preliminary aspect that arose during the hearing of the Request for Review.

The Applicant having received its letter of notification of unsuccessful bid dated 1st October 2019, it wrote to the Procuring Entity requesting for a summary of the Evaluation Report. In its response letter of 9th October 2019 a summary of Evaluation Report was sent to the Applicant with details of the total scores awarded to the Applicant by each assessor during Technical Evaluation.

Counsel for the Procuring Entity, Mr. Kihara submitted that such summary of evaluation report was given to the Applicant in error, since the summary contained confidential information that the Applicant ought not rely on the same to support its Request for Review.

Upon enquiry by the Board as to whether the Applicant obtained that information illegally, Counsel confirmed that the summary was voluntarily

given by the Procuring Entity, but urged the Board to expunge the summary from the Applicant's bundle of documents.

On his part, Counsel for the Applicant, Mr. Mumia submitted that the Applicant requested for the said summary to know of the reasons why its bid was declared non-responsive.

The Board having considered each of the parties' submissions, addressed its mind to the provisions in section 67 of the Act which states that:-

"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 of 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 authorized 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 67(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.”

Section 68 (2) (d) (iii) of the Act states as follows:-

- (1)***;
- (2) The records of a procurement shall include:***
 - (a)***;
 - (b)***;
 - (c)***;
 - (d) for each tender, proposal or quotation that was submitted—***
 - (i) the name and address of the person making the submission;***
 - (ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation; and***
 - (iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed***

Section 67 (1) of the Act codifies the nature of confidential information that is in the custody of a procuring entity, which information includes information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition. During the existence of review proceedings, such confidential information is disclosed to this Board pursuant to section 67 (3) (e) of the Act. Further an Applicant seeking a review and pursuant to section 67 (4) of the Act is only entitled to the summary contemplated in section 68 (2) (d) (iii) of the Act.

The Board noted that, the Procuring Entity failed to take these provisions into account and opposed the Applicant relying on what the Procuring Entity viewed to be a summary of Evaluation Report, despite the fact that such summary was voluntarily given to the Applicant upon request. There was therefore no evidence that the Applicant obtained such information illegally in a manner that would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition among bidders who participated in the subject tender.

As a result, the Board declined to grant the Procuring Entity's prayer that the summary relied upon by the Applicant be expunged from the Applicant's bundle of documents, noting that the Board was privy to the Procuring Entity's confidential file and was therefore capable of arriving at a just determination of the Request for Review.

Having dispensed with the above preliminary aspect, the Board now proceeds to address the issues as framed.

I. Whether the Procuring Entity evaluated the Applicant's bid at the Technical stage in accordance with the Technical Evaluation Criteria at page 34 of the Tender Document, the provisions of section 80 (3) (a) of the Act and the Constitution

This is a case of an Applicant who achieved a score of 72.6% after Technical Evaluation, when the minimum technical score for proceeding to Financial Evaluation was 65% but still challenges the scores awarded to its bid during Technical Evaluation, alleging that such evaluation was neither objective nor quantifiable.

The Applicant herein was among six bidders that submitted their bids in response to the Procuring Entity's advertisement of the subject tender on 13th August 2019. An Evaluation Committee commenced evaluation of bids on 5th September 2019 wherein the Applicant together with three other bidders, qualified for Technical Evaluation after Preliminary Evaluation of bids was concluded.

The Applicant, while relying on the summary of Evaluation Report submitted to it by the Procuring Entity, challenged the scores awarded to it during Technical Evaluation. However, the Applicant failed to specify the sub-

categories it was challenging and generalized its claim against the overall score of each assessor awarded to it during Technical Evaluation

In the Applicant's view, the evaluation criteria used by the Evaluation Committee (i.e. the assessors) was neither objective nor quantifiable. To support this assertion, Counsel for the Applicant referred the Board to section 80 (3) (a) of the Act which states that:-

"80 (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents...

(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"

It was the Applicant's contention that the Evaluation Committee, that is, the different assessors that evaluated the Applicant's bid, assigned different scores to the Applicant thereby creating doubt as to whether such evaluation was objective and quantifiable.

The Board studied the summary of Evaluation Report relied upon by the Applicant and notes that five different assessors evaluated the Applicant's

bid. According to the summary of the Evaluation Report, each assessor allocated scores to the Applicant and determined the Applicant's average score as 72.6%.

The Applicant submitted that the Board ought to examine the scores awarded to its bid on each item to arrive at the scores the Board considers to be more appropriate to the Applicant's bid. The Board notes that there are no itemized scores in the summary of Evaluation Report submitted to the Applicant. Hence, the Applicant generalized its claim in search of a ground to challenge the scores awarded to it but did not cite the specific item or category where it felt evaluation on its bid was neither objective nor quantifiable.

Section 80 (1) of the Act states that, *an evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, has the responsibility to evaluate and compare the responsive tenders.*

This role is not assigned to any other person or body, save that the Evaluation Committee must evaluate tenders using criteria that is objective and quantifiable. Failure to adhere to this requirement means that the results of evaluation and comparison of tenders may be annulled by this Board if the same is found to offend the principle that ***"whenever a State organ procures for goods or services it must do so in a system that is fair,***

equitable, transparent, competitive and cost-effective” as stated in Article 227 (1) of the Constitution.

