

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 112/2020 OF 30TH JULY 2020

BETWEEN

MADISON GENERAL INSURANCE KENYA LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KWALE.....1ST RESPONDENT

AAR INSURANCE KENYA.....2ND RESPONDENT

Review against the decision of the County Government of Kwale with respect to Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

The County Government of Kwale (hereinafter referred to as “the Procuring Entity”) advertised Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff (hereinafter referred to as “the subject tender”) on MyGov Publication Website on 21st April 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 7 No. of bidders by the bid submission deadline of 5th May 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders and their representatives. The seven bids were recorded as follows: -

1. M/s AAR Insurance Kenya
2. M/s CIC General Insurance Limited
3. M/s GA Insurance Company
4. M/s Resolution Insurance Company
5. M/s Kenya Alliance Insurance
6. M/s Madison General Insurance Kenya Ltd
7. M/s Jubilee Health Insurance Ltd

Evaluation of Bids

The bids were evaluated electronically using the Integrated Financial Management Information System (IFMIS) using the evaluation criteria specified in the Tender Document and as reproduced in the IFMIS Evaluation

Matrix Report dated 11th May 2020, at the Preliminary, Technical and Financial Evaluation stages. Upon conclusion of the Financial Evaluation, the Evaluation Committee recommended award of the subject tender to M/s AAR Insurance Kenya Ltd at its tender sum of Kshs. 284,999,997.00.

Professional Opinion

In a professional opinion dated 11th May 2020, the Head of Procurement Function reviewed the IFMIS Evaluation Matrix Report dated 11th May 2020 and opined that evaluation of bids in the subject tender satisfied the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") therefore urged the Procuring Entity's Chief Officer, Finance and Economic Planning to award the subject tender to M/s AAR Insurance Kenya Ltd at its tender sum of Kshs. 284,999,997.00, which recommendation was approved by the Chief Officer, Finance and Economic Planning.

Notification to Bidders

In letters dated 13th May 2020, the Chief Officer, Finance and Economic Planning notified the successful bidder and all the unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 79/2020

M/s Madison General Insurance Kenya Limited lodged a Request for Review dated 11th June 2020 and filed on 12th June 2020 seeking the following orders: -

- i. An order annulling and setting aside the Respondent's decision awarding TENDER NO: CGK-797822-2019/2020 to AAR INSURANCE KENYA, the alleged successful bidder;***
- ii. An order annulling and setting aside the Respondent's decision notifying the Applicant that it had not been successful in TENDER NO: CGK-797822-2019/2020 by way of the letter dated 13th May 2020;***
- iii. The Board be pleased to review all records of the procurement process relating to TENDER NO: CGK-797822-2019/2020 and grant an order substituting the decision of the Review Board for the decision of the 1st Respondent and award the Tender to the Applicant;***
- iv. Consequent to (iii) above, an order directing the 1st Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- v. Further and/or in the alternative and without prejudice to any of the other prayers sought herein, an order directing the 1st Respondent to re-admit the Applicant back to the tender process and subject its tender to technical evaluation and conclude the process in strict adherence to the Tender, the Act***

and the Regulations and award to the lowest competitive bidder;

- vi. An order directing the Respondent to pay the costs of and incidental to these proceedings; and***
- vii. Such other or further relief or reliefs as the Board shall deem just and expedient.***

Having considered parties' pleadings and written submissions together with confidential documents submitted to it pursuant to section 67 (3) (e) of the Act, the Board granted the following orders: -

- 1. The Contract dated 1st June 2020 signed between the Procuring Entity and M/s AAR Insurance Kenya Limited, the 2nd Respondent herein with respect to Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 13th May 2020 addressed to the 2nd Respondent with respect to the subject tender, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Letters of Notification of Unsuccessful bid dated 13th May 2020 addressed to the Applicant and the one addressed to the Interested Party with respect to the subject tender, are hereby cancelled and set aside.**

4. The Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to the following criteria, taking into consideration the Board's findings in this Request for Review: -

- Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document**
- Clause 2.22 (7) of the Appendix to Instructions to Tenderers of the Tender Document; and**
- Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document**

5. Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award to the lowest evaluated responsive tenderer within fourteen (14) days from the date of this decision.

