

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 134 OF 2019

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

COUNTY ASSEMBLY OF NYAMIRA.....1ST RESPONDENT

AND

THE AG. CLERK,

COUNTY ASSEMBLY OF NYAMIRA.....2ND RESPONDENT

Review against the decision of the Accounting Officer of the County Assembly of Nyamira as set out in the letter dated 9th October 2019 in respect of Tender No. CAN/T/02/2019-2020 for Provision of Medical Insurance Cover for Hon. Speaker, Members of County Assembly (MCAs), County Assembly Service Board Members and Members of Staff.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Mr. Steven Oundo, OGW | -Member |
| 4. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

-TRIDENT INSURANCE COMPANY LIMITED

1. Mr. Ong'anda Junior -Advocate, Ong'anda & Associates Advocates
2. Ms. Abigael Rasugu -Advocate, Ong'anda & Associates Advocates
3. Ms. Maryanne Mwigire -Lawyer, Ong'anda & Associates Advocates
4. Mr. Elvis Seroney -Business Development Manager
5. Ms. Emily Ndirangu -General Manager
6. Mr. Moses Karumba -Marketer

PROCURING ENTITY

-COUNTY ASSEMBLY OF NYAMIRA

1. Mr. Joshua Orangi -Deputy Clerk

INTERESTED PARTIES

1. Ms. Joan Kuria -Marketing, GA Insurance Limited
2. Mr. Haron Kimamira -Marketing, GA Insurance Limited

BACKGROUND TO THE DECISION

The Bidding Process

Requisition

A requisition for the procurement of Medical Cover for Honorable Speaker, MCAs, County Assembly Service Board (External) Members, Staff of the County Assembly and their dependents accompanied by the signed population of principal beneficiaries was initiated by the Human Resource Department on 20th August 2019 and approved by the Acting Clerk.

Advertisement/Invitation for tenders

The tender was advertised in two newspapers of nationwide circulation, *The Standard* and *The Star* Newspapers on 22nd August, 2019. Eligible bidders

were instructed to submit their tenders through the IFMIS supplier portal on or before 5th September, 2019 at 10:30am.

Tender Opening

At exactly 10:30am on 5th September, 2019 the unique IFMIS Negotiation No.747626 on the Supplier Portal closed automatically. Upon closure, the Sourcing Buyer opened the Tender Responses from the System for respective bidders in the presence of the tender opening committee and witnesses.

1.4 Tender Applicants/Bidders

The following bidders responded to the invitation to tender for provision of Medical Insurance Cover:

| NO. | COMPANY NAME | BID SECURITY | TENDER SUM |
|------------|--|---------------------|-------------------|
| 1. | Jubilee Insurance Company of Kenya Limited | 800,000 | 39,623,935 |
| 2. | First Assurance Company Limited | 550,000 | 32,753,063 |
| 3. | GA Insurance Limited | 600,000 | 29,963,968 |
| 4. | Trident Insurance Company Limited | 470,000 | 23,403,423 |
| 5. | Resolution Insurance Company Limited | 650,000 | 25,732,942 |
| 6. | CIC General Insurance Limited | 794,577 | 35,851,420 |
| 7. | Saham Assurance Company Kenya Limited | 600,000 | 29,989,842 |

Evaluation of Bids

Mandatory Requirements

Under this stage, the Evaluation Committee interrogated the seven bid documents for compliance with the mandatory requirements. The bidder(s) that met ALL requirements was/were considered Responsive and therefore eligible to proceed to the Technical Stage of evaluation. At the end of this stage, only the Responsive Bidder(s) proceeded to Technical Evaluation

Technical Evaluation

At this stage, the Evaluation Committee evaluated bidders against the technical requirements in the Tender Document. Bidders that scored above 50% marks were qualified to proceed to the financial stage.

Financial Evaluation

At this stage, the bidders were evaluated to determine conformity to SRC premium limits and check for arithmetic errors, if any.