In this instance where the Applicant generalized its claim against the scores awarded to it during Technical Evaluation, the Board is unable to formulate a specific claim for the Applicant to arrive at a conclusion whether or not any of the sub-categories of Technical Evaluation were unfairly evaluated in a manner that offends the principle of fairness as espoused in Article 227 (1) of the Constitution.

Section 80 (1) of the Act places the obligation to evaluate and compare tenders on an evaluation committee. The Board cannot therefore sit as an evaluation committee to decide on the marks that a bidder ought to be awarded. Had we found the evaluation conducted in this procurement process offends the principles under Article 227 (1) of the Constitution, the Board would order a re-evaluation, directing the Evaluation Committee to properly discharge its obligation under section 80 (1) of the Act. To award scores to the Applicant is tantamount to exercising the role of the Evaluation Committee.

Given that no evidence has been adduced on a specific item or criteria of Technical Evaluation to demonstrate that the Procuring Entity failed to evaluate the Applicant’s bid at the Technical stage in accordance with the Technical Evaluation Criteria at page 34 of the Tender Document, the provisions of section 80 (3) (a) of the Act and Article 227 (1) of the

Constitution, the Board finds that the Applicant's claim that evaluation was neither objective nor quantifiable lacks merit.

II. Whether the Procuring Entity awarded the subject tender in accordance with the applicable award criterion under section 86 (1) of the Act

It was common ground between parties during the hearing of the Request for Review that the Procuring Entity applied the open method of tendering in this procurement process and not the Request for Proposal method of tendering. However, the Procuring Entity took the view that section 86 (1) of the Act does not preclude it from electing an award criterion to use for determining the successful bidder as it deems appropriate.

Section 86 (1) of the Act states as follows:-

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for

proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.”

The Court in **Miscellaneous Civil Application 552 of 2016, Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] eKLR** had occasion to interpret section 86 (1) of the Act when it held as follows:-

It is therefore clear that for a bidder to be successful, the bid must meet any one of the specifications in section 86 (1). In this case, the Respondent [Review Board] found that the award ought to have been made in accordance with section 86 (1) (a) since this was an open tender. That provision expressly mentions that the tender be awarded to the one with the lowest evaluated price”

From the above case, the Court while upholding the decision of this Board, found that for a bidder to be successful, it must meet any one of the award criteria specified under section 86 (1) of the Act and that sub-section (a) thereof is applicable when open tendering method is used by a procuring entity. In the above case, the Request for Proposals method of tendering had not been used.

The introductory clause of section 86 (1) of the Act states that an award criterion should be specified in the Tender Document. Further to this, sections 86 (1) (b) (c) and (d) of the Act specify the methods of tendering under which such award criteria applies. In open tenders where the Request for Proposal method is not used, the award criterion applicable is section 86 (1) (a) of the Act, noting that it is the only method of tendering that does not apply the other types of award criteria. The other types of award criteria specify their methods of tendering. In a nutshell, a procuring entity should not specify an award criterion that is not applicable to the method of tendering it is using.

The Board heard submissions by the Procuring Entity that the Applicant ought to have raised the issue of award criterion at the time it received the Tender Document and not when its bid was found non-responsive. The Board notes that a determination of when the Applicant became aware of the alleged breach by the Procuring Entity was already made at the time the Board entertained the Procuring Entity's Preliminary Objection.

Further to this, the Procuring Entity contended that in its previous tendering process, which was an open tender that did not apply Request for Proposal method of tendering, the Applicant was determined to be the successful bidder using the criteria of combined technical and financial score but did not complain of such award criterion. The Board notes that the review proceedings before it, is in respect of the subject tender (i.e. Tender No. KEBS/002/2019/2020 for Provision of Staff Medical Insurance Cover). We cannot therefore address issues touching on a tender not in dispute before this Board.

The Board would like to reiterate that having found that it has the jurisdiction to entertain this Request for Review, it cannot be silent when a criterion is applied that does not match the applicable procurement method used by a procuring entity. Section 3 of the Act states that:-

"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)

(c)

(d)

(e) the principles of public finance under Article 201..."

Article 10 (2) of the Constitution provides that:-

"(1)

(2) The national values and principles of governance include—

(a)

(b)

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development"

Further, Article 201 (d) of the Constitution states as follows:-

The following principles shall guide all aspects of public finance in the Republic:

...(d) public money shall be used in a prudent and responsible way

The above provisions require this Board to uphold principles of public procurement necessitating this Board to guide procuring entities on the correct award criteria that gives effect to the principles under the Constitution and the Act.