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

Re-evaluation

According to the Minutes of Tender Re-evaluation dated 16th July 2020, the Evaluation Committee subjected three tenders (i.e. M/s AAR Insurance Kenya Limited, M/s Madison General Insurance Kenya Limited and M/s

Resolution Insurance Company Limited) to Technical Evaluation. However, it is only two bidders who achieved the overall technical score of 70 points required to qualify for Financial Evaluation. M/s Madison General Insurance Kenya Limited was found non-responsive due to the following reasons: -

- *Recommendation Letters provided were scanned copies that appeared black and white;*
- *The bidder did not provide sufficient proof of similar services offered/on-going with a minimum of Kshs. 150,000,000/- from 5 institutions, through valid award letters or contract agreements;*
- *The Audited Accounts attached by the bidder were not certified thus the Evaluation Committee could not rely on them to perform liquidity ratio;*
- *The evidence provided on medical service provider showing specialist and international partners did not include recommendation letters from them.*

Financial Evaluation

At the Financial Evaluation Stage, the Evaluation Committee recorded the amounts quoted by the remaining two bidders as follows: -

S/NO		AAR	RESOLUTION
1	Tender sum (Kshs.)	284,999,997.00	299,920,455.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s AAR Insurance Kenya Ltd for being the most responsive and lowest evaluated bidder at its tender sum of Kshs. 284,999,997.00

Professional Opinion

In a professional opinion dated 16th July 2020, the Procuring Entity's Head of Procurement reviewed the Minutes of Tender Re-evaluation dated 16th July 2020 and noted the recommendation made therein that award of the subject tender be made to M/s AAR Insurance Kenya Ltd for being the most responsive and lowest evaluated bidder at its tender sum of Kshs. 284,999,997.00.

He took the view that the re-evaluation process complied with provisions of the Act therefore urged the Chief Officer, Finance & Economic Planning to approved the said award recommendation. The Chief Officer, Finance & Economic Planning approved the professional opinion prepared by the Head of Procurement on 17th July 2020.

Notification to Bidders

In letters dated 17th July 2020, the Chief Officer, Finance & Economic Planning notified the successful and unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 112/2020

M/s Madison General Insurance Kenya Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 30th July 2020 together with a Statement in Support of the Request for Review sworn

and filed on even date, through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders: -

- a) An order nullifying and setting aside the Respondent's decision awarding Tender No: CGK-797822-2019/2020 to AAR INSURANCE KENYA, the alleged successful bidder;***
- b) An order nullifying and setting aside the Respondent's decision notifying the Applicant that it had not been successful in TENDER NO: CGK-797822-2019/2020 by way of the letter dated 17th July 2020;***
- c) The Board be pleased to review all records of the procurement process relating to TENDER NO: CGK-797822-2019/2020 and substitute its decision for the decision of the 1st Respondent and award the Tender to the Applicant;***
- d) Consequent to (c) above, an order directing the 1st Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board;***
- e) Further and/or in the Alternative and without prejudice to any of the other prayers sought herein, an order directing the 1st Respondent to re-admit the Applicant back to the tender process and subject its tender to technical evaluation and conclude the process in strict adherence to the Tender, the Act and the Regulations and award to the lowest competitive bidder;***
- f) An order directing the 1st Respondent to pay the costs of and incidental to these proceedings; and***

g) Such other or further relief or reliefs as this board shall deem just and expedient.

In response, the 1st Respondent lodged a Memorandum of Response dated 6th August 2020 and filed on 10th August 2020 together with a Notice of Preliminary Objection dated and filed on even date through the firm of Muturi Gakuo & Kibara Advocates. However, on 11th August 2020, the 1st Respondent filed a Notice of Withdrawal of its Notice of Preliminary Objection. The same was marked as withdrawn by the Board and thus shall not form part of these proceedings. On its part, the 2nd Respondent lodged a Replying Affidavit sworn and filed on 10th August 2020 through the firm of Chepkuto 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

the 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.

Accordingly, the Applicant lodged Written Submissions dated and filed on 17th August 2020, the 1st Respondent lodged Written Submissions dated 12th August 2020 and filed on 17th August 2020 while the 2nd Respondent lodged Written Submissions dated and filed on 18th August 2020.

BOARD'S DECISION

The Board has considered all 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 issue calls for determination: -

Whether the Procuring Entity complied with the orders of the Board issued on 3rd July 2020 in PPARB Application No. 79 of 2020, Madison General Insurance Kenya Limited v. The Accounting Officer, County Government of Kwale and 2 Others.

