REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 107, 108 AND 109 OF 2020 (CONSOLIDATED)

BETWEEN

NAIROBI X-RAY SUPPLIES LIMITED.....1ST APPLICANT

MEDITEC SYSTEMS LIMITED.....2ND APPLICANT

VARIAN MEDICAL SYSTEMS INTERNATIONAL AG....3RD APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....1stRESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2nd RESPONDENT

AND

DEBRA LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenya Medical Supplies Authority with respect to Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson

2. Mr. Ambrose Ogetto -Member

3. Mr. Nicholas Mruttu -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for the Secretary

2. Mr. Stanley Miheso -Secretariat

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Medical Supplies Authority (hereinafter referred to as "the Procuring Entity") invited eligible firms to bid for Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (hereinafter referred to as "the subject tender") through an advertisement published on MyGov Publication Website (www.mygov.go.ke) on 4th February 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity issued several Addenda clarifying certain provisions of the Tender Document thereby extending the bid submission deadline to 26th March 2020. Consequently, the Procuring Entity received a total of twelve (12) bids by the bid submissions deadline, which were opened

shortly thereafter by a Tender Opening Committee in the presence of tenderer's representatives and recorded as follows: -

Bidder no.	Bidder Name
1	Triven Ltd
2	Indepth Scientific Co.Ltd
3	Crown Healthcare
4	Razor Brand Ventures Limited
5	Asterisk Limited
6	Meditec Systems Limited
7	Duke Agencies Limited
8	Pacific Diagnostics Limited
9	Medivision Equipments Limited
10	Debra Ltd
11	Nairobi X-ray Supplies Limited
12	Varian Medical Systems International AG

Evaluation of Bids

The Procuring Entity's Chief Executive Officer appointed an Evaluation Committee that evaluated bids in the subject tender in the following three stages: -

i. Preliminary Evaluation;
ii. Technical Evaluation (i.e. Documents and Product Evaluation); and
iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause A. Preliminary Examination of Section VIII. Evaluation Criteria of the Tender Document. Having subjected the 12 bids to evaluation, the Evaluation Committee observed that Bidder No. 7 **(M/s Duke Agencies**

Ltd) provided Bid Security that was valued at Ksh. 100,000.00 instead of KES 447,330.00 required under Clause A.6 of Section VIII. Evaluation Criteria of the Tender Document and was therefore non-responsive. Eleven (11) bidders passed preliminary examination and qualified for Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause B of Section VIII. Evaluation Criteria of the Tender Document which comprised of Documents and Product Evaluation evaluated against the following items depending on the item that a bidder had bidded for: -

Item No.	Item Code	Item Description	Unit Pack	Quantity
1	EM01ATH001	Arthroscopy Tower	unit	1
2	NX08BRA001	Brachytherapy (HDR)	unit	1
3	EM11CNE001	Colonoscope	unit	1
4	EM11DNE001	Duodenoscope	unit	1
5	EM11TSE001	Ent Telescope	unit	1
6	EM11ENT007	Fiberoptic Laryngoscope	unit	15
7	EM11GSE001	Gastroscope	unit	1
8	EM11APA001	General Surgery Laparoscopic Equipment	unit	1
9	EM11APA002	Gynaecolocogy Laparascopy Tower	unit	1
10	EM11TSE003	Gynaecology Telescopes	unit	1
11	EM11APA003	Laparoscopic Equipment For Urology	unit	1
12	EM11NCQ001	Ancillary Equipment	unit	1

2.1. Documents Evaluation

On the first limb of Technical Evaluation, documents submitted by bidders were subjected to a detailed examination to confirm the following: -

- Whether Manufacturer's Authorization for the item (s) was provided;
- Copy of Product-Specific Valid Certificate of Quality ISO 13485; and
- IEC 60601 or Council Directive 93/42/EEC.

Having subjected bidders to evaluation at this stage, the Evaluation Committee made the following observations: -

Item No.	**Item Description**	**Observation**
1	Arthroscopy Tower	Triven Ltd, Crown Healthcare, Razor Brand Ventures Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
2	Brachytherapy (HDR)	Meditec Systems Limited and Debra Ltd were responsive therefore recommended for further evaluation
3	Colonoscope	Crown Healthcare, Pacific Diagnostics Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
4	Duodenoscope	Crown Healthcare and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
5	Ent Telescope	Crown Healthcare, Razor Brand Ventures Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
6	Fiberoptic Laryngoscope	Crown Healthcare and Debra Ltd were responsive therefore recommended for further evaluation
7	Gastroscope	Crown Healthcare, Pacific Diagnostics Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation

Item No.	Item Description	Observation
8	General Surgery Laparoscopic Equipment	Triven Ltd, Crown Healthcare, Razor Brand Ventures Ltd, Pacific Diagnostics Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
9	Gynaecolocogy Laparascopy Tower	Triven Ltd, Razor Brand Ventures Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
10	Gynaecology Telescopes	Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
11	Laparoscopic Equipment For Urology	Triven Ltd, Razor Brand Ventures Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd were responsive therefore recommended for further evaluation
12	Ancillary Equipment	(Nairobi X-Ray Supplies Ltd was responsive therefore recommended for further evaluation

2.2. Product Evaluation

The bidders who were found responsive at the end of Documents Evaluation in the respective items were subjected to Product Evaluation which involved; Packaging evaluation, labelling evaluation based on product type, product form (i.e. the physical configuration and shape) and product ingredients (i.e. content, components and composition). At the end of evaluation at this stage, the Evaluation Committee made the following observations: -

Item No.	Item Description	Observation
1	Arthroscopy Tower	Crown Healthcare and Debra Ltd met all the tender specifications and were recommended for financial evaluation
2	Brachytherapy (HDR)	Debra Ltd met all the tender specifications and was recommended for financial evaluation
3	Colonoscope	Nairobi X-Ray Supplies Ltd met all the tender specifications and was recommended for financial

Item No.	Item Description	Observation
		evaluation
4	Duodenoscope	Nairobi X-Ray Supplies Ltd met all the tender specifications and was recommended for financial evaluation
5	Ent Telescope	Crown Healthcare, Razor Brand Ventures Ltd, Debra Ltd and Nairobi X-Ray Supplies Ltd met all the tender specifications and were recommended for financial evaluation (
6	Fiberoptic Laryngoscope	No bidder recommended for further evaluation
7	Gastroscope	Nairobi X-Ray Supplies Ltd and Debra Ltd met all the tender specifications and were recommended for financial evaluation
8	General Surgery Laparoscopic Equipment	Crown Healthcare and Debra Ltd met all the tender specifications and were recommended for financial evaluation
9	Gynaecolocogy Laparascopy Tower	No bidder recommended for further evaluation
10	Gynaecology Telescopes	Debra Ltd met all the tender specifications and was recommended for financial evaluation
11	Laparoscopic Equipment For Urology	Debra Ltd met all the tender specifications and was recommended for financial evaluation
12	Ancillary Equipment	No bidder recommended for further evaluation

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause C. Financial Evaluation of Section VIII. Evaluation Criteria of the Tender Document. Upon conclusion of evaluation at this stage, the Evaluation Committee made the following observations: -

Item No.	Item Description	Observation
1	Arthroscopy Tower	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 15,254,456.81
2	Brachytherapy (HDR)	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 125,136,405.79
3	Colonoscope	Nairobi X-Ray Supplies Ltd submitted the lowest evaluated bid at a total cost of USD 37,030.00

Item No.	Item Description	Observation
4	Duodenoscope	Nairobi X-Ray Supplies Ltd submitted the lowest evaluated bid at a total cost of USD 30,355.00
5	Ent Telescope	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 427,399.43
6	Fiberoptic Laryngoscope	No bidder recommended for award
7	Gastroscope	Nairobi X-Ray Supplies Ltd submitted the lowest evaluated bid at a total cost of USD 29,140.00
8	General Surgery Laparoscopic Equipment	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 14,789.819.81
9	Gynaecolocogy Laparascopy Tower	No bidder recommended for award
10	Gynaecology Telescopes	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 1,286,467.53
11	Laparoscopic Equipment For Urology	Debra Ltd submitted the lowest evaluated bid at a total cost of Kshs. 37,972.617.54
12	Ancillary Equipment	No bidder recommended for award

Recommendation

The Evaluation Committee recommended award of the subject tender to the bidders found to have submitted the lowest evaluated bid in the respective items (i.e. Item 1, 2, 3, 4, 5, 7, 8, 10 and 11) outlined hereinbefore.

Professional Opinion

In a professional opinion dated 30th June 2020, the Procuring Entity's Director, Procurement outlined the manner in which the Procuring Entity carried out the subject procurement process whilst reviewing the Evaluation Report dated 27th April 2020. He took the view that the subject procurement process satisfied the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and

Article 227 of the Constitution. He therefore advised the Chief Executive Officer to award the subject tender to the lowest evaluated bidders in the respective items (i.e. Item 1, 2, 3, 4, 5, 7, 8, 10 and 11) outlined hereinbefore as recommended by the Evaluation Committee. The said professional opinion was approved by the Chief Executive Officer on 30th June 2020.

Notification to Bidders

In letters dated 30th June 2020, the Procuring Entity notified the successful and unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 107/2020

M/s Nairobi X-Ray Supplies Limited lodged a Request for Review dated 21st July 2020 and filed on 22nd July 2020 together with a Supporting Affidavit sworn and filed on even date and a Further Affidavit sworn on 4th August 2020 and filed on 5th August 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

i. ***An order annulling and setting aside the award of Tender Number KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Items No. 1, 8 and 11) to M/S Debra Limited;***

ii. ***An order annulling and setting aside the Respondents' letter of notification dated 30th June 2020 and addressed to M/s Nairobi***

X-Ray Supplies Limited with respect to Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment to the extent of declaring M/s Nairobi X-Ray Supplies Limited, the Applicant, unsuccessful in subject tender Items No. 8, 11 and 12.

iii. ***An order declaring that the Applicant's bids in the subject tender Items No. 1, 8, 11 and 12 were substantially responsive;***

iv. ***An order directing the Respondent to award the subject tender number KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Items No. 1, 8, 11 and 12) to M/s Nairobi X-Ray Supplies Limited, the Applicant herein;***

v. ***Without prejudice to (d) above, an order directing the Respondents to award the subject tender number KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Item No 12) to M/s Nairobi X-Ray Supplies Limited, the Applicant herein, being the sole bidder which submitted a responsive tender;***

vi. ***In the alternative, an order directing the Respondents to re-admit the Applicant's bids in the subject tender Items No. 8, 11 and 12 to technical evaluation in accordance with the***

criteria for evaluation provided in the tender document, taking into account the findings of the Review Board herein and to award in accordance with the award criteria provided in Clause 35 of the tender document;

vii. ***Any other relief that the Board may deem fit and just to grant; and***

viii. ***An order awarding costs of the Review to the Applicant.***

In response, the Respondents lodged a Replying Affidavit sworn and filed on 30th July 2020 through the firm of Kiugu & Company Advocates while the Interested Party lodged a Response to the Request for Review dated and filed on 27th July 2020 through the firm of Mwenda Kinyua & Company Advocates.