5.2 Ranking

The Committee ranked the bidders in a descending order based on the Tender Sum.

| No | BIDDER | TENDER SUM | RANKING |
|----|--|------------------|---------|
| 1. | Jubilee Insurance Company of Kenya Limited | Kshs.39,623,935 | 5 |
| 2. | CIC General Insurance Ltd | Kshs.35,851,420 | 4 |
| 3. | Saham Assurance Company Kenya Limited | Kshs. 29,989,842 | 3 |
| 4. | GA Insurance Limited | Kshs.29,963,968 | 2 |

| | | | |
|----|-----------------------------------|-----------------|---|
| 5. | Trident Insurance Company Limited | Kshs.23,403,423 | 1 |
|----|-----------------------------------|-----------------|---|

5.3 Overview of Trident Insurance Company Limited

The Evaluation Committee noted the following regarding M/s Trident Insurance Company Limited:-

- Trident Insurance Company Limited was incorporated on 17th May 1982.
- The Company has a total Share Capital of Kshs. 500,000,000/-
- In the year ended 31st December, 2018 the company declared Gross Earned Premiums of Kshs. 625,877,485.
- The Company has offered similar services (Medical Insurance) to a range of clients as listed below but not limited to:
 - County Government of Busia (Kshs. 198,000,000/-)
 - National Water Harvesting and Storage Authority (Kshs. 31,036,799/-) awarded on 27th November, 2018 for a period of 2 years.
 - Homabay County Government (Kshs. 130,860,574/-) awarded on 3rd April, 2017 for (12) Twelve Months.
 - Migori County Government
 - County Government of Kilifi (Kshs. 217,897,428.87) awarded on 1st December, 2016.

Recommendation

Upon considering the entire evaluation process and carrying out due diligence, the Evaluation Committee recommended that M/s Trident

Insurance Company Limited be considered for award of the tender at a Tender Sum of Kshs. 23,403,423.00 (Twenty-Three Million, Four Hundred and Three Thousand, Four Hundred and Twenty-Three Shillings Only).

Professional Opinion

The Head of Procurement issued her Professional Opinion to the Accounting Officer in which she stated as follows:-

"In my considered opinion, based on Section 84 of the PPADA, 2015 and the Ad-Hoc Evaluation Committee report, I recommend the award of Medical Insurance Cover for the Hon. Speaker, MCAs, External Members of the County Assembly Service Board, Members of Staff of the County Assembly of Nyamira and their Dependents (Tender Ref. NO: CAN/T/02/2019-2020) to Ms. Trident Insurance Company Limited of P.O Box 55651-00200 Nairobi, at a Tender Sum of Ksh. 23,403,423.00 (Twenty-Three million, Four Hundred and Three Thousand, Four Hundred and Twenty-Three Shillings Only)."

THE REQUEST FOR REVIEW

M/s Trident Insurance Company Limited (hereinafter referred to as "the Applicant") filed this Request for Review on 20th November 2019 seeking the following orders:-

- 1. An order declaring the purported termination of Tender No. CAN/T/02/2019-2020 for Provision of Medical Insurance Cover for Hon. Speaker, Members of County Assembly (MCAs), County Assembly Service Board Members and Members of Staff set out in the letter dated 9th October 2019 was illegal, null and void;***
- 2. An order setting aside the Procuring Entity's decision terminating Tender No. CAN/T/02/2019-2020 for Provision of Medical Insurance Cover for Hon. Speaker, Members of County Assembly (MCAs), County Assembly Service Board Members and Members of Staff by a letter dated 9th October 2019;***
- 3. An order compelling the Procuring Entity to enter into a contract with the Applicant in Tender No. CAN/T/02/2019-2020 for Provision of Medical Insurance Cover for Hon. Speaker, Members of County Assembly (MCAs), County Assembly Service Board Members and Members of Staff in accordance with the requirements of the Public Procurement and Asset Disposal Act, 2015; and***
- 4. An order awarding costs of this Request for Review to the Applicant.***

During the hearing, the Applicant was represented by Mr. Ong'anda Junior appearing together with Ms. Abigael Rasugu on behalf of the firm of Ong'anda & Associates Advocates, the Procuring Entity was represented by its Deputy Clerk, Mr. Joshua Orangi.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Ong'anda, fully relied on the Request for Review and the documents attached thereto.

Counsel submitted that the Applicant responded to an invitation to tender advertised by the Procuring Entity by submitting a bid in strict compliance with the requirements of the Tender Document. On 11th September 2019, the Procuring Entity visited the Applicant's premises to conduct a post-qualification exercise paving way for award of the subject tender to the Applicant. However, it was Counsel's submissions that the Procuring Entity took reasonably long to communicate the outcome of evaluation on the Applicant's bid, thereby necessitating the Applicant, in an email of 5th November 2019 to enquire of its bid outcome. On 6th November 2019, the Procuring Entity informed the Applicant that the tender was terminated and forwarded the letter of termination dated 9th October 2019.

Counsel submitted that the Procuring Entity breached section 63 (4) of the Act which requires notification to bidders of termination of a procurement process to be made within 14 days from the date of such termination. In Counsel's view, timelines under the Act regarding procurement processes are strict and precise, thus, the Procuring Entity failed to adhere to the same thereby calculated to prevent the Applicant from challenging the Procuring Entity's decision in good time.

On the impugned termination, Counsel submitted that the same failed to meet the threshold of section 63 of the Act, since the grounds cited in the said provision were not cited by the Procuring Entity. In his view, it seems that persons other than the Accounting Officer of the Procuring Entity terminated the subject procurement proceedings and that the Accounting Officer only played a facilitative role noting that paragraph two of the letter of termination makes reference to the County Assembly and House Leadership as the persons who terminated the subject tender.

Counsel then submitted that the Procuring Entity admitted there was an intended award before the tender was terminated and that the Procuring Entity applied requirements not previously set out in the tender document which were introduced during post qualification evaluation to disqualify the Applicant.

Counsel then referred the Board to the provisions of section 79 (1) and 80 (2) of the Act to support the view that these are the provisions in the Act that should guide a procuring entity in evaluating tenders, even during post-qualification.

In conclusion, Counsel urged the Board to allow the Application as prayed.

Procuring Entity's Submissions

In his submissions, Mr. Orangi, fully relied on the Procuring Entity's Response and documents attached thereto.

Mr. Orangi submitted that the Procuring Entity terminated the intended award by virtue of section 63 (1) (e) and (i) of the Act. To support his submissions, he stated that the Procuring Entity discovered that the Applicant is not a reputable company during the due diligence exercise. For example, hospitals do not honour the medical cards issued by the Applicant, such that patients are asked to make payments and ask for reimbursement from the Applicant.

Having received a copy of the First Due Diligence Report, it was the submission of Mr. Orangi that the Clerk of the National Assembly formed a smaller committee to conduct another due diligence exercise on the Applicant. He submitted that a second due diligence exercise was conducted

despite the first due diligence having resulted in a positive outcome on the qualifications of the Applicant.

Mr. Orangi submitted that the Procuring Entity saw an Article circulating in the social media regarding medical cards not honoured when the Applicant was providing services to the County Assembly of Kiambu thereby necessitating the Procuring Entity to conclude that the Applicant will not provide services to the Procuring Entity satisfactorily.

Similarly, he submitted that Aga Khan Hospital also reported of the Applicant's failure to honour medical cards issued to its clients. Mr. Orangi then made reference to **Civil Suit Number 389 of 2017, Saham Assurance Kenya Limited v, Trident Insurance Company Limited** wherein the court awarded damages to the plaintiff due to the Applicant's failure to honour claims for Tusky's Supermarket. He further submitted that reports from the Insurance Regulatory Authority showed that the Applicant is a loss making company. In conclusion, Mr. Orangi submitted that these instances demonstrate that the Applicant is not a reputable company.

Upon enquiry by the Board, Mr. Orangi submitted that the material governance issue that arose necessitating termination of the subject tender is the fact that previous clients of the Applicant confirmed that their medical cards were not being honoured by the Applicant, but submitted not to have

tangible evidence of the corrupt practices allegedly conducted by the Applicant.

Applicant's Rejoinder

In a rejoinder, Mr. Ong'anda urged the Board to note that various committee conducted a due diligence exercise on the Applicant, yet section 83 of the Act states that it is an Evaluation Committee that conducts a due diligence exercise. He further submitted that the documents adduced by the Procuring Entity alleging that the Applicant is not a reputable company are from unknown sources and their production does not satisfy the rules under section 106 (B) of the Evidence Act, Chapter 80, Laws of Kenya.

In Counsel's view, the Procuring Entity ought to have contacted clients whom the Applicant has had prior engagement with as provided for in section 83 (2) of the Act, and not rely on internet sources.

In conclusion, Counsel urged the Board to grant the orders sought in the Request for Review.

THE BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and oral submissions of the parties.

The issue for determination is as follows:-

Whether the Procuring Entity terminated the procurement proceedings of the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board.

In determining the above issue, the Board shall address the following sub-issues:-

- a) Whether the Procuring Entity's second due diligence exercise on the Applicant meets the threshold of section 83 of the Act; and*
- b) Whether the Procuring Entity's Letter of Notification to the Applicant satisfies the threshold of section 87 (3) of the Act, read together with Article 47 (2) of the Constitution.*

The Board shall now address the above issue for determination as follows:-

Termination of procurement proceedings is governed by section 63 of the Act. In addition to this, when the said termination meets the threshold of that provision, the jurisdiction of this Board is ousted by section 167 (4) (b) of the Act which states that:-

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act..."
[Emphasis by the Board]

In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:-

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the

jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

The failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets

of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

The court in the Selex Sistemi Integrati case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by mere existence of a letter of notification terminating procurement proceedings.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute** (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") held as follows:-

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

The Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati* Case that this Board has jurisdiction to determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process.

It is therefore important to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender.

The Board studied the Evaluation Report signed on 16th September 2019 and notes that the Applicant's bid was evaluated at Preliminary, Technical and Financial Evaluation stages after which the Evaluation Committee made the following recommendation:-

"Upon considering the entire evaluation process and carrying out due diligence, the committee recommends that M/s Trident Insurance Company Limited be considered for award of the tender...at a tender sum of Kshs. 23,403,423.00..."

A due diligence exercise was conducted on the Applicant between 11th to 13th September 2019. A Professional Opinion dated 16th September 2019 was then issued by the Procuring Entity's Director, Supply Chain Management wherein she advised the Accounting Officer of the Procuring Entity to award the subject tender to the Applicant herein.

Upon concluding the due diligence exercise, the Due Diligence Report shows that the Evaluation Committee established the following:-

"After considering all probable aspects, the committee established that Trident Insurance Company Limited is qualified as per the requirements and having offered satisfactory services to the sampled Confidential References"

The Applicant received a letter dated 9th October 2019 notifying it that:-

"With reference to the tender submitted by your company for the above stated services and based on the evaluation report, I regret to inform you that your company was not successful.

This is because the County Assembly Service Board and the House Leadership resolved that your Company is not reputable enough to handle the contract. In this regard therefore, the tender was cancelled."

It is this decision notifying the Applicant that its bid was not successful that precipitated the instant Request for Review.

The Board heard submissions by the Procuring Entity that its Acting Clerk established a "*smaller committee*" to conduct a second due diligence

exercise, despite the positive outcome of the first due diligence exercise confirming that the Applicant was "***qualified as per the requirements and had offered satisfactory services to the sampled Confidential References***".

However, no Second Due Diligence Report was submitted to the Board to ascertain the criteria used and the outcome of such due diligence process, save for the Procuring Entity's oral submissions that it conducted a second due diligence exercise that found the Applicant not reputable enough to handle the services in the subject tender.

The Board having considered the arguments by parties on the question whether the Procuring Entity conducted a due diligence exercise in accordance with provisions of the Act, finds it necessary to establish what a due diligence exercise is, and its purpose.

Due diligence is in this regard defined in Black's Law Dictionary, Ninth Edition at page 523 thereof as "***the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation***". Diligence on the other hand is defined as "***the attention and care required from a person in a given situation***".

In essence, a due diligence exercise is an important component of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Further, section 83 provides as follows:-

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
 - (a) initial each page of the report; and***
 - (b) append his or her signature as well as their full name and designation."***

Pursuant to section 83 of the Act, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined to be the lowest evaluated responsive tenderer. In conducting such a due diligence exercise, a procuring entity must bear in mind that when it advertises a tender, tenderers submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer, the procuring entity considers documents that support the eligibility and mandatory requirements specified in the Procuring Entity's Tender Document. Section 79 of the Act is instructive on this aspect as it states:-

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

After eligibility and mandatory documents/requirements are considered at Preliminary and Technical Evaluation stages, Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender Document.

When conducting a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, such due diligence would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

The Board studied the First Due Diligence Report signed on 16th September 2019 and notes that at page 3 thereof, the Evaluation Committee specified that one of the purpose of due diligence on the Applicant was:-

"Obtaining Confidential References from Clients who have had prior engagement with Trident Insurance Company Limited in respect of the following main Terms of Reference:-

- a. Settlement of Claims;***
- b. Authenticity of statutory documents;***
- c. Physical location of the premises;***
- d. Past experience and measures to be put in place to mitigate the challenges faced;***
- e. Extent of negotiation;***
- f. Flexibility of Hospital/Network Coverage;***
- g. Smart Card production period once the agreement has been signed;***

- h. Medical Cover Administration proposal;***
- i. Performance guarantee should be availed before signing of the agreement (5% of the tender sum);***
- j. Credit Period (The period within which the company would offer services upon entering into contract and prior to the first payment)***

It is evident that for purposes of the first due diligence exercise, the Evaluation Committee outlined a due diligence criteria based on documents and information provided in the Applicant's original bid, when it was conducting the first due diligence exercise and specified that it would obtain information by contacting clients who have had prior engagement with the Applicant, which is a mode recognized in section 83 (2) of the Act.

In respect of the second due diligence exercise, no documentation is before the Board outlining the due diligence criteria used by the "smaller committee" appointed by the Clerk of the County Assembly. In order to justify the sources that informed a second due diligence exercise on the Applicant, the Procuring Entity made reference to the following:-

i. County Assembly of Kiambu

Firstly, Counsel for the Procuring Entity made reference to an internet extract of an Article titled **“MCAs cry foul over Assembly’s Twenty-Five Million health insurance scheme”**

This Article makes reference to claims that, beneficiaries of the County Assembly of Kiambu medical scheme experienced difficulties in accessing medical services in many hospitals listed by the Applicant, being the contracted company to provide services under the said medical scheme.

The Board observes that no evidence was provided by the Procuring Entity to demonstrate that it wrote to the County Assembly of Kiambu regarding these claims and subsequently, received any response to that effect in writing.

ii. Aga Khan Hospital

In respect of Aga Khan Hospital, the Procuring Entity submitted that the said hospital does not honour medical cards issued by the Applicant to patients seeking to obtain treatment from the said hospital.

Upon enquiry by the Board as to whether the Procuring Entity wrote to the said hospital, Counsel for the Procuring Entity submitted that due to time constraints, the Procuring Entity did not write to the said hospital nor receive

any response in respect of the concerns the Procuring Entity had, of the services provided by the Applicant.

It is the Board's observation that the Procuring Entity did not take reasonable steps to obtain evidence regarding services offered by the Applicant, given the Procuring Entity's failure to write to Aga Khan Hospital in order to obtain written responses regarding services provided by the Applicant.

iii. Civil Suit No. 389 of 2017

The Procuring Entity further made reference to **Civil Suit No. 389 of 2017, Saham Assurance Company Kenya Limited v. Trident Insurance Company Limited [2019] eKLR**

The Board studied the above case and notes that the defendant (that is the Applicant herein) was ordered by the Court to pay the plaintiff therein Kshs. 33,427,695.61 with interest, being payment for damages caused as a result of a fire accident at one of Tuskys Supermarket's branch.

However, the Procuring Entity did not have any information from Tuskys Supermarket concerning services provided to it by the Applicant. In essence, the Procuring Entity never wrote to Tuskys Supermarket, neither did it receive any communication in writing regarding the services provided to Tuskys Supermarket by the Applicant.

These instances cited by the Procuring Entity as the basis for its second due diligence exercise on the Applicant where no reasonable steps were taken to communicate in writing to the aforesaid clients brings us to the question, how should a due diligence exercise be conducted?

According to section 83 of the Act, a due diligence exercise should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to have submitted the lowest evaluated responsive tender. Section 83 (1) of the Act stipulates that a due diligence exercise is conducted on the lowest evaluated responsive tender to confirm and verify qualifications of such tenderer.

Section 83 (1) of the Act instructs that an Evaluation Committee is the one that conducts a due diligence exercise.

According to section 46 (4) (b) of the Act, *An Evaluation Committee established under subsection (1) [of section 46 of the Act] shall:-*

(a)

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or

their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time

From the above provision, the minimum number required to constitute an Evaluation Committee is 3. On the other hand, section 83 (3) of the Act directs that it is only the Evaluation Committee members who took part in the due diligence that sign and initial the due diligence report. Even though it is not mandatory that all Evaluation Committee members participate in a due diligence exercise, the minimum number of three stipulated under section 46 (4) (b) of the Act must be maintained for purposes of conducting a due diligence exercise, noting that it is an Evaluation Committee that conducts due diligence.

In this instance, the Clerk of the County Assembly, in electing to establish a “smaller committee” to conduct a second due diligence exercise, ought to have adhered to section 46 (4) (b) of the Act on the composition of such committee, bearing in mind it is only an Evaluation Committee that conducts a due diligence exercise.

Prior to commencing a due diligence exercise, due diligence criteria must be prepared outlining the parameters of the due diligence process to be

conducted on the lowest evaluated responsive tenderer. This criteria should be used to verify and confirm the qualifications of the lowest evaluated tenderer after preliminary, technical and financial evaluation with respect to what such tenderer provided in its bid, in response to the minimum eligibility and mandatory requirements in the Tender Document and which documents and qualifications ought to have been considered during evaluation.

After concluding the exercise, a due diligence report must be prepared, outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

If the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined. If all tenderers are found non-responsive after due diligence, the Accounting Officer has the option to terminate the tender prior to notification of tender award, pursuant to section 63 (1) (f) of the Act which states that:-

"An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies-

...(f) all evaluated tenders are non-responsive"

Having established how a due diligence exercise is conducted, the Board notes, the Procuring Entity herein never wrote to Aga Khan Hospital, Tusky's Supermarket and the County Assembly of Kiambu regarding the claims it received on the services provided by the Applicant, neither were there any responses in writing received by the Procuring Entity from the said clients.

Furthermore, there is no evidence from the documentation and submissions by the Procuring Entity, that the procedure for a due diligence exercise outlined hereinbefore was followed to the end in order to demonstrate fair administrative action was taken into account when conducting a second due diligence exercise on the Applicant.

Article 47 (1) of the Constitution provides that:-

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

The Procuring Entity failed to take the principles enshrined under Article 47 (1) of the Constitution into consideration thereby making the second due diligence exercise conducted on the Applicant null and void for its failure to adhere to principles of fair administrative action.

Furthermore, upon determining that a tenderer was non-responsive after a due diligence exercise, the Evaluation Committee must give specific reasons to a tenderer, and not generalize such reasons. For example, a tenderer must be informed that *"a negative response was received after a due diligence exercise, because of reason (a), (b) and (c)"* as the case may be, in order for such tenderer to challenge the specific reasons cited, if need be.

The Board finds that the Procuring Entity's second due diligence exercise conducted on the Applicant fails to meet the threshold of section 83 of the Act.

The Board would like to note that in so far as responsiveness of tenderers is concerned, a tender may be terminated by dint of section 63 (1) (f) of the Act, only if all evaluated tenders are non-responsive. However, this was not the scenario in the subject procurement process. As observed earlier, if a procuring entity finds the lowest evaluated responsive tenderer unsuitable or unqualified after a due diligence exercise, such procuring entity ought to recommend the next lowest evaluated responsive tender for award of the tender, subject to a due diligence exercise.

Therefore, negative responses after a due diligence exercise on the lowest evaluated responsive tenderer should not be a ground for terminating a tender, but a reason to give the next lowest evaluated responsive tenderer, the opportunity to demonstrate its qualifications in a due diligence exercise.

From the Evaluation Report of 16th September 2019, there were still four other tenderers at the Financial Evaluation stage and the next lowest evaluated responsive tenderer, that is M/s GA Insurance Limited at Kshs. 29,963,968/- ought to have perhaps, been recommended for award of the subject tender, subject to a due diligence exercise conducted on it by the Evaluation Committee. Therefore, the Procuring Entity ought not to have rushed to terminate the subject procurement process without giving other tenderers who made it to the Financial Evaluation stage the opportunity to demonstrate their qualifications in a due diligence exercise.

In any case, the Procuring Entity herein admitted that it never had “tangible evidence” when it elected to terminate the subject tender. The reason cited by the Procuring Entity for terminating the subject tender are as stated in section 63 (1) (e) and (i) of the Act, which provide as follows:-

"An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a);

(b);

(c);

(d);

(e) material governance issues have been detected;

(f);

(g);

(h);

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer"

With regards to termination of a tender on the ground that material governance issues have been detected, the Board has previously found that

such a ground requires real and tangible evidence before a procuring entity elects to terminate a tender based on the said ground. In **PPARB Application No. 69 of 2019, CMC Motors Group Limited v. The Principal Secretary, Ministry of Interior and Coordination of National Government & Another**, the Board held as follows:-

"To understand what material governance is, the Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is:-

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

On the other hand, governance and how it relates to public procurement is explained in the book "Public Procurement:

International Cases and Commentary, (2012) edited by Louise Knight, et al, as follows:-

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definitions, the Board notes that principles of governance dictate that a procuring entity and bidders avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices.

Principles of governance that bind public procurement are explained in the Constitution, some of which include the following:-

"Article 10 (2) (c): The national values and principles of governance include:-... good governance, integrity, transparency and accountability

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

The Cambridge Dictionary of English defines "material" as "significant, major, important, of consequence, consequential".

Therefore, it can be said that material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has the option to terminate procurement proceedings only if there is real and tangible evidence demonstrating such material governance issues.

The Procuring Entity's second due diligence exercise does not demonstrate that there was real and tangible evidence obtained after a fair administrative process, conducted pursuant to the second due diligence exercise on the Applicant, to inform the decision terminating the subject tender on the ground stated in section 63 (1) (e) of the Act.

On the second ground for terminating a tender pursuant to section 63 (1) (i) of the Act, the Procuring Entity stated it did not have tangible evidence of the Applicant having engaged in fraudulent and corrupt practices, but still terminated the subject tender based on that ground.

This Board would like to reiterate that the grounds for terminating a tender as provided for under section 63 (1) of the Act are not for cosmetic purposes, but grounds that may require real and tangible evidence obtained by a procuring entity exercising caution and taking reasonable steps to comply with the principles of fair administrative action outlined under Article 47 (1) of the Constitution, cited hereinbefore.

In essence, the proper procedure for terminating a procurement process is as follows:-

According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer prior to notification of award

As noted above, the Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in section 63 of the Act. The grounds stipulated under section 63 of the Act are not mere pronouncements of the law but grounds that should be well founded by evidence and fair administrative action that is reasonable and procedurally fair.

Secondly, the Accounting Officer must submit a report to the Public Procurement Regulatory Authority within 14 days from the date of termination of a tender. Such a report must contain the reasons for termination of the tender.

Thirdly, all persons who submitted tenders must be notified within fourteen days from the date of termination and such notice must contain the reasons for termination, which reasons may require real and tangible evidence to afford tenderers the right to fair administrative action as stipulated in Article 47 of the Constitution.

Having studied the reasons cited by the Procuring Entity for terminating the subject tender and the Procuring Entity's own admission that it did not have

tangible evidence to terminate the subject tender, the Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and tangible evidence to support a termination process.

The Board has already addressed its mind to the requirement that a procuring entity must give tenderers specific reasons why their respective bids were found to be non-responsive after a due diligence exercise conducted on such tenderer. It is also important to emphasize that the specific reasons why a tender has been terminated, must be included in the letter of notification issued to tenderers.

Section 87 (3) of the Act provides that:-

"When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof"

This provision is supported by Article 47 (2) of the Constitution which states that:-

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

The Letter of Notification dated 9th October 2019 addressed to the Applicant, does not contain specific reasons why the Applicant was disqualified after conclusion of the second due diligence exercise neither does the letter state that the subject tender was terminated and the specific reasons for such termination.

It is the Board's considered view that, Article 47 (2) of the Constitution read together with section 87 (3) of the Act, applies in this instance to the specific reasons why the Applicant was disqualified after the second due diligence exercise and the specific reasons why the subject tender was terminated.

In essence, the Procuring Entity ought to have specified that the Applicant was found non-responsive after a due diligence exercise for reasons (a)....., (b) and (c)..... Further that, the subject tender was terminated for reason (a) as the case may be, to enable the Applicant to challenge such reasons for termination and reasons for non-responsiveness, if need be.

In the circumstances, the Board finds that the letter of notification dated 9th October 2019 fails to meet the threshold of section 87 (3) of the Act read together with Article 47 (2) of the Constitution and the purported termination fails to meet the threshold of section 63 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 decision terminating the subject procurement process of Tender No. CAN/T/02/2019-2020 for Provision of Medical Insurance Cover for Hon. Speaker, Members of County Assembly (MCAs), County Assembly Service Board Members and Members of Staff, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's second due diligence exercise on the Applicant, be and is hereby cancelled and set aside.**

For the avoidance of doubt, the First Due Diligence Report signed on 16th September 2019 remains valid.

- 3. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 9th October 2019 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated responsive tenderer in accordance with section 86 (1) (a) of the Act, taking into consideration, the findings of the Board in this case and complete the procurement process to its logical conclusion within fourteen (14) days from the date of this decision.**
- 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 11th day of December 2019

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CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of:-

- i. Mr. Ong'anda appearing with Ms. Mukami for the Applicant;**
- ii. Mr. Joshua Orangi, Deputy Clerk for the Respondents.**