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

It is not in dispute that the Applicant herein was among seven bidders who participated in the subject procurement process advertised by the Procuring Entity on 21st April 2020. It is also not in dispute that the Procuring Entity conducted a first evaluation process and found the Applicant's bid non-responsive at the Technical Evaluation Stage whereas the 2nd Respondent qualified for Financial Evaluation and was subsequently awarded the subject tender through a letter of notification of award dated 13th May 2020. Being aggrieved by this decision, the Applicant lodged Request for Review No. 79/2020 challenging the outcome of its bid.

The Board having considered each of the parties' cases and all documentation filed before it, rendered a decision on 3rd July 2020 in **PPARB Application No. 79 of 2020, Madison General Insurance Kenya Limited v. The Accounting Officer, County Government of Kwale and 2 Others** (hereinafter referred to as "Review No. 79 of 2020") directing the Procuring Entity to undertake the following: -

1.;
2.;
3.;
4. **The Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at**

the Technical Evaluation Stage with respect to the following criteria, taking into consideration the Board’s findings in this Request for Review: -

- **Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document**
- **Clause 2.22 (7) of the Appendix to Instructions to Tenderers of the Tender Document; and**
- **Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document.**

5. Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award to the lowest evaluated responsive tenderer within fourteen (14) days from the date of this decision.

6.”

According to Order No. 4 of the decision in Review No. 79 of 2020, the Board directed the Procuring Entity to re-instate the Applicant’s bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to **Clause 2.22 (1), Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document** whilst taking into consideration the Board’s findings in Review No. 79 of 2020. Further to this, pursuant to Order No. 5 in Review No. 79/2020 the Board directed the Procuring Entity to proceed with the procurement process to its logical

conclusion, including the making of an award to the lowest evaluated responsive tenderer within fourteen (14) days from the date of the decision in Review No. 79 of 2020.

It is worth noting that, pursuant to Order No. 4 of the decision rendered on 3rd July 2020 in Review No. 79 of 2020, the Board specified only three criteria found at the Technical Evaluation Stage as outlined hereinbefore under which the Procuring Entity was required to conduct a re-evaluation process. These three criteria deal with the following: -

- **Clause 2.22 (1) [Provide proof of at least five (5) clients from reputable institutions through original recommendation letters on the clients' letterheads whom similar services have/are been offered];**
- **Clause 2.22 (7) [Provide evidence of medical service providers showing specialists & their recommendation letters plus international partners]; and**
- **Clause 2.22 (10) [Provide Premium chargeable for additional members and dependants as per the job groups provided in the document]**

Through the letter of notification of unsuccessful bid dated 17th July 2020, the Applicant was notified that its bid was unsuccessful due to the following reasons: -

"This is to notify you that your application dated 5th May 2020 in relation to the above mentioned tender was unsuccessful upon evaluation by committee constituted:

- Recommendation letters provided were scanned copies that appeared in black and white. To prove that they were original recommendation letters, the committee expected them to have been certified as true copies;***
- The bidder did not provide sufficient proof of similar services offered/on-going from five (5) with a minimum of Kshs. 150,000,000/-, through valid award letters or contract agreements hence did not score maximum marks;***
- Since the Audited Accounts attached by the bidder were not certified we could not rely on them to perform liquidity ratio;***
- Evidence provided on medical service provider showing specialist and international partners did not include recommendation letters from them."***

The Board studied the Tender Document to establish the specific clauses that deal with the criteria outlined in the Applicant's letter of notification of unsuccessful bid and notes that the reasons cited in the Applicant's letter correspond to the following criteria: -

- **Clause 2.22 (1) [Provide proof of at least five (5) clients from reputable institutions through original recommendation letters on the clients' letterheads whom similar services have/are been offered];**
- **Clause 2.22 (3) [Proof of similar services offered/on-going, at least five (5) with a minimum of Kshs. 150,000,000 for the aforementioned institutions, through valid award letters, contract agreements;**
- **Clause 2.22 (5) [Provide Certified Audited Accounts for 2018 and 2019 with Gross Premium for Medical Cover of Kshs. 150 Million per year]; and**
- **Clause 2.22 (7) [Evidence of medical service providers showing specialists & their recommendation letters plus international partners].**