REQUEST FOR REVIEW NO. 108/2020

M/s Meditec Systems Ltd lodged a Request for Review dated 21st July 2020 and filed on 22nd July 2020 together with a Supporting Affidavit sworn and filed on even date and a Further Affidavit sworn on 4th August 2020 and filed on 5th August 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

a) ***An order annulling and setting aside the award of Tender NumberKEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Item No. 2) to M/S Debra Limited;***

b) An order annulling and setting aside the Respondents' letter of notification of unsuccessful bid in respect to tender number KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Item No. 2) dated 30th June 2020 and addressed to M/S Meditec Systems Limited;

c) An order declaring that the Applicant's bid in the subject tender item number 2 was substantially responsive;

d) An order directing the Respondents to award the subject tender number KEMSA/REFF/HOSP/OIT 06/2019-2022–Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment (Item No. 2) to M/S Meditec Systems Limited, the Applicant herein, on account of having submitted a substantially responsive tender with the lowest evaluated tender price;

e) In the alternative, an order directing the Respondents to re-admit the Applicant's tender to technical evaluation in accordance with the criteria for evaluation provided in the tender document, taking into account the findings of the Review Board herein and to award in accordance with the award criteria provided in Clause 35 of the Tender Document;

f) Any other relief that the Board may deem fit and just to grant; and

g) An order awarding costs of the Review to the Applicant.

In response, the Respondents addressed a letter dated 27th July 2020 to the Board Secretary and a Replying Affidavit sworn on 30th July 2020 and filed on even date while the Interested Party lodged a Response to the Request for Review dated 27th July 2020 and filed on even date.

REQUEST FOR REVIEW NO. 109/2020

Varian Medical Systems International AG lodged a Request for Review dated 23rd July 2020 and filed on even date together with an Affidavit in Support of the Request for Review sworn on 23rd July 2020 and filed on even date and a Supplementary Affidavit sworn and filed on 4th August 2020, through the firm of Anjarwalla & Khanna LLP, seeking the following orders: -

i. ***An order declaring the Respondent's decision rejecting the Applicant's bid for Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 is manifestly without legal grounds, unsubstantiated, unreasonable and illogical; and violates the provisions of Article 47 of the Constitution of Kenya, 2010 and Section 87 (4) of the Public Procurement and Asset Disposal Act, 2015;***

ii. ***An order revoking, set aside, cancelling and declaring the Letter of Notification of unsuccessful bid dated 30 June 2020 and transmitted to the Applicant on 9 July 2020 with respect to Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 null and void in its entirety;***

iii. ***An order revoking, cancelling, and setting aside the Respondent's decision to award Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 to Debra Limited;***

iv. ***An order directing the Procuring Entity to re-instate the Applicant's bid for determination alongside all other bids that made it to the Technical Evaluation stage in Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022;***

v. ***An order awarding costs of the Application to the Applicant; and***

vi. ***Any other relief that the Board deems fit to grant in the interest of justice.***

In response, the Respondents lodged a Replying Affidavit sworn on 30th July 2020 and filed on even date and a Further Affidavit sworn on 7th August 2020 and filed on even date, through the firm of Kiugu & Company Advocates while the Interested Party lodged a Response to the Request for Review dated 24th July 2020 and filed on 27th July 2020 through the firm of Mwenda Kinyua & Company Advocates.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic. Through the said Circular, the Board instituted certain measures

to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

With respect to Request for Review No. 107/2020, M/s Nairobi X-Ray Supplies Limited lodged Skeletal Submissions dated 5th August 2020 and filed on 6th August 2020, the Interested Party lodged Written Submissions dated 3rd August 2020 and filed on 4th August 2020. In Request for Review No. 108/2020, M/s Meditec Systems Limited lodged Skeletal Submissions dated and filed on 5th August 2020 while the Interested Party lodged Written Submissions dated 3rd August 2020 and filed on 4th August 2020. With respect to Request for Review No. 109/2020, M/s Varian Medical Systems International AG lodged Written Submissions dated and filed on 4th August 2020 while the Interested Party lodged Written Submissions dated 3rd August 2020 and filed on 4th August 2020.

CONSOLIDATION OF THE THREE REQUEST FOR REVIEW APPLICATIONS

When Request for Review No. 107/2020, Request for Review No. 108/2020 and Request for Review No. 109/2020 came up for deliberation, the Board noted that they relate to the same tender advertised by the same Procuring Entity. The Board further noted that where two or more Request for Review applications are filed relating to the same tender, it has discretion to consolidate the request for review applications pursuant to Regulation 211 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

Accordingly, the Board consolidated the three Request for Review applications, bearing in mind that any orders issued by the Board upon completing review of either of the three applications must be taken up by the same Accounting Officer and this would affect all parties to the request for review applications since the tender under review before this Board is the same in the three applications.

PRELIMINARY ISSUES FOR DETERMINATION

On the first preliminary issue, the Board notes that M/s Pacific Diagnostics Ltd addressed a letter dated 12th August 2020 to the Board Secretary stating as follows: -

"We are in receipt of your letter dated 30th July 2020 Ref: PPARA/ERB/7/107,108 & 109/2020 in which you have stated we submit any information or arguments about the tender within three days of the mail

However, having looked at the review dates we were called by your office on 10th August 2020 and the letter given on the same day for this reason we feel it will not be fair for us to be excluded in the tender review

Our argument is based on KEMSA letter dated 30th June 2020 Ref: KEMSA/PROC/REFF/OIT06/2020 herein attached as quoted "You provided a brochure that had more than one image and you did not highlight any for evaluation"

It was the responsibility of KEMSA tender evaluation team to identify the correct image in the brochure that matched with the quoted item.

We therefore would like to be enjoined as one of the bidders in the said tender"

The Board observes that M/s Nairobi X-Ray Supplies Limited lodged its Request for Review on 22nd July 2020. Thereafter, the Board Secretary addressed a letter dated 22nd July 2020 to the Procuring Entity directing it to forward all the confidential documents relating to the subject procurement process including a list of all tenderers. Through a letter dated 30th July 2020 addressed to the Board Secretary, the Procuring Entity

forwarded the confidential file and a list of all tenderers who participated in the subject procurement process. It is only on 30th July 2020 that the Board knew of the tenderers in the subject procurement process. The Board Secretary addressed letters dated 30th July 2020 to all bidders attaching the Request for Review application and Circular No. 2 dated 24th March 2020, which letters were picked by the Board's courier from the Board's offices on 4th August 2020. However, the letter dated 30th July 2020 addressed to M/s Pacific Diagnostics Ltd was not delivered since the offices of the said tenderer could not be traced. This prompted the Board Secretariat to contact M/s Pacific Diagnostics Ltd via telephone (i.e. +254 0202021576 and +254725247287 provided in the Procuring Entity's confidential file) on 5th August 2020 directing it to collect the Request for Review applications (i.e. Review No. 107, 108 & 109) from the Board's offices. However, from the Board's Dispatch Register, M/s Pacific Diagnostics Ltd only sent its representative to collect the Request for Review applications on 10th August 2020. M/s Pacific Diagnostics Ltd has now filed a letter dated 12th August 2020 seeking to be joined as a party to the Request for Review to challenge the outcome of its bid.

From the foregoing, the Board observes that even though M/s Pacific Diagnostics Ltd was contacted by the Board Secretariat to collect the Request for Review applications on 5th August 2020, the said tenderer delayed to collect the said applications. Despite this delay, M/s Pacific Diagnostics Limited did not file a substantive response to the request for review applications (either in support of the applicants or in support of the

procuring entity) but only waited until 12th August 2020 to file a letter seeking to be joined in order to challenge the Procuring Entity's decision on its bid.

A party seeking to challenge a procuring entity's decision on its bid can only do so by way of a Request for Review lodged in accordance with section 167 (1) of the Act upon payment of the requisite fees and not through a letter seeking to be joined as a party to an already existing Request for Review application in order to challenge the Procuring Entity's decision on its bid. Furthermore, M/s Pacific Diagnostics Ltd has made thisrequest on the last day that the Board is left with to determine the consolidatedRequest for Review challenging the decision of the Procuring Entity with respect to its own bid. Such a request cannot be entertained at this point noting that the proper procedure in law requires M/s Pacific Diagnostics Ltd to file a Request for Review under section 167 (1) of the Act. This would enable other parties to the consolidated Request for Review to file their respective responses to the grounds raised by M/s Pacific Diagnostics Ltd in its Request for Review.

Accordingly, the Board declines to join M/s Pacific Diagnostics Ltd as a party to the Request for Review in so far as the said tenderer seeks to be joined as a party so as to challenge the Procuring Entity's decision on its bid.

M/s Debra Limited who was joined as an Interested Party to the Request for Review, raised two preliminary points of law in its Response to the Request for Review. According to its first preliminary point of law, M/s Debra Limited contended that the Board lacks jurisdiction to entertain the Request for Review. However, M/s Debra Limited failed to state the grounds under which it was challenging the jurisdiction of the Board. In response, M/s Meditec Systems Limited at paragraph 6 (a) of its Further Statement urged the Board to note that no grounds have been proferred by M/s Debra Limited as to why this Board lacks jurisdiction to entertain the Request for Review. On its part, M/s Debra Limited opted to raise the grounds of its preliminary point of law through its Written Submissions by stating that the jurisdiction of this Board can only be invoked where a party seeking administrative review can demonstrate that: -

- *A duty is imposed upon the procuring entity by the Act and Regulations 2020;*
- *That there is a breach of such imposed duty under the Act; and*
- *That the party has suffered or risks suffering, loss or damage due to the breach.*

Having considered parties' pleadings, the Board would like to point out that it is only through its written submissions that M/s Debra Limited laid the foundation of its challenge to the jurisdiction of this Board. Written Submissions, as the Board understands them have a dual role, that is, to introduce a decision maker to a party's case and to persuade the decision

maker to accept it. As regards the second step of persuasion, the decision maker must understand the reasons why it should decide in that party's favour on the issues and not find in favour of the party's opponent. In essence, written submissions sum up the facts of the case, the legal issues arising (i.e. issues that were already raised by parties in their pleadings that were filed before any written submissions were made), how the law applies to those legal issues and a conclusion whereina party would be persuading the decision maker to find in its favour.

A party that wishes to object to the jurisdiction of the Board may do so through a response to the request for review by raising the specific grounds for such objection. Regulation 205 of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as "Regulations 2020" provides a procedure for filing a preliminary objection as follows:-

> ***"205. (1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.***
>
> ***(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.***

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision"

The grounds raised by a party while objecting to the jurisdictionof the Board enables other parties to a request for review to respond to the objection that has been raised before they sum up their case through written submissions. The response that was filed by M/s Debra Limited does not contain any grounds to support its objection to the jurisdiction of the Board and such grounds cannot be introduced by way of written submissions.

Accordingly, the Board finds that the first preliminary point of law raised by M/s Debra Limited was not properly filed before the Board as the same did not set out the grounds upon which it is based as required under Regulation 205 (2) of Regulations 2020.

On its second preliminary point of law, M/s Debra Limited took the view that the Request for Review is incurably defective and mala fides for the reason that M/s Meditec Systems Limited joined M/s Debra Limited as an Interested Party instead of a Respondent in contravention of mandatory

provisions of section 170 (c) of the Act. M/s Debra Limited therefore urged the Board to strike out the Request for Review filed by M/s Meditec Systems Limited.