According to the Tender Document, the Procuring Entity specified the following award criteria:-

"Clause 2.25.1: Subject to paragraph 2.29, the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily

However, at page 35 of the Tender Document, a formula is introduced to be used during financial evaluation as follows:-

"The evaluation of the responsive bids will take into account technical factors, in addition to cost factors. An Evaluated Bid Score (B) will be calculated for each responsive bid using the following formula, which permits a comprehensive assessment of the bid price and the technical merits of each bid:"

C low

C X + T

C = Evaluated Bid Price

C low = the lowest of all Evaluated Bid Prices among responsive bids

T = the total Technical score awarded to the bid

X = weight for the Price as specified in the BDS (i.e. 0.2)

From the Procuring Entity's Evaluation Report, the above formula was used during Financial Evaluation of the Applicant's bid and that of the Interested Party in order to arrive at the bidder with the highest combined technical and financial score to be awarded the subject tender.

Having noted the finding by the High Court cited hereinabove that section 86 (1) (a) of the Act is the award criterion applicable in open tenders where the Request for Proposal method of tendering is not used, the Board finds that the formula expressed at page 35 of the Tender Document ought not to have been used by the Procuring Entity while conducting Financial Evaluation.

Notably, Counsel for the Interested Party, even while defending her client, was keen not to mislead the Board and submitted that the award criterion applicable in this procurement process is the one expressed in section 86 (1) (a) of the Act.

It is the Board's finding that the Procuring Entity failed to award the subject tender in accordance with the applicable award criterion in this instance which is expressed in section 86 (1) (a) of the Act.

Having dispensed with the main issues for determination, we shall now address our minds on the appropriate orders to grant in the circumstances.

The Board heard submissions by the Interested Party that should we find that the Procuring Entity used an award criterion not applicable in this procurement method and that should we find the Tender Document contains two conflicting provisions on award criteria, then the Tender Document ought to be annulled and the Procuring Entity be directed to re-tender for the services under the subject tender.

This is also the Applicant's prayer (f) of the Request for Review that:-

"Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh"

The Board has considered the Interested Party's submissions and the prayer sought by the Applicant in its Request for Review. In determining the appropriate orders to issue, the Board takes cognizance that section 86 (1) of the Act is specific on the award criteria to be used by a procuring entity and specifies when each award criterion may be used. In open tenders, a

procuring entity receives numerous bids noting that such tendering method when used, is open to all and sundry to express their capacity to execute a tender.

This must be the reason why the legislature saw it prudent that award in open tenders where the Request for Proposal method of tendering is not used, be made to the lowest evaluated bidder so as to save on tax payers' money. This supports one of the principles under Article 227 (1) of the Constitution that procurement of goods or services must be made in a system that is cost-effective. Article 201 (d) of the Constitution which was cited above further provides that:-***public money shall be used in a prudent and responsible way***

On its part, section 3 (h) of the Act states that:-

"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-

...(h) maximization of value for money"

The Procuring Entity was well aware of these provisions, which exist in law and supersede provisions of the Tender Document, especially in this case where the "Award Criteria" was provided as that of lowest evaluated bidder

at clause 2.25.1, but that a formula is later introduced at page 35 of the Tender Document to the effect that award of the subject tender is made to the bidder with the highest combined technical and financial score.

The Act is very clear on the award criteria applicable in open tenders where the Request for Proposal method of tendering is not used and a procuring entity cannot hide behind a formula introduced in the Tender Document that differs with the Award Criteria applicable in this instance. It was never the intention of the legislature that a procuring entity uses any award criterion it desires, without taking the limitations provided in section 86 (1) of the Act into consideration. Assuming that no award criteria was expressed at all in the Tender Document, what then would the procuring entity resort to? The answer is quite simple, that is, to examine the method of procurement it has used and restrict itself to the applicable award criterion among those provided for in section 86 (1) of the Act.

It is the Board's finding that where section 86 (1) (a) of the Act has already expressed the award criterion for this procurement process, nothing calls for annulment of the Tender Document, but to direct the Procuring Entity on the correct award criterion to apply in determining the successful bidder. The Board has discretionary powers under section 173 (a) and (b) of the Act to undertake the following, among others:-

"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...”***

In the circumstances, the Board finds that the appropriate order to issue in exercise of the powers under section 173 (a) and (b) of the Act is to annul the award that was made to the Interested Party based on its highest combined technical and financial score, that is, section 86 (1) (b) of the Act which is not applicable in this instance and to direct the Procuring Entity to award the subject tender in accordance with section 86 (1) (a) of the Act.

In totality, the Request for Review succeeds in terms of the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Procuring Entity's Letter of Notification of Award of Tender No. KEBS/002/2019/2020 for Provision of Staff Medical Insurance Cover which is dated 1st October 2019 and addressed to M/s Jubilee Insurance Company of Kenya Limited, be and is hereby cancelled and set aside.**

- 2) The Procuring Entity's Letter of Notification of unsuccessful bid in respect of the subject tender dated 1st October 2019 and addressed to M/s Madison General Insurance Kenya Limited, be and is hereby cancelled and set aside.**

- 3) The Procuring Entity is hereby directed to award the subject tender to the bidder determined to have submitted the lowest evaluated price in accordance with clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document and section 86 (1) (a) of the Act, within fourteen (14) days from the date of this decision, taking into consideration, the Board's findings in this case.**

4) Further to Order No. 3 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion.

5) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 4th day of November, 2019

Signed

**CHAIRPERSON
PPARB**

Signed

**SECRETARY
PPARB**