This prompted the Board to study the Procuring Entity's Minutes of Tender Re-evaluation dated 16th July 2020 to establish the manner in which the Evaluation Committee carried out the re-evaluation process and we note that the Evaluation Committee reinstated the Applicant's bid together with the 2nd Respondent's bid and the bid of M/s Resolution Insurance Company Limited at the Technical Evaluation Stage and conducted a re-evaluation at the Technical Evaluation Stage with respect to the following criteria outlined in Clause 2.22 of the Appendix to Instructions to Tenderers of the Tender Document: -

Instructions To tenderers	Particulars of appendix to instruction to Tenderers	Points
	Evaluation and Comparison of Tenders TECHNICAL EVALUATION CRITERIA (Total Points 70)	Max Score
1	Provide list of at least five (5) clients from reputable institutions, through original recommendation letters on the clients' letterheads whom similar services have/are been offered.	5
2	Provide five (5) recommendation letters from key major health providers.	5
3	Proof of similar services offered/on-going, at least five (5) with a minimum of Kshs 150,000,000 for the aforementioned institutions, through valid award letters, Contract Agreements. Any award of less than 150,000,000 10 0	10 0
4	Provide CVs & Academic testimonials for at least ten (10) key professional staff and Management personnel, specifying the relevant portfolio/tasks.	10
5	Provide Certified Audited Accounts for 2018 and 2019 with Gross Premium for Medical cover of Kshs 150 Million per year	10
6	Provide Certified Bank statements for January 2018 to December 2019	10
7	Provide evidence of Medical service providers showing specialists & their recommendation letters plus international partners	10
8	Provide a claim procedure, a turnaround time and evidence of claim settlements to Medical Service Providers	10
9	Provide proof of Medical Insurance Business for over 10years	10
10	Provide premium chargeable for additional members and dependents as per the job groups provided in the document	10

It is evident that whereas the Board directed the Procuring Entity to carry out a re-evaluation at the Technical Evaluation Stage only with respect to Clause 2.22 (1), Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document outlined in Order No. 4 of the decision rendered on 3rd July 2020 in Review No. 79 of 2020, the Procuring Entity, in blatant breach of the specific orders issued by the Board, conducted a re-evaluation of all the ten criteria outlined in Clause 2.22 of the Appendix to Instructions to Tenderers of the Tender Document.

At this juncture, the Board deems it necessary to address its mind on the effect of orders issued in a decision rendered by the Board, especially in cases where the decision of the Board is not challenged by way of Judicial Review or by way of an Appeal. Section 175 (1) of the Act provides that: -

"175. Right to judicial review to procurement

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

Further, Article 165 (3) (e) of the Constitution provides that: -

(1)

(2)

(3) Subject to clause (5), the High Court shall have-

(a);

(b);

(c);

(d);

(e) any other jurisdiction, original or appellate, conferred on it by legislation

The Court in **Judicial Review Miscellaneous Application No. 337 of 2013, Republic v Public Procurement Administrative Review Board & 2 others ex parte Noble Gases International Limited [2013] eKLR** had occasion to pronounce itself on the import of section 175 (1) of the Act, when it held as follows: -

"...the fourteen days' period is a window availed to serve the purpose of limiting the time frame within which a review against the Board's decision can be lodged in the High Court for purposes of expediency and conclusiveness of the Board's decision as these activities are time bound and the procurement process ought not be held hostage to indefinite proceedings."

The Board observes that the Court in the above case found that section 175 (1) of the Act provides a limited time-frame within which a person aggrieved by the decision of this Board may institute Judicial Review proceedings for purposes of expediency and conclusiveness of the Board's decision. This means, failure to challenge a decision rendered by this Board in accordance with section 175 (1) of the Act renders such decision final and binding to all parties to the Request for Review. The Procuring Entity in this instance, did not challenge the decision of the Board rendered on 3rd July 2020 in Review No. 79 of 2020 and had the obligation to implement the said decision in terms of the specific orders issued therein. This means, the Procuring Entity did not have leeway to conduct a re-evaluation at the Technical Evaluation Stage with respect to all the criteria outlined in Clause 2.22 of the Appendix to Instructions to Tenderers but to restrict itself to Clause 2.22 (1), Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document during the re-evaluation process since the decision and orders issued in Review No. 79/2020 are final and binding to the Procuring Entity.