The Board observes that M/s Debra Limited has been joined as an Interested Party to these proceedings. However,M/s Debra Limited has taken the view that it ought to have been joined as a Respondent pursuant to section 170 of the Act. This prompted the Board to determine the meaning of the word **"Respondent"** and **"Interested Party".**

The Black's Law Dictionary, 9th Edition defines the term "Respondent" as follows: -

> ***"In legal proceedings, the person against whom action or relief is prayed, or who opposes the prayer of the application, is called the "respondent."***

In **Petition No. 37 & 49 of 2017 (Consolidated), Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR**, the court defined the term **"Interested Party"** as: -

> ***"Interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"***

Having considered the two definitions, the Board notes that a person against whom action or relief is prayed, or who opposes the prayer of an application is called a **"Respondent".**In a request for review application, applicants normally seek relief against a procuring entity, therefore joining an accounting officer of a procuring entity as a respondent. On the other hand, bidders who participatein a procurement process have an identifiable stake in the legal proceedings (especially the successful bidder) relating to such procurement process because they may be directly affected by the outcome of the review, hence are normally joined as interested parties to a request for review.

This Board has had instances where successful bidders (and other bidders who participated in the procurement process) have been joined as respondents to a request for review. However, whether bidders are joined as interested parties or respondents in a request for review, they do not advance their own grievances in terms of challenging the outcome of their respective bids since their role is limited to supporting an applicant's case or the respondent's (i.e. the accounting officer of a procuring entity's) case. This is because any candidate or tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity, may seek administrative review (by filing a Request for Review) within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process in accordance with section 167 of the Act. Such a candidate or

tenderer who moves the Board by way of a Request for Review filed under section 167 of the Act is known as an applicant.

The Board further notes that section 170 of the Act provides as follows: -

"The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine."

Section 170 (c) of the Act which was cited by M/s Debra Limited requires the successful tenderer to be joined as one of the parties to a request for review. This provision does not specify whether such a party should be joined as a respondent or an interested party. M/s Meditec Systems Limited already joined M/s Debra Limited, the successful bidder in Item No. 2 of the subject tender, as a party to its Request for Review in compliance with section 170 (c) of the Act as an Interested Party. As a result, M/s Debra Limited had the opportunity to participate in the instant request for review proceedings and suffered no prejudice by being identified as an Interested Party.

Accordingly, the Board finds that M/s Meditec Systems Limited joined M/s Debra Limited as a party to its Request for Review in accordance with section 170 (c) of the Act.

M/s Varian Medical Systems International AG addressed a letter dated 10th August 2020 to the Board Secretary stating as follows: -

> ***"We act for the Applicant, Varian Medical Systems International AG (our client) in the above referenced application***
>
> ***On Saturday 8 August 2020, we were served by e-mail with the Respondent's Submissions filed on 7th August 2020 together with the Submissions we were also served with a Further Affidavit of Dr. Jonah Manjari sworn on 7th August 2020 and filed on the same date (the Further Affidavit)***
>
> ***We are instructed to lodge an objection to the filing of the Further Affidavit and pray to expunge it on the following grounds:***
>
> 1. ***The Circular No. 2 dated 24 March 2020 issued by the Public Procurement Administrative Review Board (the Board) does not make the provision for the filing of a Further Affidavit by the Respondent in response to a***

supplementary affidavit. Pleadings closed on the filing of the Applicant's Supplementary Affidavit.

2. ***The Further Affidavit contains averments that are meant to prejudice and ambush the Applicant. The Further Affidavit introduces a new reason for declaring the Applicant non-responsive. In the Respondent's Replying Affidavit filed on 30th July 2020, nothing was said of alleged defect in the Quality Certificate supplied by the Applicant. Indeed, at paragraph 12 of its Replying Affidavit, the Respondent states as follows: -***

> ***"A bidder was supposed to submit ISO 13485-Medical Quality Systems Management and any of the two other provided quality certification, both issued by a recognized independent certification body. The applicant submitted an ISO certificate"***

At paragraph 5 of the Further Affidavit, the Respondent has now shifted goalpost and now states that the "Quality Certificate to be submitted by bidders needed to be one for manufacture as provided in the Tender Document on qualification of a valid Quality Certification..."

Firstly, it is an outright falsehood that page 120 of the Tender Document provided that the quality certificate needed to be one for manufacture

Furthermore, the Respondent did not point out any fault in the Quality Certificate either in its letter communicating non-responsiveness or in its replying affidavit. It implicitly admitted through its replying affidavit that there was nothing wrong with the Quality Certificate. The Respondent cannot, at the eleventh hour, be permitted to introduce new evidence in the nature of grounds and reasons for rejecting the Quality Certificate. It had the opportunity to do so in the Replying Affidavit. Not only did it keep silent, it implicitly admitted that there was nothing wrong with the Quality Certificate. The Respondent's conduct amounts to trial by ambush which the Board should not condone

3. ***In the event the Respondent wanted to file a further affidavit, it ought to have sought leave to do so; laying a basis and giving cogent reasons of the need to file a further affidavit. The Applicant would, as a matter of law, have a right to rebut any evidence to challenge this controversial piece of evidence filed at the eleventh hour and amounts to an infringement of the Applicant's constitutional right to a fair hearing.***
4. ***The other averments in the Further Affidavit are meant to plug holes in the Respondent's case which ought to be rejected. These are matters based on analysis of***

evidence of the Applicant's Supplementary Affidavit, which ought to be addressed through submissions, not affidavit evidence.

5. ***Considering the strict statutory timelines for making determinations on applications for review under the Public Procurement and Asset Disposal Act, 2015 and the prejudice caused by the filing of the Further Affidavit, we pray that the Board expunges the Further Affidavit from the record"***

Having considered the contents of the letter dated 10th August 2020, the Board observes that the Procuring Entity lodged a Further Affidavit sworn on 7th August 2020 and filed with the Board on even date. Previously, the Procuring Entity had lodged a Replying Affidavit sworn and filed on 30th July 2020. Thereafter, M/s Varian Medical Systems International AG lodged a Supplementary Affidavit sworn and filed on 4th August 2020.

According to Clause 4 of Circular No. 2 dated 24th March 2020 issued by the Board, an applicant has the right to file a supplementary affidavit and/or further affidavit/statement in support of its Request for Review together with written submissions. Thereafter, Clause 5 of the said Circular gives applicants, respondents and the successful bidder the right to file written submissions. The Board issued the said circular in recognition of the challenges faced by Covid-19 pandemicand the strict statutory timeline of

twenty-one (21) days within which the Board must hear and determine a Request for Review application outlining the timelines and procedure applicable when a Request for Review is filed.

The Board further takes cognizance of the constitutional right to fair hearing provided in Article 50 (2) (k) of the Constitution which includes the right to adduce and challenge evidence. It is a well-known practice that once an applicant has closed its case through a Further Response (i.e. Further Affidavit or Further Statement), all other parties to the Request for Review have no further right of reply. The action left for all parties is to file written submissions as directed in Circular No. 2 dated 24th March 2020 persuading the Board to decide in their favour.

The Procuring Entity's Further Affidavit was filed in blatant breach of Circular No. 2 dated 24th March 2020 and interferes with the right to fair hearing provided in Article 50 (2) (k) of the Constitution available to M/s Varian Medical Systems International AG. This means that the Procuring Entity's Further Affidavit is not properly filed before this Board.

Accordingly, the Procuring Entity's Further Affidavit sworn on 7th August 2020 and filed on even date is hereby expunged and shall not form part of the record of these proceedings.

The Board further notes that the Procuring Entity addressed two letters to the Board Secretary which are all dated 10th August 2020 challenging the period within which M/s Nairobi X-Ray Supplies Limited and M/s Meditec Systems Limited filed their respective Further Affidavits. Having considered the Procuring Entity's contention, the Board notes that the two bidders did not strictly file their further affidavits within the timelines required. However, upon perusing the said Affidavits, the two bidders addressed the issues raised in the Procuring Entity's Response and reiterated the grounds in their Request for Review applications. The Board observes that M/s Nairobi X-Ray Supplies Limited and M/s Meditec Systems Limited did not introduce new issued in their respective Further Affidavits and the Procuring Entity did not need to file a Further Affidavit (when it has no right to do so) but to summarize its case through written submissions.

Having dispensed with the above preliminary issues, and having consolidated the three Request for Review applications, the parties to the Request for Review shall be identified as follows: -

- Nairobi X-Ray Supplies Limited.....1st Applicant
- Meditec Systems Limited.....2nd Applicant
- Varian Medical Systems International AG.....3rd Applicant
- The Accounting Officer, Kenya Medical Supplies Authority.....1st Respondent
- Kenya Medical Supplies Authority.....2nd Respondent
- Debra Limited.....Interested Party.

BOARD'S DECISION

The Board has considered the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

I. **Whether the 1st Applicant is entitled to be notified of the outcome of its bid with respect to Item 1. Arthroscopy Tower of the subject tender;**
II. **Whether the 1st Applicant satisfied the criteria outlined in the Tender Document with respect to the following items in the subject tender: -**
    a. **Item 8. General Surgery Laparoscopic Equipment;**
    b. **Item 11. Laparoscopic Equipment for Urology; and**
    c. **Item 12. Ancillary Equipment**
III. **Whether the 2ndApplicant satisfied the criteria outlined in the Tender Document with respect to the following item in the subject tender: -**
    a. **Item 2. Brachytherapy**
IV. **Whether the 3rd Applicant satisfied the criterion outlined in the Tender Document with respect to the following item in the subject tender: -**
    a. **Item 2. Brachytherapy**

The Board now proceeds to address the above issues as follows: -

On the first issue for determination, the 1st Applicant received a letter of notification of unsuccessful bid dated 30th June 2020 with the following details: -

> **"Following your bid submission in the above tender, we are pleased to advise that you have been awarded to supply the following items;**
>
> **.....**
>
> **We however regret to inform you that your bid for the following items was unsuccessful due to the reasons indicated below:**

<table>
<tr><th>Item No.</th><th>Description</th><th colspan="2">Reason for Non-responsiveness</th></tr>
<tr><td>5</td><td>.....</td><td colspan="2">.....</td></tr>
<tr><td>8</td><td rowspan="5">General Surgery Laparoscopic Equipment</td><td colspan="2">According to the Brochure you provided, the item did not conform to the specifications as indicated</td></tr>
<tr><td rowspan="4"></td><td>Parameters</td><td>Reason for non-responsiveness</td></tr>
<tr><td>Must have a full range of bipolar and monopolar modes</td><td>Not indicated</td></tr>
<tr><td>Must be able to perform resection in saline*</td><td>Not indicated</td></tr>
<tr><td>Unit must be supplied with a foot switch</td><td>Not indicated</td></tr>
<tr><td>9</td><td>.....</td><td colspan="2">.....</td></tr>
<tr><td>10</td><td>.....</td><td colspan="2">.....</td></tr>
</table>

11	Laparoscopic Equipment for Urology	According to the Brochure you provided, the item did not conform to the specifications as indicated	
		Parameters	**Reason for non-responsiveness**
		Ellik Evaluator Plastic –Qty 1	Not provided
		Outer Sheath Fixed, 15.9Fr	Not complied
		Guiding Tube	Not complied
		Guiding Tube for Second Guide Wire	Not complied
		Bougie Dilator Tubes 9-28Fr QTY 1	Not complied
		Grasping Forceps 5Fr X 340mm	Not complied
12	Ancillary Equipment	According to the Brochure you provided, the item did not conform to the specifications as indicated	
		Parameter	**Reason for non-responsiveness**
		Large Single Lumen Probes for Quick Drilling and Continuous Fragment Removal	Not indicated
		Complete with Suitable probes for Immediate use	Not indicated
		(b) 30 Watt Holmium Laser -1 Quantity	Not indicated
		Descriptions:	Not indicated
		A 30 Watt holmium laser for lithotripsy on stones of all types and sizes with high energy per pulse of 5j and reputation rate of 25Hz	Not indicated
		The multipurpose, multi-specialty holmium wavelength ideal for	Not indicated

		fragmenting stones and for precision surgery, including the ablation and vaporization of soft tissue with minimal bleeding	
		FEATURES	Not indicated
		7" high-resolution screen	Not indicated
		Should be able to recognize fiber size	Not indicated
		Green aiming beam	Not indicated
		Save the laser setting for at least ten treatments used	Not indicated
		Should be on castors/on a trolley	Not indicated
		MSystem Includes	Not indicated
		1 Single foot Pedal	Not indicated
		1 20A Inlet 3 wire cable	Not indicated
		1 UK Power cable	Not indicated
		I Operator Manual CD	Not indicated
		1 Debris Shields	Not indicated
		1 English Laser Warning Sign	Not indicated
		Warranty- 2 years. After warranty period is over, five years annual comprehensive maintenance contract (CMC) will have to be entered into with the terms and conditions mentioned in the tender specification. The successful bidder has to ensure all the required spares and services are available during the period of CMC and 3 years after that period	You offered limited warranty support

The Board studied page 25 of Evaluation Report dated 27th April 2020 and notes that the 1st Applicant was found non-responsive with respect to Item 1 of the subject tender for the following reasons: -

"Conditions for warranty, (Manufacturer's defects only)"

The Board studied the 1st Applicant's original bid and notes that at page 040 thereof, the 1st Applicant indicated the following: -

Item	**Description**	**Comply/Not comply**	**Remarks**
1. Arthroscopy	Warranty 2 years. After warranty period is over, five years annual comprehensive maintenance contract (CMC) will have to be entered into with the terms and conditions mentioned in the tender specification. The successful bidder has to ensure all the required spares and services are available during the period of CMC and 3 years after that period	Comply	Annual PMC after warranty; warranty on manufacturer's defects only

The Board studied the criterion of Warranty under Item 1 of the subject tender and notes that: -

- *Bidders were required to provide a warranty of 2 years;*

- *After warranty period of 2 years is over, five years' annual comprehensive maintenance contract (CMC) will have to be entered into with the terms and conditions mentioned in the tender specifications;*
- *A successful bidder has to ensure all the required spares and services are available during the period of CMC and 3 years after that period.*

From the above criterion, the Board notes that bidders were required to provide a warranty of 2 years. After that period a five-year annual comprehensive maintenance contract (CMC) will have to be entered into with the terms and conditions mentioned in the tender specifications. This prompted the Board to first establish the meaning of an **"Annual Comprehensive Maintenance contract"**, which we note is defined by Monish Bhalla in his book **"Front Metamorphosis -Service Tax to Goods Services Tax (Business and Economics, 2020)"** as follows: -

> ***"An annual maintenance contract (AMC) is an agreement with a service provider for repair and maintenance of property used by your company. Quality output from any machine depends on the machine's long-term repeat performance. Machine maintenance is the key to this quality performance. In a comprehensive AMC, the analysis of breakdowns/faults in the hardware and repairing/service is taken care of by the service provider during the warranty period. This includes spare parts replacement. Apart from***

this, preventive maintenance is also done, on a pre-determined/agreed-to frequency."

From the foregoing, the Board observes that, after the warranty period of 2 years, the Procuring Entity desires an annual Comprehensive Maintenance Contract of 5 years whereby the analysis of breakdowns/faults in the hardware and repairing/service is taken care of by the service provider (i.e. the tenderer), including spare parts replacement. Apart from this, preventive maintenance ought to be undertaken by such tenderer, on a pre-determined/agreed-to frequency. At pages 71 to 72 of the Tender Document, the technical specifications to Item 1. Arthroscopy are provided, which ought to be covered in the Warranty of 2 years and catered for in the annual Comprehensive Maintenance Contract of 5 years, which will be entered into after the 2-year warranty has lapsed. In addition to this, a successful bidder has to ensure all the required spares and services are available during the period of Comprehensive Maintenance Contract (i.e. 5 years after the 2-year warranty period has lapsed) and 3 years after that period.

Having studied the 1st Applicant's original bid, the Board notes that the 1st Applicant did not provide documentation specifying the 2-year warranty neither did it mention that it will provide an annual Comprehensive Maintenance Contract of 5 years after the lapse of the Warranty period. It is also not clear whether the 1st Applicant will ensure all the required

spares and services are available during the period of Comprehensive Maintenance Contract (i.e. a period of 5 years after the 2-year warranty period has lapsed) and 3 years after that period, in the event the 1st Applicant's bid is successful.

The 1st Applicant only specified an Annual PMC after Warranty and that the warranty would be on manufacturer's defects only but failed to indicate the warranty is for 2 years and/or failed to provide a warranty of 2 years required in the Tender Document, which was required even before an Annual Comprehensive Maintenance Contract of 5 years could be entered into.

The 1st Applicant submits that the Procuring Entity failed to disclose the reasons why the 1st Applicant's bid was not successful with respect to Item 1.

The Board observes that 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"***

Section 87 (3) of the Act gives the Procuring Entity an obligation to disclose all the specific reasons why a tenderer was found non-responsive. This enables unsuccessful tenderers to challenge such reasons pursuant to section 167 (1) of the Act, if they wish to do so. The 1st Applicant was not informed of the reasons why it was not awarded Item No. 1 in the subject tender which it had bidded for, and has challenged the Procuring Entity's actions through this Request for Review.

The Procuring Entity admitted that it erroneously omitted to include the outcome of the 1st Applicant's bid with respect to Item 1 of the subject tender, in the 1st Applicant's letter of notification of unsuccessful bid dated 30th June 2020.

The Procuring Entity ought to have informed the 1st Applicant of the reasons why its bid was not successful with respect to Item 1 in addition to the reasons cited in the letter of notification of unsuccessful bid dated 30th June 2020, in so far as Items 8, 11 and 12 are concerned.

Accordingly, the Board finds that 1st Applicant is entitled to be notified of the outcome of its bid with respect to Item 1. Arthroscopy Tower of the subject tender in accordance with section 87 of the Act.

On the second issue for determination, the 1st Applicant further contends in paragraph 21 of its Further Statement that its bid was the most responsive

in Items 8, 11 and 12 of the subject tender therefore ought to have been awarded the tender in the aforementioned items. In essence, the 1st Applicant is aggrieved by the 1st Respondent's decision finding its bidnon-responsivewith respect to Items 8, 11 and 12 in the subject tender. Accordingly, the Board shall address the 1st Applicant's grievancesas follows: -

- **Item 8- General Surgery Laparoscopic Equipment**

With respect to this item, the 1st Applicant's bid was unsuccessful on three technical specifications of the Surgical Tissue Management System (Qty-1) found at page 81 to 82 of the Tender Document as follows: -

- ✓ *Must have a full range bipolar and monopolar modes;*
- ✓ *Must be able to perform Resection in saline; and*
- ✓ *Unit must be supplied with a foot switch.*

The Board notes that the 1st Applicant proposed the products listed hereinbelow in so far as Item 8 of the subject tender is concerned, which products are found after the divider labelled as **"8. EM11APA001 General Surgery Laparoscopic Equipment"**: -

- ✓ At page 116 of the 1st Applicant's original bid, Electrosurgical Generator ESG-400;
- ✓ At page 117 to 118 of the 1st Applicant's original bid, Ultrasonic Generator USG-400;

Having studied the technical specifications of the two products listed hereinbefore, the Board observes that according to Clause B (i). Technical Evaluation at page 119 of the Tender Document, it was mandatory for bidders to **"highlight the product to be offered where two or more of these products appear in the brochure provided".** Further, given that this was a mandatory requirement, the Tender Document expressly stated that **"Non-compliance to the above requirements will amount to non-responsiveness of the bid and disqualification from further evaluation."**

The 1st Applicant offered two products but failed to highlight the specific product it would offer to the Procuring Entity and thus the Procuring Entity did not know which product it would be supplied with by the 1st Applicant.

That notwithstanding, the Board compared the Technical Specifications of the two products and notes the following: -

- **Must have a full range of bipolar and monopolar modes;**

At page 116 of the 1st Applicant's bid it stated that the Electrosurgical Generator ESG-400 has a **"Full range of monopolar and bipolar modes-perform open, lap and endoscopic surgery procedures"**with the following specifications: -

Monopolar

- ✓ 2x3-pin (Ø4mm), International standard;

- ✓ 1x1-pin (Ø8mm), Bovie standard;
- ✓ 1x coaxial (Ø inner 5 mm/Øouter 9mm), Erbe standard.

Bipolar

- ✓ 1x2-pin (Ø4mm, pin spacing 28.8mm), international standard;
- ✓ 1xcoaxial (Ø inner 4mm/Ø outer 8 mm) Erbe standard).

The 1st Applicant's second product, i.e. Ultrasonic Generator USG-400 did not indicate whether or not it has **a full range bipolar and monopolar modes.**

- **Must be able to perform Resection in saline**

On this requirement, the Board notes that one of the technical specifications of the **Electrosurgical Generator ESG-400** proposed by the 1st Applicant at page 116 of its original bid is that the same has **"New saline modes (for bipolar resection)- improved ignition performance and continuous vaporization".** The 1st Applicant's second equipment, i.e. **Ultrasonic Generator USG-400** did not indicate whether or not it can perform resection in saline.

- **Unit must be supplied with a foot switch**

On this requirement, the Board notes that one of the technical specifications of the **Electrosurgical Generator ESG-400** proposed by the 1st Applicant at page 116 of its original bid is that the same has: -

- ✓ **Footswitch double pedal WB50402W;**
- ✓ **Footswitch single pedal WB50403W**

Further, to this one of the technical specifications of the Ultrasonic Generator USG-400 proposed by the 1st Applicant at page 118 of its original bid is that the same has: -

- ✓ **MAJ-1869 Footswitch for SONIC BEAT;**
- ✓ **MAJ-1870 Footswitch for THUNDERBEAT.**

From the foregoing, the Board notes that the 1st Applicant offered two products but failed to highlight the specific product it would offer to the Procuring Entity and thus the Procuring Entity did not know which product the 1stApplicant would supply to the Procuring Entity in the event the 1stApplicant is successful. Having studied the Technical Specifications of General Surgery Laparoscopic Equipment outlined in the Tender Document, the Board observes that the 1st Applicant failed to highlight the product it was offering amongst the two products that appeared in its brochure as required in the Tender Document. This left the Procuring Entity with no knowledge of the product that would be supplied to it by the 1st Applicant in the event its bid was successful. This was a mandatory requirement to the effect that failure to meet the same rendered the 1st Applicant's bid non-responsive with respect to Item 8.

Accordingly, the Board finds that the 1st Applicant failed to satisfythe technical specifications of the Surgical Tissue Management System (Qty-1) found at page 81 to 82 read together with the mandatory requirement for highlighting specified at page 119 of the Tender Document.

- **Item 11. Laparoscopy Equipment for Urology**

With respect to this item, the 1st Applicant's bid was unsuccessful on six technical specifications found at page 94 and 96 of the Tender Document as follows: -

- ✓ Ellik Evaluator Plastic (Qty 1);
- ✓ Outer Sheath Fixed 15.9 Fr;
- ✓ Guiding Tube;
- ✓ Guiding Tube for second wire;
- ✓ Bougie Dilator Tubes 9-28Fr (Qty 1);
- ✓ Grasping Forceps 5Fr x 340mm

At this juncture, the Board deems it necessary to point out that Item 11 was divided into two categories as follows: -

1. Lower Tract Set	**a. Telescopes** i. Telescope 4mm 0Degrees-1 ii. Telescope 4mm 12Degrees-2 iii. Telescope 4mm 30Degrees-3 iv. Telescope 4mm 70Degrees-1

	v. Telescope 4mm 110Degrees-1 **b**. **Cystoscope Sheaths & Attachments** i. Cystoscopy Sheath 19.8Fr with Obturator-1 ii. Optical Obturator for 19.8Fr Cystoscope Sheath iii. Cystoscopy Sheath 21Fr with Obturator iv. Optical Obturator for 21Fr Cystoscope Sheath v. Cystoscopy Sheath 22Fr with Obturator vi. Optical Obturator for 22 Fr Cystoscope Sheath vii. Cystoscopy Bridge One way viii. Cystoscopy Bridge Two Way ix. Albaraan with Bridge **(c) Monopolar 26Fr Rotatable Continuous Flow System consisting of:** i. Active Monopolar Working Element - Qty 1 ii. Inner Sheath Qty - 1 iii. Outer Sheath Qty - 1 iv. Monopolar Cable - Qty - 2 v. Monopolar Loop Electrode – Qty - 12 vi. Monopolar Roller Ball - Qty - 12 **vii. Ellik Evaluator Plastic - Qty - 1** **d. TURIS Bipolar 26Fr Rotatable Continuous Flow System consisting of:**

	i. Active Working Element - Qty 1 ii. Inner Sheath - Qty 1 iii. Outer Sheath - Qty 1 iv. Bipolar Cable - Qty 2 v. Bipolar Loop Electrodes - Qty 12 vi. Bipolar Vaporisation Electrode (Mushroom) - Qty 12 vii. Bipolar Roller Ball - Qty 12 viii. Plastic Ellik Evacuator - Qty 1 **e. DVU Kit Consisting of** i. 22Fr Sheath - Qty 1 i i. 26Fr Outer Sheath - Qty 1 iii. Insertion Sleeve For Balloon Catheter - Qty 1 iv. Working Element - Qty 1 v. Knife, Lancet Type, Straight - Qty 5 vi. Knife Serrated - Qty 5 vii. Knife Semi Circular - Qty 5 viii. Bladder Stone crushing forceps Qty 1
2. Upper Tract Set	**a. Semi-rigid Ureterescope QTY 2** • Angled Ocular • Single Channel, • 7° Direction of View, • 6.4/7.8FRx430mm • 4.2Fr Channel

	b. **Video Ureteroscope QTY 1** • 8.2Fr Slim Videoscope compatible with Video processor & Light Source • Forward Viewing • Working Length 670mm • Channel 3.6FR • Up Angulation 275° • Down Angulation 275° **c. Fibreoptic Flexible Ureteroscope QTY 1** • Field of view 90°, • Forward Viewing, • Evolution Tip 4.5Fr, • Working Length 670mm **<u>d. Nephroscope</u>** **A. Nephroscope- Qty 1** • 4mm 30Deg OP Nephrosocpe • Outer Sheath 25Fr (Rotatable) Sheath • Sheath Acc for Amplatz • 2 Stopcock Rotatable Qty • 11Fr 7Deg OP Nephroscope •**Outer Sheath Fixed, 15.9Fr** • **Guiding Tube**

	• **Guiding Tube for Second Guide wire** • **Bougie Dilator Tubes 9-28Fr Qty** **B. Nephroscope Graspers-1** • 1Toothed Grasper 3.25x400mm • 1Grasper with Lumen 3.25x400mm • Fine Toothed Grasper 3.25x400mm •**Grasping Forceps 5Fr X 340mm** **e. Bugbee Electrode with Monopolar HF Cable Qty - 2**

The issuedraised by the 1st Applicant fall under **Clause (c) Monopolar 26Fr Rotatable Continuous Flow System under Lower Tract Set** (i.e. Ellik Evaluator Plastic (Qty 1), **Clause (d) (A) Nephroscope- Qty 1** (i.e. Outer Sheath Fixed, 15.9Fr, Guiding Tube, Guiding Tube for Second Guide wire & Bougie Dilator Tubes 9-28Fr Qty) **under Upper Tract Set**and **Clause (d) (B) Nephroscope Graspers-1** (i.e. Grasping Forceps 5Fr X 340mm)**under Upper Tract Set.**

- **Ellik Evaluator Plastic (Qty 1) (under Monopolar 26 Fr Rotatable Continuous Flow System)**

The Board studied the 1st Applicant's original bid and notes that:-

- At page 235 of its original bid, the 1st Applicant proposed a Rotatable continuous-flow resectoscope and highlighted some features namely;

Inner Sheath, A22040 for 26Fr, outer sheath& Outer sheath A22026A 26Fr, 2 stopcocks, rotatable;

- At page 237 of its original bid, the 1st Applicant provided two drawings of an equipment labelled as Ellik-Evacuator with the following technical specifications: -

  ✓ 03657 Evacuator, acc. To Ellik;

  Spare parts

  ✓ 03665 Pressure ball;
  ✓ 03653 Glass;
  ✓ 03664 Tube, with clamping cone;

  Adapter

  Ellik Evacuator/bladder syringe to

  ✓ A02700A OES 4000 outer sheath;
  ✓ WA330026A OES Pro outer sheath.

The Board observes that the 1st Applicant provided an Ellik Evacuator whilst highlighting its technical specification as **"03657 Evacuator acc. to Ellik"**with one of the technical specification of the spare parts being **"03653Glass"**at page 237 of its original bid. The Tender Document required an **Ellik Evacuator Plastic**whereas the 1st Applicant's Ellik Evacuator is made of glass as one of its technical specification, which does not correspond to the requirement of a Plastic Ellik Evaluator at page 94 of the Tender Document.

- **Outer Sheath Fixed 15.9 Fr (Under Nephroscope)**

The Board studied the 1st Applicant's original bid and notes that at page 263 to page 265 thereof, the 1st Applicant proposed an Endourology Mini-Nephroscope. At page 264 of its original bid, one of the features of the Endourology Mini-Nephroscope is a Nephroscope Sheath with the following technical specification that has been highlighted: -

- ✓ **A37022A Outer Sheath 15.9Fr fixed**

The Board observes that the technical specification proposed by the 1st Applicant corresponds to the criterion under consideration therefore satisfied this criterion.

- **Guiding Tube (Under Nephroscope)**

In response to this criterion, the 1st Applicant at page 264 of its original bid, proposed a Nephroscope containing the following technical specifications: -

- ✓ WA37031A Guiding tube, for WA33027A;
- ✓ Adapts bougie tubes WA33027A to nephroscope sheath A37022A.

The Board observes that the technical specification proposed by the 1st Applicant corresponds to the criterion but the same was not highlighted.

- **Guiding Tube for Second wire (Under Nephroscope)**

In response to this criterion, the 1st Applicant at page 264 of its original bid highlighted that its proposed Nephroscope contains the following technical specifications: -

- ✓ **Guiding tube for second guide wire, for WA33027A**

From the foregoing, the Board observes that the 1st Applicant highlighted the guiding tube for the second guide wire as required in the Tender Document.

- **Bougie Dilator Tubes 9-28Fr (Qty 1)**

At page 264 of its original bid, the 1st Applicant highlighted that its proposed Endourology Mini-Nephroscope contains a Bougie set with the following specification; **"WA33027A Bougie Tubes, set 9-28Fr" as required in the Tender Document.**

- **Grasping Forceps 5Fr x 340mm**

At page 265 of its original bid, the 1st Applicant highlighted that its proposed Endourology Mini-Nephroscope contains Semi Flexible Hand Instruments one of them being Grasping Forceps with the following specification; **"5Fr. X 340mm, semi flexible"as required in the Tender Document.**

From the foregoing, the Board notes that with respect to the items outlined hereinbefore, the 1st Applicant highlighted the **Outer Sheath Fixed 15.9 Fr, Guiding Tube for Second wire (Under Nephroscope), Bougie Dilator Tubes 9-28Fr (Qty 1)** and the **Grasping Forceps 5Fr x 340mm** but indicated the **Guiding Tube**(without highlighting) for its proposed **Endourology Mini-Nephroscope**, which was the only product under this Item to be supplied by the 1st Applicant. As a result, there was no need for the 1st Applicant to highlight the **Guiding Tube** for the product it was supplying.

It is worth noting that a complete Nephroscope contains other additional components (4mm 30Deg OP Nephroscope, Outer Sheath 25Fr (Rotatable) Sheath, Sheath Acc for Amplatz, 2 Stopcock Rotatable Qty and 11Fr 7Deg OP Nephroscope) outlined in the Tender Document, which were not highlighted by the 1st Applicant. This therefore means that without all the components required for a complete Nephroscope, the 1st Applicant failed to satisfy this criterion.

Item 12. Ancillary Equipment

This criterion is found at page 96 to 98 of the Tender Document. The 1st Applicant was found non-responsive under the following categories: -

- **Large Single Lumen Probes for Quick Drilling and Continuous Fragment Removal**

According to the 1st Applicant's letter of notification of unsuccessful bid dated 30th June 2020, the Procuring Entity contended that the 1st Applicant did not indicate this component. Having studied the 1st Applicant's original bid, the Board notes the following: -

- ✓ At page 269 to 274 of its original bid, the 1st Applicant proposed a **ShockPulse SE, Advanced Dual-Action Lithotripsy for Superior Efficiency and Surgeon Comfort**and an **HO: YAG LASER, Olympus Empower H35 Laser, Higher Frequency for Enhanced Laser Lithotripsy** found immediately after the Dividers labelled as **"12. Option Ancillary for EM11APA003 Ultrasonic Lithotripter for Urology" and 12. Option Ancillary for EM11APA003 Laser Machine,** respectively.

It is worth noting that even though the 1st Applicant proposed two products under this Item, it only highlighted some technical specifications for consideration by the Procuring Entity with respect to the first product, known as **ShockPulse SE, Advanced Dual-Action Lithotripsy for Superior Efficiency and Surgeon Comfort**, which runs through pages 269 to 272 of the 1st Applicant's original bid. This is because, it was

mandatory for bidders to highlight the product that they would supply to the Procuring Entity.

At page 271 of its original bid, the 1st Applicant indicated as follows: -

- ✓ Large single-lumen probe quick drills through all stone types, allowing continuous stone fragment removal;
- ✓ Substantially larger inner lumen for fragment removal.

- **Complete with suitable probes for immediate use**

The Board studied the 1st Applicant's bid and notes that the 1st Applicant did not indicate whether or not its proposed product (**ShockPulse SE, Advanced Dual-Action Lithotripsy for Superior Efficiency and Surgeon Comfort)** is complete with suitable probes for immediate use.

- **30Watt Holmium Laser 1-Quality**

According to page 96 of the Tender Document, bidders were required to indicate **"a 30-watt holmium laser for lithotripsy on stones of all types and sizes with high energy per pulse of 5J and reputation rate of 25Hz"** under this criterion. The Board studied the product proposed by the 1st Applicant running through pages 269 to 274 of its original bid and notes that there is no indication of **a 30-watt holmium laser for lithotripsy on stones of all types and sizes with high energy per pulse of 5J and reputation rate of 25Hz** as required by the Tender Document. However, the second product, i.e. **HO: YAG**

LASER, Olympus Empower H35 Laser, Higher Frequency for Enhanced Laser Lithotripsy indicates 35W at page 274 of the 1st Applicant's original bid, which was not required in the Tender Document, which specified a 30-watt holmium laser for lithotripsy on stones of all types and sizes with high energy per pulse of 5J and reputation rate of 25Hz.

- **The multipurpose, multi-specialty holmium wavelength ideal for fragmenting stones and for precision surgery, including the ablation and vaporization of soft tissue with minimal bleeding.**

According to page 96 of the Tender Document, bidders were required to indicate **the multipurpose, multi-specialty holmium wavelength ideal for fragmenting stones and for precision surgery, including the ablation and vaporization of soft tissue with minimal bleeding.** The Board studied the product proposed by the 1st Applicant running through pages 269 to 272 of its original bid and notes that there is no indication of the multipurpose, multi-specialty holmium wavelength ideal for fragmenting stones and for precision surgery, including the ablation and vaporization of soft tissue with minimal bleeding**.** In addition to this, the 1st Applicant has failed to demonstrate how it satisfied this criterion through its Request for Review.

- **FEATURES**

Clause 3 of Item 12. Ancillary Equipment at page 97 of the Tender Document contains the following features: -

- 7" high-resolution screen;
- Should be able to recognize fiber size;
- Green aiming beam;
- Save the laser setting for at least last ten treatments used;
- Should be on castors/ on a trolley.

Since the five components listed hereinbefore comprise of the features of the Ancillary Equipment, the Board studied the 1st Applicant's original bid to establish whether its product (**ShockPulse SE, Advanced Dual-Action Lithotripsy for Superior Efficiency and Surgeon Comfort)** complied with the five features and notes that: -

- The 1st Applicant did not indicate whether its product provides the 7" high-resolution screen required in the Tender Document;
- There is no indication whether the product is able to recognize fiber size;
- No indication whether the product has a Green aiming beam;
- No indication whether the product can save the laser setting for at least last ten treatments used;
- No indication whether the product is on castors/on a trolley. The Board notes that the 1st Applicant only provided pictures of its product.

From the foregoing, the Board notes that the 1st Applicant's product does not contain the five features outlined in **Clause 3 of Item 12. Ancillary Equipment at page 97 of the Tender Document.**

- **Msystem**

According to Clause 4 of Item 12. Ancillary Equipment at page 97 of the Tender Document, MSystem of the Ancillary Equipment includes the following: -

- ✓ 1 Single Foot Pedal;
- ✓ 1 20A Inlet 3 wire cable;
- ✓ 1 UK Power cable;
- ✓ 1 Operator Manual CD;
- ✓ 1 Debris Shields;
- ✓ 1 English Laser Warning Sign.

The six components listed hereinbefore comprise of the components of the MSystem of the Ancillary Equipment. As a result, the Board studied the 1st Applicant's original bid to establish whether its product (**ShockPulse SE, Advanced Dual-Action Lithotripsy for Superior Efficiency and Surgeon Comfort)** complied with the afore stated six features and notes the following: -

- ✓ The 1st Applicant did not indicate whether its product has a 1 Single Foot Pedal;

- ✓ The 1st Applicant did not indicate whether its product has a 1 20A Inlet 3 wire cable;
- ✓ The 1st Applicant did not indicate whether its product has a 1 UK Power cable;
- ✓ The 1st Applicant did not indicate whether its product has a 1 Operator Manual CD;
- ✓ The 1st Applicant did not indicate whether its product has a 1 Debris Shields;
- ✓ The 1st Applicant did not indicate whether its product has a 1 English Laser Warning Sign.

From the foregoing, the Board notes that the 1st Applicant's product does not comprise of the six components that make up the MSystem of the Ancillary Equipment outlined in Clause 4 of Item 12. Ancillary Equipment at page 97 of the Tender Document.

Warranty

The Board observes that Clause 16 of Item 12. Ancillary Equipment at page 98 of the Tender Document provides as follows: -

> ***"Warranty-2-Years.After the warranty period is over, five years annual Comprehensive Maintenance Contract (CMC) will have to be entered into with the terms and conditions mentioned in the tender specification. The successful bidder has to ensure that all the required spares and services are***

available during the period of CMC and 3years after that period

The Board already observed hereinbefore that the Procuring Entity required the technical specifications of the items (in this case, Item 12. Ancillary Equipment) to be covered in a Warranty of 2 years and catered for in the annual Comprehensive Maintenance Contract of 5 years, which will be entered into after the 2-year warranty has lapsed. In addition to this, a successful bidder has to ensure all the required spares and services are available during the period of Comprehensive Maintenance Contract (i.e. 5 years after the 2-year warranty period has lapsed) and 3 years after that period.

Having studied the 1st Applicant's original bid, the Board notes that the 1st Applicant did not provide documentation specifying the 2-year warranty required in the Tender Document neither did it mention that it will provide an annual Comprehensive Maintenance Contract of 5 years after the lapse of the Warranty period. It is also not clear whether the 1st Applicant will ensure all the required spares and services are available during the period of Comprehensive Maintenance Contract (i.e. a period of 5 years after the 2-year warranty period has lapsed) and 3 years after that period, in the event the 1st Applicant's bid is successful.

The 1st Applicant at page 057 of its original bid only specified it will provide an Annual PMC after Warranty with respect to the item under consideration and that the warranty would be on manufacturer's defects only. There is no indication that the 1st Applicant will provide a 2-year warranty before its proposed Annual PMC starts running after the warranty period, which warranty was required even before an Annual Comprehensive Maintenance Contract of 5 years could be entered into.

With respect to Item 12, the Board observes that the 1st Applicant only satisfied one component, i.e. **Large Lumen Probes for Quick Drilling and Continuous Fragment Removal**. However, the Board has observed that the 1st Applicant failed to demonstrate that it satisfied the other 20 components under Item 12 and could not therefore be considered for further evaluation.

In totality of Item 12, the Board finds that the1st Applicantfailed to fully satisfy the criterion of Item 12. Ancillary Equipment of the Technical Specifications of the Tender Document.

Having found that the 1st Applicant failed to fully satisfy the requirements of Items 8, 11 and 12, the Board finds that the 1st Applicant could not proceed to Financial Evaluation with respect to Item 8, 11 and 12 given that evaluation at the Technical Evaluation Stage was on a PASS/FAIL basis.

B. 2nd Applicant

On the third issue for determination, the 2nd Applicant received a letter of notification of unsuccessful bid dated 30th June 2020 with the following details: -

"Reference is made to the above tender and advise that your bid was unsuccessful due to the following reasons

Item No.	**Item Description**	**Reason for non-responsiveness**
2	Brachytherapy	You provided a user's manual instead of a brochure

The criterion under consideration is provided in Clause (B) 1. Manufacturer's Brochure of Section Viii. Stages of Tender and Evaluation Criteria at page 119 of the Tender Document as follows: -

SCHEDULE OF REQUIREMENTS – DOCUMENTARY REQUIREMENTS
1. MANUFACTURER'S BROCHURE

a) Tenderers are required to submit with their offer a legible manufacturer's brochure for each product/item offered. Failure to submit a legible manufacturer brochure will lead to disqualification of the product/item offered.

b) For the purpose of this tender a manufacturer brochure shall contain the following information;

i) Name and physical address of the product manufacturer, including the phone number, fax number, e-mail address, website (URL), other manufacturing sites if any, and country.

ii) The product model name/number assigned by the manufacturer

iii) Colour picture of the product, which must be clear and reasonably sized.

iv) Description of the product and its features.

v) Performance specification of the product including any other technical data

vi) Dimensions of the product

A brochure shall not be acceptable if it:

i) does not contain any of the requirements in (b) above from (i) to (vi)
ii) Contains superimposed images of the product

c) The assembled colour picture in the brochure should be a representative of the product that the bidder intends to supply.

d) For ease of comparison of bids, the tenderer is supposed to;

i) Highlight the product to be offered where two or more of these products appear in the brochure provided.

The Procuring Entity referred the Board to Addendum No. 1 dated 19th February 2020 which provides as follows: -

"...Question 1:

We have noticed that the tender requested for samples whereas the quantity required in most of the items is 1 unit. This unfortunately is not favourable/not possible or there is an error. Kindly confirm that sample submission is required

Response:

You are required to bring original manufacturer's brochure for all items"

Further to this, the Procuring Entity made reference to Clarification No. 2 dated 27th February 2020 with respect to the following response to clarification sought by bidders: -

"Question 3:

In TDS ITT 6.3C (b) the tender requires a sample. These are capital equipment which manufacturing time is more than given for tendering and price is very high kindly clarify

Answer:

For all equipment tender please provide a colored brochure for the items tendered for."

Having considered the provisions of the Tender Document and the two Addenda issued by the Procuring Entity, the Board studied the Tender Document to establish whether the Procuring Entity provided a sample manufacturer's brochure that would guide bidders on the format to be taken for such a brochure. However, no sample brochure was provided by the Procuring Entity but instead, the Tender Document only outlined the key items to be covered in the said brochure. This prompted the Board to determine the meaning of the word **"Brochure"** and **"Manual",** given

that the Procuring Entity contends the documentation provided by the 2nd Applicant was a user's manual and not a brochure.

The Oxford English Dictionary, 7th Editions defines the term **"brochure"** as a small book or magazine containing pictures and information about a product or service. A second meaning is given in the said dictionary to the word **"brochure"** as follows: -

> ***"brochures are promotional documents, primarily used to introduce a company, organization, products or services and inform prospective customers or members of the public of the benefits"***

Penny Sparke and Fiona Fisher in the book **"The Routledge Companion to Design Studies (2016)"** explain the purpose of a manufacturer's brochure as follows: -

> ***"Manufacturer's brochures sell the benefits of a company's products, not to objectively record reality, and although the actual forms and images of the products in the brochures can be assumed to be accurate, it cannot be assumed unquestioningly that the context in which they are shown or described is as veracious. These brochures are mostly aimed at corporate buyers in order to show new unfamiliar products"***

From the foregoing definitions, the Board notes that a brochure's main function is to act as a promotional document primarily used to introduce a company, organization, products or services and inform prospective customers or members of the public of the benefits of such company, organization, products or services. On its part, a manufacturer's brochure is issued by the manufacturer to sell the benefits of the products that are manufactured and/or produced by the company whilst introducing products to potential buyers.

Penny Sparke and Fiona Fisher in the book **"The Routledge Companion to Design Studies (2016)"** also describe the term "Manual" and "User Manual" as follows: -

> ***"A manual is a book giving instructions or information. A User Manual contains all essential information for the user to make full use of the information system. The manual includes a description of the system functions and capabilities, contingencies and alternate modes of operation, and step-by-step procedures for system access and use"***

The Board observes that unlike a manufacturer's brochure which may only be limited to advertising the benefits of the products that are manufactured and/or produced by a company, a manual or a user manual provides specific information and instructions related to the use of a product.

In determining whether the 2nd Applicant satisfied the criterion under consideration, the Board studied the document appearing from pages 057to 113 of the 2nd Applicant's original bid and notes the following: -

- **Name and physical address of the product manufacturer, including the phone number, fax number, e-mail address, website (URL), other manufacturing sites if any, and country**.
    - ✓ *At page 059 of the 2nd Applicant's original bid, itis stated that a manufacturer known as* ***"Elekta"*** *"designed a brand new afterloading platform for brachytherapy: Flexitron putting the user-not the technology first, Flexitron offers a logical workflow and intuitive user interface"*
    - ✓ *At page 064 of the 2nd Applicant's original bid, the physical address, telephone numbers and social media network addresses of the manufacturer (i.e. Elekta) is provided*;

- **The product model name/number assigned by the manufacturer**
    - ✓ *At page 064 of the 2nd Applicant's original bid, the product model name is identified as "Flexitron"*

- **Colour picture of the product, which must be clear and reasonably sized.**
    - ✓ *At page 059 of the 2nd Applicant's original bid, a colour picture of the product known as Flexitron is provided and a second*

colour picture is provided of a person who appears to be using the product

- **Description of the product and its features.**
  - ✓ *At page 062 of the 2nd Applicant's original bid, a description of the Flexitron is provided as follows: -*

    "When Oncentra Brarchy treatment planning (v4.x) is used in combination with the Flexitron afterloading platform, you will optimally benefit from a number of smart features that allow an easy, standardized way of treatment planning-while feeling confident about accurate and safe treatment delivery. Benefit from constant setting such as a fixed step size

    Because all transfer tubes have a fixed length (1000mm), the reference length will always be the same. The forward stepping boosts your confidence about treatment accuracy (0.5mm). For flexible catheters, dedicated CT-markers help you reconstruct and measure the source path length during the planning process. The friendly user-interface helps you save time

    -The scalable Flexitron platform with 10, 20 or 40 channels can easily be tailored to the evolving needs of your brachytherapy practice"

- **Performance specification of the product including any other technical data**
    - ✓ *At page 059 and 062 of the 2nd Applicant's original bid, the following performance specification is provided:-*
      -Connectivity to OIS and MOSAIQ

    - ✓ *At page 060 of the 2nd Applicant's original bid, a description of the performance of the product (i.e. Intuitive interface with smooth navigation saves time) is given together with a diagram illustrating the products performance.*

- **Dimensions of the product**
    - ✓ *At page 088 of the 2nd Applicant's original bid is a drawing of a complete Flexitron (which is similar to the diagram found at page 059 of the 2nd Applicant's bid) with Treatment Delivery Unit (TDU) dimensions) illustrated therein;*
    - ✓ *At page 085 of the 2nd Applicant's original bid is a drawing of a Typical Flexitron treatment room with dimensions listed as; 4.000mm, 5.000mm and 2.500mm;*
    - ✓ *At page 089 of the 2nd Applicant' original bid is a drawing of a Source Positions Check Ruler (SPCR) with dimensions listed as 410x60x10mm (L x W x H);*
    - ✓ *At page 089 of the 2nd Applicant's original bid is a drawing of a Remote controlled camera (option) which forms part of the Flexitron with the dimensions illustrated therein;*

- ✓ *At page 090 of the 2nd Applicant's bid is a drawing of a Start enable module (option) which forms part of the Flexitron with the dimensions illustrated therein;*
- ✓ *At page 091 of the 2nd Applicant's original bid is drawing of an Emergency button box of the Flexitron with dimensions illustrated therein;*
- ✓ *At page 091 of the 2nd Applicant's original bid is a drawing of a Treatment status indicator (TSI) of the Flexitron with dimensions illustrated therein;*
- ✓ *At page 093 of the 2nd Applicant's original bid is a drawing of a Treatment Control Panel of the Flexitron with dimensions illustrated therein;*
- ✓ *At page 094 of the 2nd Applicant's original bid is a drawing of a Radiation Console of the Flexitron with dimensions illustrated therein;*
- ✓ *At page 094 of the 2nd Applicant's original bid is a drawing of a Insulation box of the Flexitron with dimensions illustrated therein; and*
- ✓ *At page 095 of the 2nd Applicant's original bid is a drawing of a Junction Box of the Flexitron with dimensions illustrated therein*

Having considered the document running from pages 045 to 113 of the 2nd Applicant's original bid, the Board notes that the said document meets all the requirements of a manufacturer's brochure specified in Clause (B) 1 (a-vi). Manufacturer's Brochure of Section VIII. Stages of Tender and

Evaluation Criteria at page 119 of the Tender Document. The Procuring Entity did not provide a sample format for a brochure but only specified the contents of the brochure it required. This, in the Board's view, gave bidders leeway to provide documentation that would contain all the items listed in Clause (B) 1. (a-vi) Manufacturer's Brochure of Section VIII. Stages of Tender and Evaluation Criteria at page 119 of the Tender Document.

In **Miscellaneous Succession Cause No. 15 of 2018, Re Estate of George Gikundi- (Deceased) [2019] eKLR**, the court held that: -

> ***"At the end of the day a court of law should always aspire to deliver or administer justice based on substance rather than form"***

Having noted that the Procuring Entity did not provide a sample manufacturer's brochure, the Board finds that the substance of the 2nd Applicant's document contains all the requirements of a manufacturer's brochure as outlined hereinbefore which were the bare minimum required by the Procuring Entity, therefore satisfied the requirement of Clause (B) 1. (a-vi) Manufacturer's Brochure of Section VIII. Stages of Tender and Evaluation Criteria at page 119 of the Tender Document.

Accordingly, the Board finds that the 2nd Applicant satisfied the requirement of Clause (B) 1 (a, b (i)-vi). Manufacturer's Brochure of Section VIII. Stages of Tender and Evaluation Criteria at page 119 of the Tender Document.

C. 3rd Applicant

On the fourth issue for determination, the 3rd Applicant received a letter of notification of unsuccessful bid dated 30th June 2020 which contained the following details: -

"Reference is made to the above tender and advise that your bid was unsuccessful due to the following reasons: -

Item	Item Description	Reason for non-responsiveness
2	Brachytherapy	You provided quality certificate No. MD550255 that was for sale and installation and the Council Directive 93/42/EEC was not issued by an independent certification body

Having considered parties' pleadings, the Board notes that the criterion under consideration is provided in Clause (B) (3). Technical Evaluation of Section VIII. Stages of Tender and Evaluation Criteria at page 120 of the Tender Document as follows: -

"3. Quality Certification

Three international quality standards bodies have been used for this tender

(i) ISO 13485-Medical Device quality management system;

(ii) IEC 60601-Requirement for safety of medical electrical equipment; and

(iii) Council Directive 93/42/EEC-Medical devices

(a) The tenderer shall be required to submit ISO 13485-quality certificate and any of the two above for purpose of this tender

(b) For the <u>certificate of conformity</u> to be valid it shall comply with the following;

i) Issued by recognized independent certification body to the manufacturer

ii) It should be current (not have expired)

iii) Clearly specify the product(s) being offered

iv) State the location of the manufacturing plant

v) Must not contain any alterations whosoever"

From the foregoing, bidders were required to submit an ISO 13485-Medical Device quality management system as a mandatory requirement and to choose either an IEC 60601-Requirement for safety of medical electrical equipment or Council Directive 93/42/EEC-Medical devices.

The Board notes that having expunged the Procuring Entity's Further Affidavit sworn on 7th August 2020 and filed on even date, the Procuring Entity in paragraph 12 of its Replying Affidavit sworn on 30th July 2020 and filed on even date admitted that the 3rd Applicant provided an ISO Certificate but took issue with the fact that the Council Directive 93/42/EEC No. 01414 of the 3rd Applicant which in the Procuring Entity's view, was not issued by a recognized independent body as required in the Tender Document.

The Board takes cognizance that the Procuring Entity being the beneficiary of the product being procured, is better placed to know its needs.

The Board observes that the Council Directive 93/42/EEC (i.e. Council Directive 93/42/EEC of 14 June 1993 concerning medical devices) (hereinafter referred to as "the Council Directive") is a public document that can be accessed on the Official Website of the European Union (www.europa.eu). According to Article 1 of the Council Directive, it is stated as follows: -

> ***"This Directive shall apply to medical devices and their accessories. For the purposes of this Directive, accessories shall be treated as medical devices in their own right. Both medical devices and accessories shall hereinafter be termed devices.***

'medical device' means any instrument, apparatus, appliance, software, material or other article, whether used alone or in combination, including the software intended by its manufacturer to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application, intended by the manufacturer to be used for human beings for the purpose of:

-diagnosis, prevention, monitoring, treatment or alleviation of

disease,

-diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap,

— investigation, replacement or modification of the anatomy or of a physiological process,

— control of conception, and which does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means"

Article 11 of the Council Directive further states that: -

"In the case of devices falling within Class III, other than devices which are custom-made or intended for clinical investigations, the manufacturer shall, <u>in order to affix the CE marking</u>, either:

(a) follow the procedure relating to the EC declaration of conformity set out in Annex II (full quality assurance); or

(b) follow the procedure relating to the EC type-examination set out in Annex III, coupled with:

(i) the procedure relating to the EC verification set out in Annex IV; or

(ii) the procedure relating to the EC declaration of conformity set out in Annex V (production quality assurance).”

Article 11 of the Council Directive demonstrates that there are two types of procedures that a manufacturer ought to follow in order to affix the CE marking, that is, either follow the procedure relating to the EC declaration of conformity set out in Annex II (full quality assurance) or the procedure relating to the EC type-examination set out in Annex III (whereby the manufacturer will elect the procedure relating to the EC verification set out in Annex IV or the procedure relating to the EC declaration of conformity set out in Annex V (production quality assurance)].

The Board studied Annex III of the Council Directive and notes that a procedure is outlined therein for EC TYPE-EXAMINATION and the said examination is defined as follows: -

"EC Type Examination is the procedure whereby a notified body ascertains and certifies that a representative sample of the production covered fulfils the relevant provisions of this Directive"

It is worth noting that EC type examination under Annex III of the Council Directive is conducted together with a procedure relating to EC verification set out in Annex IV or EC declaration of conformity set out in Annex V. Clause 5 of Annex IV of the Council Directive further states that: -

"Every product is examined individually and the appropriate tests defined in the relevant standard(s) referred to in Article 5 or equivalent tests must be carried out in order to verify, where appropriate, the conformity of the products with the EC type described in the type-examination certificate and with the requirements of the Directive which apply to them.

The notified body must affix, or have affixed its identification number to each approved product and must draw up a written certificate of conformity relating to the tests carried out"

It is therefore evident that it was possible for a manufacturer to obtain a certificate of conformity after an EC Type examination set out in Annex III, coupled with the procedure relating to the EC verification set out in Annex IVof the Council Directive has been concluded. This is a separate process

from the one outlined in Annex II (Quality Assurance) of the Council Directive for obtaining a Declaration of Conformity with respect to a medical device. This therefore leads the Board to address the question; what did the Tender Document require bidders to provide?

Clause (B) (3) (b). Technical Evaluation of Section VIII. Stages of Tender and Evaluation Criteria at page 120 of the Tender Document specified that bidders were to provide a Certificate of Conformity. However, the 3rd Applicant provided a Declaration of Conformity. Upon studying the Declaration of Conformity attached to the 3rd Applicant's original bid, the foot of the said declaration of conformity provides that: -

> ***"This Declaration of Conformity is valid until the expiration date of EC Certificate referenced above. Format L2447 Rev 04"***

It is evident that the 3rd Applicant's own declaration of conformity makes reference to an EC Certificate. Having studied the provisions of the Council Directive, the Board notes that a medical device may be subjected to an EC Type Examination coupled with EC Verification, hence the reason why the certificate of conformity would also be referred to as an EC Certificate. The EC Certificate mentioned in the 3rd Applicant's declaration of conformity is not attached to the 3rd Applicant's bid. However, what has been referenced is an EC Certificate No. CE 01414, which certificate was not provided in the 3rd Applicant's bid for the Board to verify its contents.

The 3rd Applicant failed to provide the EC Certificate (i.e. certificate of conformity), which is the document specified under Clause (B) (3) (b). Technical Evaluation of Section VIII. Stages of Tender and Evaluation Criteria at page 120 of the Tender Document.

Even if the Board were to consider the contents of the 3rd Applicant's declaration of conformity, the Board observes the following: -

- ✓ *The Declaration of Conformity is issued on the letterhead of Varian, i.e. the 3rd Applicant's themselves and not an independent body;*
- ✓ *It specifies the products being offered as Remote Afterloading Brachytherapy system, GammaMedplus Ix/GammaMedplus 3/24Ix,GM12000680 Ir-192 Source, HDR (GMplus & GMplusiX), GM12000560 Ir-192 Source, PDR (GMplus & GMplusiX);*
- ✓ *It states that the legal manufacturer is located in 3100 Hansen Way, Palo Alto, CA 94304-1038, USA;*
- ✓ *The Declaration was issued on **15th March 2019** and is valid until the expiry date of the EC Certificate that was not attached in the 3rd Applicant's original bid. As a result, one cannot ascertain whether or not the Declaration of Conformity is with respect to a Certificate of Conformity that was still valid as at the tender submission deadline of 26th March 2020.*

The Board observes that the Evaluation Committee could not ascertain the validity of the 3rd Applicant's declaration of conformity, which in any case, is not a Certificate of Conformity having established that the said declaration makes reference to an EC Certificate that is not attached in the 3rd Applicant's bid.

The Board has already noted that the criterion under Clause (B) (3). Technical Evaluation of Section VIII. Stages of Tender and Evaluation Criteria at page 120 of the Tender Document had two limbs (i.e. ISO 13485-Medical Device Quality Management System & to either provide; IEC 60601-Requirement for safety of medical electrical equipment or Council Directive 93/42/EEC- Medical Devices). The 3rd Applicant failed to satisfy the requirement of Council Directive 93/42/EEC- Medical Devices which was a mandatory requirement and never provided the alternative being IEC 60601-Requirement of safety for medical electrical equipment. Given that evaluation at the Technical Stage was based on a PASS/FAIL basis, it is the Board's considered view that the 3rd Applicant's bid could not proceed to Financial Evaluation.

Accordingly, the Board finds that the 3rd Applicant failed to satisfy the criterion under Clause (B) (3). Technical Evaluation of Section VIII. Stages of Tender and Evaluation Criteria at page 120 of the Tender Document.

The 2nd Applicant and the 3rd Applicant contended that they had the lowest bid price and therefore ought to have been awarded the subject tender whereas the Interested Party did not submit the lowest bid price yet was awarded Item 2 of the subject tender.

It is worth noting that both the 2nd Applicant and the 3rd Applicant challenged the outcome of their respective bids with respect to Item 2. Brachytherapy of the subject tender. According to their respective Forms of Tender, the 2nd Applicant submitted a bid price of €609,904.80 whereas the 3rd Applicant submitted a bid price of USD385,000.00. On the other hand, the Interested Party was awarded Item 2 of the subject tender at the price of Kshs. 125,136,405.79.

The Board observes that the Procuring Entity herein specified the award criterion in Clause 35 of Section I. Instruction to Tenderers of the Tender Document as follows: -

> ***"Pursuant to ITT clauses 32, 34 and 39, the Purchaser will award the contract to the 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, pursuant to ITT clause 35"***

Further, ITT Clause 32.5 (d) of Section II. Tender Data Sheet of the Tender Document provides that: -

> ***"Tender evaluation and award will be made on individual item basis."***

This means, the Procuring Entity would determine the substantially responsive tender determined to be the lowest evaluated tender for award on each of the respective items in the subject tender in accordance with Clause 35 of Section I. Instruction to Tenderers read together with ITT Clause 32.5 (d) of Section II. Tender Data Sheet of the Tender Document.

This award criterion is identified in section 86 (1) (a) of the Act applicable when the Request for Proposal method of tendering is not used and is stated 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"***

The court in **Judicial Review No. 106 of 2014, Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, while

considering the issue of award of a tender based on the lowest evaluated price held as follows: -

> ***"the documents before the Board demonstrated the manner in which the lowest evaluated price was to be reached and the same documents also showed that the lowest evaluated price awarded was reached in that manner...There is no requirement in the Act, the Regulations and the tender document, requiring a procuring entity to award a tender at the price set in the form of tender without carrying out bid evaluation"***

Having considered the finding in the above case, the Board notes that consideration of price is done at the last stage of evaluation after bidders already demonstrated their responsiveness to eligibility and mandatory requirements (including technical specifications) of a tender document. It is also worth noting that Article 227 (1) of the Constitution cites principles that guide public procurement process. The said provision states: -

> ***"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"***

Procurement of goods and services in a cost-effective manner is one out of five principles that guide public procurement. The principles of fairness,

equitability, transparency and competitiveness dictate that bidders are subjected to the same evaluation criteria so that they compete on an equal footing for award of a tender. Therefore, the price a bidder quoted in its Form of Tender does not count as the sole consideration for award of a tender.

From the Procuring Entity's Evaluation Report dated 27th April 2020, the 2nd Applicant was not among the bidders that proceeded to Financial Evaluation. At the time Technical Evaluation was carried, the Evaluation Committee found the 2nd Applicant's bid non-responsive, therefore it could not be subjected to a Financial Evaluation, since in the Procuring Entity's view, the 2nd Applicant's bid was not responsive at the end of Technical Evaluation.

On the other part, the Board has established that the 3rd Applicant failed to satisfy all the mandatory requirements at the Technical Evaluation Stage and therefore could not be subjected to Financial Evaluation where consideration of the price it offered with respect to Item 2 of the subject tender is undertaken. In essence, the Evaluation Committee could not award Item 2 of the subject tender to either the 2nd Applicant or the 3rd Applicant simply because of the price they quoted at tender opening without first determining whether the two bidders are substantially responsive to eligibility and mandatory requirements including technical specifications of the Tender Document.

In determining the appropriate orders to issue in the circumstances, the Board observes that ITT Clause 18.1 of Section II. Tender Data Sheet specified the tender validity period to be 120 days after the tender submission deadline. The Procuring Entity issued a tender extension notice extending the tender submission deadline to 26th March 2020. By the time the 1st Applicant lodged its Request for Review 88 days of the tender validity period had lapsed. Section 168 of the Act states that: -

> ***"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed"***

In **Judicial Review No. 540 for 2017, Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR**, the court while addressing the import of section 168 of the Act provisions held as follows: -

> ***"Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review***

Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings."

According to the above finding, an automatic suspension of procurement proceedings including the tender validity period exists once a Request for Review is lodged before this Board. This means, the tender validity period of the subject tender stopped running when the 1st Applicant lodged the Request for Review on 22nd July 2020. Accordingly, the Board finds that the tender validity period of the subject tender has 32 days remaining (i.e. 120-88).

Having found that the 2nd Applicant satisfied the requirement in Clause (B) 1. Manufacturer's Brochure of Section VIII. Stages of Tender and Evaluation Criteria at page 119 of the Tender Document, this Board is cognizant of the powers vested upon it by section 173 (b) of the Act which states as follows: -

> ***"Upon completing a review, the Review Board may do any one or more of the following—***
>
> ***(a) .....;***
>
> ***(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"***

The Board deems it necessary to direct the Accounting Officer of the Procuring Entity to notify the 1st Applicant of the outcome of its bid with respect to Item 1. Arthroscopy Tower of the subject tender, to re-instate the 2nd Applicant's bid at the Technical Evaluation Stage for re-evaluation at the Technical Evaluation Stage and to proceed to the logical conclusion on procurement of Item 1. Arthroscopy Tower, Item 3. Colonoscope, Item 4. Duodenoscope, Item 5. Ent Telescope, Item 7. Gastroscope, Item 8. General Surgery Laparoscopic Equipment, Item 10. Gynaecology Telescopes and Item 11. Laparoscopic Equipment for Urology of the subject tender.

In totality, the Consolidated Request for Review succeeds only with respect to the following orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

1. **The Procuring Entity's Letter of Notification for Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment dated 30th June 2020 addressed to the Interested Party herein, the 1st Applicant and all other unsuccessful bidders (with respect to Item 1. Arthroscopy Tower), be and is hereby cancelled and set aside.**
2. **The Procuring Entity is hereby directed to issue new letters of notification of the outcome of Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment with respect to Item 1. Arthroscopy Tower to the Interested Party, the 1st Applicant and all other unsuccessful bidders in accordance with section 87 of the Act.**
3. **The Procuring Entity's Letters of Notification for Tender dated 30th June 2020 addressed to the Interested Party, the**

2nd Applicant, 3rd Applicant and all other unsuccessful bidders with respect to Item 2. Brachytherapy of Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment, be and are hereby cancelled and set aside.

4. **The Procuring Entity is hereby directed to re-admit the 2nd Applicant's tender at the Technical Evaluation Stagetogether with all other tenders that qualified for Technical Evaluation and conduct a re-evaluation at the Technical Evaluation Stage with respect to Item 2. Brachytherapy of Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment.**
5. **Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this review.**

For avoidance of doubt, the Procuring Entity is at liberty to proceed to the logical conclusion on the procurement of Item 1. Arthroscopy Tower, Item 3. Colonoscope, Item 4. Duodenoscope, Item 5. Ent Telescope, Item 7. Gastroscope, Item 8. General Surgery Laparoscopic Equipment, Item 10.

Gynaecology Telescopes and Item 11. Laparoscopic Equipment for Urology of Tender No. KEMSA/REFF/HOSP/OIT 06/2019-2022 for the Supply, Delivery, Installation, Testing and Commissioning of Endoscopy Equipment, which are not subject to reevaluation.

6. **Given that the subject tender has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 12th day of August 2020

CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**