Having found that the Board directed the Procuring Entity to conduct a re-evaluation only with respect to Clause 2.22 (1), Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document, the Board studied the Minutes of Tender Re-evaluation dated 16th July 2020 to establish whether or not the Procuring Entity took the Board's findings into consideration on the question whether the Applicant satisfied

the aforementioned criteria. Accordingly, the Board makes the following findings: -

i. Recommendation Letters

With respect to Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document, the Board in Review No. 79/2020 held that: -

"The Board studied the Tender Document and notes that there is no provision that required bidders to submit their bids physically and therefore the Procuring Entity only relied on the bids that were submitted electronically. Having noted that e-procurement allows bidders to feed information into an electronic system when submitting their bids, the Board observes that the moment a document is scanned and fed into an electronic system, it ceases to be an original whether a person uploads a document that is in color, or a document that is in black and white (commonly referred to as grayscale in computer applications).

.....

From the foregoing, the Board observes that six (6) out of eight (8) letters outlined hereinbefore were recommendation letters by various organizations demonstrating that the Applicant has provided medical insurance covers to such organizations and that the Applicant is therefore recommended to any organization seeking medical insurance, such as the Procuring Entity herein.

From the IFMIS Evaluation Matrix Report dated 11th May 2020, the Applicant was awarded a score of 0 even though six of the letters it provided satisfy this criterion.

It is the Board's finding that the Procuring Entity unfairly evaluated the Applicant's bid which ought to have been awarded marks under this criterion and not a score of zero."

According to the decision in Review No. 79 of 2020, the Board found that six (6) out of eight (8) recommendation letters attached to the Applicant's bid satisfied the criterion of Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document. However, in its Minutes on Re-evaluation dated 16th July 2020, the Procuring Entity contends that the recommendation letters provided by the Applicant were scanned copies that appeared in black and white. In the Procuring Entity's view, to prove that the same were original recommendation letters, the Evaluation Committee expected them to have been certified as true copies.

It is worth noting that Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document did not direct bidders to certify recommendation letters provided in response to this criterion as true copies. The Board already noted that the moment a document is scanned and fed

into an electronic system, it ceases to be an original whether a person uploads a document that is in color, or a document that is in black and white (commonly referred to as grayscale in computer applications). The Procuring Entity used the IFMIS system and if it required bidders to certify the recommendation letters as true copies, nothing would have been easier than to state as much in the Tender Document. To the best of the Board's knowledge, the Board's finding in Review No. 79 of 2020 with respect to this criterion has not been quashed by any court noting that the Procuring Entity did not challenge the Board's decision in Review No. 79 of 2020 thus making the said decision final and binding to the Procuring Entity.

Accordingly, the Board finds that the Procuring Entity failed to re-evaluate the Applicant's bid at the Technical Evaluation Stage in accordance with Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document.

ii. Evidence of Medical Service Providers showing specialists & their recommendation letters plus international partners

As regards Clause 2.22 (7) of the Appendix to Instructions to Tenderers of the Tender Document, the Board in Review No. 79 of 2020 held that ***"no justification was given as to why the Applicant lost 5 marks under this criterion even though the Applicant provided 15 recommendation letters from medical services providers where the***

Applicant has offered insurance services who include a list of hospitals, clinics and specialists located in Kenya and Uganda”.

It is worth noting that during the first evaluation process, the Procuring Entity did not provide a justification why the Applicant was found non-responsive on this criterion despite having provided recommendation 15 recommendation letters from medical services providers where the Applicant offered insurance services. Having studied the Minutes of Tender Re-evaluation dated 16th July 2020, the Board observes that the Evaluation Committee provided a justification that the Applicant partially satisfied this criterion because the list of medical service providers found at pages 1199 to 1206 of the Applicant’s bid does not include recommendation letters from the said medical service providers and therefore awarded the Applicant a score of 5 marks.

iii. Premium chargeable for Additional Members and Dependants

In so far as Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document is concerned, the Board in Review No. 79 of 2020 held as follows: -

“The Applicant specified premium chargeable for a member and up to 5 additional members in one family unit and for any new dependant to be covered in a family, a premium amounting to the difference between the applicable premium for the family unit (which is inclusive

of the new dependant) and the applicable premium for the old family (which is exclusive of the new dependant). From the IFMIS Evaluation Matrix Report dated 11th May 2020, the Applicant was awarded a score of 0 out of the total score of 10 under this criterion. In the Board's view, the Applicant ought to have earned some marks since it indicated premium chargeable for a member and up to 5 additional members and how it would calculate the premium chargeable for a new dependant.

The Board observes that the Applicant achieved the full marks allocated under this criterion after the Procuring Entity's re-evaluation process noting that the Board had found that the Applicant indicated premium chargeable for a member and up to 5 additional members and how it would calculate the premium chargeable for a new dependant, therefore entitled to a score under this criterion.

From the foregoing, and having established that the Procuring Entity ought to have restricted itself to the three criteria specified in Order No. 4 of the decision rendered on 3rd July 2020 with respect to Review No. 79 of 2020, the Board notes that the Procuring Entity only took the Board's findings into consideration with respect to the criteria specified under Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender

Document, whilst re-evaluating other criteria that was not specified by the Board in Review No. 79 of 2020.

In determining the effect of failure by the Procuring Entity to fully comply with the orders issued by the Board, it is worth noting that in **Civil Appeal No. 68 of 2015, Margaret Njoki Migwi v Barclays Bank of Kenya Ltd [2016] eKLR**, the Court held that: -

"It is an abuse of the Court process for a party not to comply with Orders of the Court"

Further, the Court in **Civil Suit No. 326 of 1919, Abbeybarn Limited v. Infinity Gemstones Ltd [2000] eKLR** held as follows: -

"I do not take lightly the dangers inherent in the situation where a party would decide on his own, and without challenging a court order, that it was not a lawful order and simply decide to ignore or disobey it."

A passage from a House of Lords decision cited with approval by our own Court of Appeal seems to lend cover to such mischief: Per Lord Diplock in Isaacs v Robertson [1984] 2 All ER 141 at 142.

"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged.

The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L C said in Chuck v Cremer [1846] 1 Coop temp Cott 338 at 342, 47 ER 884 at 885) " A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed." ..."

From the foregoing cases, the Board observes, courts have taken the view that it amounts to an abuse of a judicial process for a party to disobey the orders of a court or any other decision making body. The Procuring Entity never challenged the Board's decision in Review No. 79 of 2020 therefore the same remains final and binding to it as stated in section 175 (1) of the Act. The orders of the Board in Review No. 79 of 2020 must be discharged in terms of the specific directions given by the Board. In **Macfoy vs United Africa Co Ltd [1961] 3 All ER 1169** Lord Denning delivering the opinion of the Privy Council at page 1172 (I) held as follows:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Having considered the finding in the foregoing case, the Board observes that the Minutes of Tender Re-evaluation dated 16th July 2020 emanating from a re-evaluation carried out in blatant disobedience of the orders of this Board cannot be allowed to stand.

The Procuring Entity's Evaluation Committee ought to discharge its obligation under the Act in accordance with the orders issued by the Board in Review No. 79 of 2020 and that is to re-instate the Applicant's bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage only with respect to **Clause 2.22 (1), Clause 2.22 (7) and Clause 2.22 (10) of the Appendix to Instructions to Tenderers of the Tender Document** whilst taking into consideration the Board's findings in Review No. 79 of 2020. The Minutes of Tender Re-evaluation dated 16th July 2020 emanating from a re-evaluation carried out in blatant disobedience of the orders of this Board rendered on 3rd July 2020 with respect to Review No. 79 of 2020 is null and void.

Accordingly, the Board finds that the Procuring Entity failed to comply with the orders issued on 3rd July 2020 in **PPARB Application No. 79 of 2020, Madison General Insurance Kenya Limited v. The Accounting Officer, County Government of Kwale and 2 Others.**

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

FINAL ORDERS

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

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 17th July 2020 with respect to Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff addressed to the Applicant, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 17th July 2020 with respect to Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff addressed to the 2nd Respondent, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Minutes of Tender Re-evaluation dated 16th July 2020 with respect to Tender No. CGK-797822-**

2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff, be and is hereby cancelled and set aside.

- 4. The Procuring Entity is hereby directed to comply with Order No. 4 of the decision rendered on 3rd July 2020 with respect to PPARB Application No. 79 of 2020, Madison General Insurance Kenya Limited v. The Accounting Officer, County Government of Kwale and 2 Others and to proceed with the procurement process to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 19th day of August 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB