

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO 19/2020 OF 10TH FEBRUARY 2020
BETWEEN

TRIDENT INSURANCE COMPANY LTD..... APPLICANT

AND

ACCOUNTING OFFICER,

WATER RESOURCES AUTHORITY.....1ST RESPONDENT

AND

WATER RESOURCES AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer of Water Resources Authority with respect to Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff that resulted to Tender No. WRA/T/9/2019-2020 for Provision of Medical Insurance Cover Brokerage Services for Board and Staff.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Dr. Joseph Gitari | -Member Chairing |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

- | | |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
|------------------------|------------------------------|

2. Ms. Judy Maina -Secretariat

PRESENT BY INVITATION

APPLICANT

-TRIDENT INSURANCE COMPANY LIMITED

- | | |
|------------------------|---|
| 1. Mr. Ong'anda Jr. | -Advocate, Ong'anda & Associates
Advocates |
| 2. Ms. Maryann Mwigire | -Advocate, Ong'anda & Associates
Advocates |
| 3. Mr. Elvis Seroney | -Staff |
| 4. Ms. Emily Ndirangu | -Staff |

PROCURING ENTITY

-WATER RESOURCES AUTHORITY

- | | |
|------------------------|--|
| 1. Ms. Janet Olewe | -Advocate |
| 2. Mr. Vitalis Chelimo | -Supply Chain Management |
| 3. Mr. Ian Khisa | -Supply Chain Management |
| 4. Mr. Mohammed Shurie | -CEO |
| 5. Ms. Jane Kajai | -Chief Supply Chain Management Officer |

INTERESTED PARTIES

- i. Ms. Hellen N. Mwaura -Kenya Alliance Ins. Co. Ltd

BACKGROUND TO THE DECISION

The Bidding Process

Water Resources Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff that resulted to Tender No. WRA/T/9/2019-2020 for Provision of Medical Insurance Cover Brokerage Services for Board and Staff (hereinafter referred to as “the subject tender”) on 13th December 2019 on its website (www.wra.go.ke) and the Government tenders portal (www.tenders.co.ke).

Bid submission Deadline and Opening of Bids

The Procuring Entity received a total of 4No. bids by the tender submission deadline of 27th December 2019. The same were opened shortly thereafter at 11.00 a.m. at the Procuring Entity’s Headquarters, located at NHIF building 10th Floor wing B Nairobi, by an ad-hoc committee appointed by the Procuring Entity’s CEO vide an Internal Memo dated 20th December, 2019 and witnessed by bidder’s representatives.

Evaluation of Bids

The Evaluation Committee evaluated bids received by the tender submission deadline in the following stages:-

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

1. Preliminary Examination and Responsiveness

At this stage, the Evaluation Committee applied the criterion under Clause 2.20 of Section II. Instructions to Tenderers and the criteria listed at page 30 of the Document for Provision of Medical Insurance Cover for Board and Staff that resulted to Tender No. WRA/T/9/2019-2020 for Provision of Medical Insurance Cover Brokerage Services for Board and Staff (hereinafter referred to as "the Tender Document")

At the end of Preliminary Evaluation, the Evaluation Committee noted the following:-

- **Bidder 1 (CIC Insurance Group)** provided age limit hence non-responsive;
- **Bidder 2 (Trident Insurance Company)** met all the requirements provided in the criteria hence proceeding to the next evaluation stage;
- **Bidder 3 (Pacis Insurance Company)** provided age limit hence non-responsive; and

- **Bidder 4 (The Kenya Alliance Insurance Company)** provided age limit, treatment of congenital disease and accommodation/lodger fee not provided for hence non-responsive.

2. Technical Evaluation

2.1. Mandatory Technical Evaluation Criteria

At this stage, the Evaluation Committee applied the criteria under Clause 22 of Section II. Instructions to Tenderers and as outlined at page 30-36 of the Tender Document.

2.2. Technical Evaluation (General Requirements)

The Evaluation Committee further applied the evaluation criteria outlined in pages 36-38 of the Tender Document.

At the end of Technical Evaluation, bidders were required to meet the minimum technical score of 70 points out of 80 points to proceed to Financial Evaluation.

2.3. Summary and Conclusion for Technical Evaluation

- Bidder No. 2 scored above 70 points;
- Bidder No. 2 be further subjected to the next stage; Financial Evaluation

3. Financial Evaluation

The Financial evaluation comprised of 20% of the total marks.

The formula for determining the financial score (SF) was outlined as follows at clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document and page 38 thereof:-

- $Sf = 100 \times Fm/f$ where: Sf is the financial score
- Fm is the lowest fees quoted and F is the fees of the quotation under consideration.

3.1. Summary and Conclusion of Financial Evaluation

Based on above evaluation process, bidder No. 2 **Trident Insurance Company** was found to be the responsive evaluated bidder with quoted amount of **Kshs 49,843,567 (Forty-Nine Million Eight Hundred and Forty-Three Thousand Five Hundred and Sixty-Seven Shillings Only)**

Due Diligence

The Evaluation Committee further conducted due diligence from their recommended list of clients and it was found out that:

- Trident Insurance Company medical cover services contract was terminated by National Construction Authority in a letter Ref: NCA7/SC/GEN/ Vol 8 (739) and dated 2nd May 2018 and copied to Insurance Regulatory Authority;
- **In a Business Daily article – standard digital dated 19th March 2018** complaint by Kiambu County Government for inability to access

medical services from the listed hospitals despite payment and having medical cards

Due Diligence was also done by contacting the following:-

- National Water Harvesting Authority in a letter dated 22nd January 2020;
- National Construction Authority in an email dated 17th January 2020.

Professional Opinion

In a Professional Opinion dated 16th January 2020, the Procuring Entity's Chief Supply Chain Management Officer reviewed the evaluation process, and noted the due diligence exercise carried out on Bidder No. 2 with respect to National Water Harvesting Authority and National Construction Authority the findings thereof that subsequently led to termination of the tender. The said Professional Opinion was approved by the Procuring Entity's Chief Executive Officer on 16th January 2020.

Notification of Termination

In letters dated 22nd January 2020, all bidders who participated in the subject procurement process were notified that the same was terminated.

THE REQUEST FOR REVIEW

M/s Trident Insurance Company Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 7th February 2020 and filed on 10th February 2020 together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement"). In response, the Procuring Entity lodged a Memorandum of Response dated and filed on 17th February 2020 (hereinafter referred to as "the Procuring Entity's Response"). The Applicant sought for the following orders in the Request for Review:-

- 1. An order declaring the purported termination of Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff illegal, null and void;***
- 2. An order setting aside the decision of the Procuring Entity terminating Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff;***
- 3. An order compelling the Procuring Entity to proceed with Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff to its logical conclusion;***
- 4. An order declaring the re-advertised Tender No. WRA/T/9/2019-2020 for Provision of Medical Insurance Cover Brokerage Services for Board and Staff and any processes arising therefrom null and void and set aside; and***
- 5. An order awarding costs of the Request for Review to the Applicant.***

THE PRELIMINARY OBJECTION

On the same date of 17th February 2020, the Procuring Entity lodged a Notice of Preliminary Objection together with Grounds in Support of the Preliminary Objection dated 18th February 2020 which include the following:-

- 1. The Request for Review seeks to challenge the termination of procurement proceedings undertaken by the Respondents in accordance with section 63 of the Public Procurement and Asset Disposal Act, 2015;***
- 2. The Public Procurement Administrative Review Board has no jurisdiction to hear and determine the Request for Review or grant the orders sought due to the exclusions under section 167 (4) (b) of the Public Procurement and Asset Disposal Act, 2015.***

During the hearing, the Applicant was represented by Mr. Ong'anda Junior on behalf of the firm of Ong'anda & Associates Advocates while the Procuring Entity was represented by Ms. Janet Olewe Advocate.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Ong'anda Junior, fully relied on the Request for Review, the Applicant's Statement and List of Authorities.

On the Preliminary Objection raised by the Procuring Entity, Mr. Ong'anda submitted that the Procuring Entity's Notice of Preliminary Objection ought to be dismissed with costs to the Application, since section 63 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") provides a procedure for termination of procurement proceedings and that before the Procuring Entity can benefit from section 167 (4) (b) of the Act, it ought to demonstrate that it satisfied the requirements of section 63 (1) of the Act. Counsel further submitted that no proof has been adduced by the Procuring Entity with respect to any of the grounds for termination of procurement proceedings. He therefore urged the Board to find the Procuring Entity's Preliminary Objection to lack merit and dismiss the same.

On the Request for Review, Counsel for the Applicant first gave a brief background to the procurement process of the subject tender and that the Applicant participated as a tenderer in the subject procurement process. While waiting for the outcome of evaluation, the Applicant learnt that the Procuring Entity had advertised a new tender, that is, WRA/T/9/2019-2020 for provision of Medical Insurance Cover, Brokerage Services for Board and Staff. To the Applicant, the Procuring Entity had terminated the subject tender without notifying the Applicant of its outcome. Counsel further submitted that the advertisement of the Procuring Entity was a re-advertisement of the subject tender in a different tender number before the lapse of fourteen days of termination of the subject tender. In his view, the

Procuring Entity ought not to have re-advertised a new tender before the lapse of fourteen (14) days.

Mr. Ong'anda took the view that the re-advertisement was calculated to lock out the Applicant from participating on the same as the re-advertised tender requires brokers. He therefore submitted that the actions by the Procuring Entity offend the principles enshrined in Article 227 (1) of the Constitution and that where an act is void in law, the same is a nullity and that it is not only bad, but incurably bad, since no notification was ever served upon the Applicant.

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

Procuring Entity's Submissions

Counsel for the Procuring Entity, Ms. Olewe Janet, fully relied on the Procuring Entity's Response, the Notice of Preliminary Objection and Grounds raised in support of the Preliminary Objection.

On the Procuring Entity's Preliminary Objection to the jurisdiction of the Board, Ms. Olewe submitted that section 167 (4) (b) of the Act precludes the Board from entertaining a Request for Review application where a procuring entity has terminated the procurement proceedings being challenged by way

of a Request for Review application. She contended that the Procuring Entity terminated the subject tender in accordance with section 63 of the Act, therefore the Board lacks jurisdiction to entertain the Applicant's Request for Review.

She submitted that from the confidential file submitted to the Board, a professional opinion is attached therein from the Procuring Entity's procurement unit, the report of the Evaluation Committee that confirms the evaluation process leading up to the conclusion that the subject tender ought to be terminated. She submitted that no tenderer was found responsive therefore leading the Procuring Entity to terminate the tender by dint of section 63 (1) (f) of the Act. She further referred the Board to email attachments forwarding notification letters to all bidders, including the Applicant. She further submitted that the subject tender was terminated on 16th January 2020 and bidders notified within 14 days from the date of termination vide letters dated 22nd January 2020.

Counsel then referred the Board to a report which she contended was forwarded to the Public Procurement Regulatory Authority notifying it of the said termination and that the same was submitted on the Public Procurement Information portal. In conclusion, she took the view that the Procuring Entity fully complied with section 63 of the Act in terminating the subject procurement process.

She therefore prayed that the Request for Review be dismissed with costs to the Respondents.

On the substantive Request for Review, Ms. Olewe submitted that the Applicant was notified of the termination through the email the Applicant provided to the Procuring Entity, that is, info@trident.co.ke attaching the letter of notification that the Applicant alleges not to have received the same. Upon enquiry by the Board as to whether informing the Applicant that the tender was terminated amounted to sufficient reasons to approach the Board, Counsel submitted that the reasons supplied in the said letter of notification were sufficient.

On the new tender advertised by the Procuring Entity, Counsel submitted that the Applicant appears to be challenging the choice of procurement method used by the Procuring Entity. She further took the view that the advertisement was made 16 days after the subject tender was terminated. She further submitted that the Applicant was found non-responsive following a due diligence exercise on the Applicant conducted pursuant to section 83 of the Act. Upon enquiry by the Board, Counsel submitted that the services sought in the subject tender and the re-advertised tender are the same but that the re-advertised tender is for brokerage services. In her view, the services are the same but tender differently.

In conducting the said due diligence exercise, Counsel submitted that the Procuring Entity contacted person with whom the Applicant has had prior engagement with as permitted by section 83 (2) of the Act. She then referred the Board to an email correspondence made to the National Construction Authority on 17th January 2020 and National Water and Harvesting Authority on 22nd January 2020. She further confirmed that the subject tender was terminated on 16th January 2020 but further added that phone calls to the two organizations had been initiated by the Procuring Entity before 16th January 2020.

Applicant's Rejoinder

On the issue of termination of procurement proceedings, Mr. Ong'anda submitted that the Board is awash with jurisprudence on how termination of procurement proceedings is undertaken in order for the same to meet the threshold of section 63 of the Act. He further urged the Board to note that due diligence was conducted after termination of the subject procurement process. On the email alleged to have been sent to the Applicant, Counsel made reference to section 106 (B) of the Evidence Act, Chapter 80, Laws of Kenya and submitted that the Procuring Entity failed to adhere to the procedure therein in adducing the aforesaid emails before the Board.

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

BOARD'S DECISION

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

The issues for determination are as follows: -

I. Whether the Procuring Entity terminated or cancelled the subject procurement process in accordance with section 63 of the Act thus ousting the jurisdiction of this Board.

Depending on the determination of the above issue:-

II. Whether the Procuring Entity's Letter of Notification dated 22nd January 2020 addressed to the Applicant meets the threshold of section 87 (3) of the Act read together with Article 47 of the Constitution; and

III. What are the appropriate orders to grant in the circumstances?

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

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act..."

[Emphasis by the Board]

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

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

answered by a close scrutiny of section 36 (6) of the said Act which provides:

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

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

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

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is

inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

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

The Court in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review**

Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") further held as follows:-

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

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

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the

primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

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

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Intergrati* Case that this Board must first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process in order to make a determination whether or not the Board can entertain a Request for Review application before it.

It is therefore important for this Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender, which determination can only be made by interrogating the reason cited for the termination.

From the documentation filed before this Board, the Procuring Entity asserts that it terminated the subject tender by dint of section 63 (1) (f) of the Act which provides as follows:-

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

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

During the hearing and having studied the documents filed by the Procuring Entity, it is apparent that the Applicant was disqualified as being non-

responsive following a due diligence exercise undertaken by the Procuring Entity. According to the Procuring Entity, it obtained confidential references from persons with whom the Applicant has had prior engagement with, and it emerged that there were performance challenges related to the Applicant's contracts with third parties.

This prompted the Board to examine how the Procuring Entity conducted the aforesaid due diligence and we hereby proceed to make the following findings:-

The Procuring Entity maintained its submissions that before 16th January 2020 (being the date when the Accounting Officer approved the Professional Opinion advising him that the subject procurement process be terminated), it initiated a due diligence exercise through phone calls made to person with whom the Applicant has had prior engagement with, to confirm and verify the qualifications of the Applicant.

Thereafter, the due diligence exercise was conducted in the following manner:-

a) National Water Harvesting and Storage Authority

The Procuring Entity submitted that by a letter dated 22nd January 2020, it contacted National Water Harvesting and Storage Authority seeking

information concerning the services provided by the Applicant. The Board studied the Procuring Entity's confidential file and found that indeed, the Procuring Entity contacted National Water Harvesting and Storage Authority seeking information on the Applicant's performance on the Medical Insurance Cover given to the said organization during the contract period ending 2018-2020.

However, a response regarding this due diligence exercising was received by the Procuring Entity on 24th January 2020 stating as follows:-

"We wish to confirm that our Authority's staff and Board were under a Medical Insurance Cover by Trident Insurance Company Ltd for the period between 20th December 2018 to 21st December 2019

However, due to various complaints by staff regarding denial of services by the major medical and health facilities as a result of non-acceptance of Trident Insurance Co. Ltd Medical Cards, the performance of the underwriter was assessed as not satisfactory

Therefore, the Authority ended the Medical Insurance cover with M/s Trident Insurance Company Ltd at the lapse of one (1) year"

b) National Construction Authority

During oral submissions, the Procuring Entity submitted that, in an email dated 17th January 2020 sent to National Construction Authority, the Procuring Entity also sought to confirm and verify the Applicant's capacity to execute the subject tender and the said email is contained in the Procuring Entity's confidential file.

The Procuring Entity further attached a letter dated 2nd May 2018 from National Construction Authority addressed to the Applicant notifying the Applicant that its contract with National Construction Authority for Provision of Medical Insurance Cover for NCA staff and Board Members had been terminated.

This Board observes that approval of the Accounting Officer that the subject tender be terminated was issued on **16th January 2020**. However, correspondence letters dated **22nd January 2020** and **17th January 2020** were sent out to National Water Harvesting and Storage Authority and National Construction Authority respectively, with the intention to confirm and verify the Applicant's capacity to execute the subject tender.

As earlier noted, Counsel for the Procuring Entity while explaining how the due diligence process was conducted, submitted that phone calls were made prior to the correspondence letters that were later sent out on 17th and 22nd

January 2020 to National Construction Authority and National Water Harvesting & Storage Authority, respectively and that a confirmation had already been received by the said references of the Applicant.

This Board wonders why a procuring entity would initiate a due diligence exercise by phone calls (as alleged by the Procuring Entity herein) and upon receiving confirmation (as alleged by the Procuring Entity) still proceeds with the due diligence exercise on 17th and 22nd January 2020, even though approval to terminate the subject tender had already been issued on 16th January 2020.

For a procuring entity to terminate a tender for the reason that all evaluated tenders were non-responsive, means that such a procuring entity must have received conclusive information in a concluded due diligence exercise that would inform a decision to terminate the tender. A procuring entity cannot therefore approve termination of a procurement process, but still continue with the said procurement process through correspondences in a due diligence exercise on one of the bidders allegedly declared to be among all other non-responsive tenderers.

In this instance, the Procuring Entity approved termination of the subject tender on 16th January 2020, but still continued with its due diligence on 17th and 22nd January 2020, meaning that the approval of 16th January 2020, was

issued before conclusive evidence was obtained from a due diligence exercise, which in any case, was still being conducted after such approval for termination had been given. Strangely enough, the Professional Opinion of **16th January 2020** captured the outcome of due diligence conducted on **17th January 2020** and **20th January 2020**.

c) Business Daily Article dated 19th March 2018

On the third limb of its due diligence exercise, the Procuring Entity at clause 4.0 at page 13 of the Evaluation Report dated 10th January 2020, noted the following:-

"In a Business Daily Article-standard digital dated 19th March 2018 complaint by Kiambu County Government for inability to access medical services from the hospitals despite payment and having medical cards. Annex 11"

The Procuring Entity attached to its confidential file to the Board, an Article appearing on Standard Digital on 19th March 2018. The Article is titled **"MCA's cry foul over assembly's Kshs. 25 million health insurance scheme"** and the same states as follows:-

"Members of County Assembly (MCAs) and other members of staff are up in arms over the assembly's health insurance scheme which they say are unable to access

The County Assembly Service Board which is chaired by the Speaker Stephen Ndicho signed the contract with Trident Insurance Company Limited last year paving the way for the health insurance scheme

The MCAs and other members of the staff are unhappy that despite such colossal amount of money being paid, they are unable to access treatment in hospitals using the medical scheme..."

The Board observes that the Procuring Entity relied on the said article as the basis of its findings of the due diligence exercise on the Applicant as captured in the Evaluation Report, but did not contact Kiambu County Assembly to verify and confirm the Applicant's capacity to execute the subject tender, if indeed the Applicant had prior engagement with Kiambu County Assembly in providing medical insurance services.

At this point, the Board deems it fit to revisit the provisions of the Act on the purpose of a due diligence exercise. Section 83 of the Act provides as follows:-

"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted

the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

Section 83 (1) of the Act is instructive that the purpose of due diligence is to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender.

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

Section 83 (1) of the Act instructs that an Evaluation Committee is the one that conducts a due diligence exercise. Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders and recommend the lowest evaluated responsive tenderer, for award of the tender and submit a duly signed Evaluation Report for transmission to the Head of Procurement function. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded.

Due diligence criteria must be prepared before commencing the due diligence exercise, outlining the parameters of the due diligence process to be conducted on the lowest evaluated responsive tenderer. This criterion must be used only to verify and confirm the qualification of the lowest evaluated tenderer determined after preliminary, technical and financial evaluation.

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

The Procuring Entity herein outlined its due diligence exercise on Applicant with respect to National Construction Authority and the Business Daily Article in the Evaluation Report, yet a proper due diligence exercise and its findings ought to be captured in a separate report known as a Due Diligence Report.

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

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

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

Even if a procuring entity (such as the one herein) terminates a tender because it has found that all evaluated tenders are non-responsive, such a termination must meet the threshold of section 63 of the Act failure to which the termination amounts to a nullity.

Even if the other requirements under section 63 of the Act regarding termination of a tender were to be considered, this Board notes the following:-

"63 (1)

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

The above provisions guide a procuring entity on the procedure to be taken for a termination to meet the threshold of section 63 of the Act. The

Procuring Entity submitted that it developed a report upon terminating the subject tender and transmitted the said report to the Director General of the Public Procurement Regulatory Authority. Further to this, that it notified bidders of the said termination as required by section 63 (4) of the Act.

The Board has already established that:-

- (i) *The Procuring Entity alleges to have initiated a due diligence exercise before 16th January 2020 (when it approved termination of the subject tender), received confirmation but still proceeded with the said due diligence exercise after approval by the Accounting Officer that the subject procurement process be terminated;*
- (ii) *The Procuring Entity captured some aspects of the due diligence exercise in its Evaluation Report instead of a Due Diligence Report;*
- (iii) *The Professional Opinion dated 16th January 2020 and the Evaluation Report dated 10th January 2020 capture the findings of a due diligence exercise conducted on 17th and 22nd January 2020, yet the due diligence exercise was conducted after issuance of the two documents; and*
- (iv) *The Procuring Entity further relied on a newspaper article as part of its due diligence exercise on the Applicant without contacting*

Kiambu County Assembly to verify and confirm the qualifications of the Applicant.

These instances render the said Due Diligence exercise null and void for its failure to meet the threshold of section 83 of the Act. Evidently, by the time the Procuring Entity approved termination of the subject tender on 16th January 2020, it had not established that the Applicant was non-responsive for its termination to meet the threshold of section 63 (1) (f) of the Act noting that on 17th and 22nd January 2020, due diligence exercise on the Applicant was still ongoing.

It is high time that procuring entities appreciate the obligations bestowed upon them by provisions of the Constitution, the 2015 Act and Regulations made thereunder when conducting public procurement processes in this country.

Article 10 (2) (c) of the Constitution states that:-

(1);

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

(a);

(b);

(c) good governance, integrity, transparency and accountability

Article 201 (d) of the Constitution further provides that:-

"public money shall be used in a prudent and responsible way"

Further, Article 227 (1) of the Constitution states that:-

"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"

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

"3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b)

(c)

(d)

(e) *the principles of public finance under Article 201;*

The above provisions guide public procurement processes and the Procuring Entity herein cannot choose to ignore them to the detriment of bidders who participated in this procurement process and the public who at the end of the day would have benefited from the services that were being procured. Each stage leading to termination of a tender must be seen to adhere to the principles of integrity and accountability and the discretion given to the Accounting Officer of the Procuring Entity herein to terminate a tender must be exercised within the confines of the law.

In the Board's view, the following are key pillars that enhance integrity and accountability in public procurement:-

- i. A procuring entity must provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment of tenderers;*

- ii. A procuring entity must ensure that public funds are used according to the purpose for which the funds are intended and the decision to terminate a tender must be made within the confines of the law;*
- iii. A procuring entity must establish a clear chain of responsibility to the public in its procurement process, including the requirement to demonstrate that any decision made in the procurement process adheres to national values and principles of governance;*
- iv. A procuring entity must put mechanisms that do not make the integrity of the procurement process to be in question.*

The Procuring Entity herein failed to take the national values and principles of governance that guide public procurement processes as outlined in Articles 10 (2) (c), 201 (d) and 227 (1) of the Constitution read together with section 3 of the Act, noting that its termination process failed to meet the threshold of section 63 of the Act.

Accordingly, the Board finds that the Procuring Entity failed to terminate the procurement proceedings in the subject tender in accordance with section 63 of the Act. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review, dismisses the Procuring Entity's Preliminary Objection and shall now turn to address the issues raised in the substantive Request for Review application.

On the second issue framed for determination, the Applicant refuted the submissions made by the Procuring Entity that it (the Applicant) was served with the letter of notification of termination of the subject procurement proceedings. In the Applicant's view, the emails furnished by the Procuring Entity to demonstrate that all bidders were notified of the said termination, were not adduced in accordance with section 106 (B) of the Evidence Act, Chapter 80, Laws of Kenya (hereinafter referred to as "the Evidence Act").

This Board notes that section 106 (B) of the Evidence Act provides a procedure for the production of electronic evidence before a court or other decision making body. That notwithstanding, Regulation 86 of the Public Procurement and Disposal Regulations, 2006 states that:-

"The Review Board shall not be bound to observe the rules of evidence in the hearing of a request under these Regulations."

Hence, the Board in ordinary circumstances may consider evidence adduced before it since it is not bound by strict rules of evidence, while taking into consideration the question whether or not such evidence may prejudice a party's right to a fair hearing. Even if the Board were to consider the letter of notification of termination dated 22nd January 2020 addressed to the Applicant, the Board notes that the same states as follows:-

"This is to notify you that the tender mentioned above has been evaluated in accordance with the evaluation criteria provided in the bid document

We regret to inform you that the aforementioned procurement process has been terminated as all bidders were declared non-responsive pursuant to section 63 (f) of PPADA 2015

We would like to thank you for the time and effort spent in submitting your proposal and to assure you the fact that you have been successful on this occasion will not affect any bids you may make in any other tendering process with us. Kindly make arrangements to come collect your original tender security from our Supply Chain Office"

From the foregoing, it is evident that the Procuring Entity merely informed the Applicant that the subject procurement process was terminated pursuant to "section 63 (f)" of the Act and failed to specify the reasons why the Applicant's bid was found non-responsive.

Article 47 of the Constitution states that:-

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

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

Further, 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"

Fair administrative action dictates that the Procuring Entity specifies the negative responses obtained from its due diligence exercise, to enable the Applicant challenge the decision made against it, if it wishes to do so. For example, in this case where a due diligence exercise was conducted on the Applicant, to specifically inform the Applicant that:-

"negative responses regarding your reference a....., b..... and c..... have been received because of the following reasons; x....., y..... and z..... upon conclusion of a due diligence exercise on your firm's professional references."

It is the Board's finding that the Procuring Entity failed to take the overall objective of Article 47 of the Constitution into account, that is, to uphold the rules of natural justice, and ought to have specifically inform the Applicant of the negative responses received after the due diligence exercise. The letter dated 22nd January 2020 does not contain any specific reasons why the Applicant's bid was found non-responsive to enable it challenged the said reasons, if it wished to do so.

In this instance, it is therefore not sufficient for the Procuring Entity to state that it terminated the subject tender because all tenders were non-responsive. The Procuring Entity ought to have provided the specific reasons why the Applicant's bid was found non-responsive.

The Board would hasten to add that the Procuring Entity's failure to provide detailed and specific reasons x.....y..... and z..... as to why the Applicant was found non-responsive as a result of the due diligence conducted on it, interfered with the Applicant's right to adequately challenge such a decision, by adducing and challenging evidence before this Board, if it wished to do so.

As a result, the Board finds that the Procuring Entity's Letter of Notification dated 22nd January 2020 fails to meet the threshold of section 87 (3) of the Act read together with Article 47 of the Constitution.

The Board shall now address its mind to an issue that arose in the course of the proceedings regarding a tender advertised by the Procuring Entity, that is, Tender No. WRA/T/9/2019-2020 for Provision of Medical Insurance Cover Brokerage Services for Board and Staff (hereinafter referred to as "Tender No. 9"). The Applicant contended that the said Tender No. 9 is a re-advertisement of the subject tender and that the same was re-advertised before expiry of fourteen (14) days. On its part, the Procuring Entity admitted that the services sought in Tender No. 9 are similar to the subject tender but tendered differently.

Having heard parties' submissions on this issue, the Board observes that the Applicant's Request for Review was initiated against Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff. However, this Board would like to point out that any procurement process similar to the subject procurement process whose termination, the Board has established contravenes section 63 of the Act, would therefore make the procurement process initiated in Tender No. 9 null and void.

In determining the appropriate orders to issue in the circumstances as the third issue for determination, the Board found that the Procuring Entity captured part of the due diligence exercise conducted on the Applicant (on 17th and 22nd January 2020) in an Evaluation Report dated **10th January 2020** under Clause 4.0 at page 13 thereof, contrary to section 83 of the Act.

Accordingly, the said Evaluation Report fails to meet the threshold of section 80 (4) of the Act which states that:-

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"

From the above provision, an evaluation report can only contain the summary of evaluation and comparison of tenders and not the findings of a due diligence exercise, which is a post-qualification exercise conducted after conclusion of evaluation in the preliminary, technical and financial evaluation stages. This Board while outlining how a due diligence exercise is conducted, already established that upon concluding a due diligence exercise, a separate Due Diligence Report is prepared, signed and initialed by the Evaluation Committee that conducted the said due diligence exercise, and not in an evaluation report.

Accordingly, Clause 4.0. Due Diligence at page 13 of the Evaluation Report dated 10th January 2020 is hereby expunged from the said report.

Secondly, the Professional Opinion dated 16th January 2020 recommending termination of the subject tender was issued and approved by the Accounting Officer on the same date, yet a due diligence exercise was

conducted on 17th and 22nd January 2020 after such approval had already been given.

On the other hand, the confidential file of the Procuring Entity at page 50 thereof contains a document titled "Termination of Procurement and Disposal Proceedings" where it is indicated that the date of termination is **22nd January 2019** and the tender number cited therein is different (that is, Tender No. WRA/T/04/RFQ/2019-2020). The said document is however signed on 23rd January 2020 and is not a true reflection of termination of procurement proceedings in the subject tender.

Accordingly, the Procuring Entity's Professional Opinion is hereby nullified to the extent that the same recommends termination of the subject tender on 16th January 2020 yet due diligence exercise was still being conducted on 17th and 22nd January 2020.

Having nullified the due diligence exercise conducted by the Procuring Entity, this Board would like to note that the Procuring Entity ought to recommend the lowest evaluated bidder for award of the subject tender and conduct a diligence exercise on that lowest evaluated bidder in accordance with section 83 of the Act, prior to award of the subject tender. Upon concluding the said due diligence, a due diligence report must be submitted and the same should be a true reflection of how the due diligence exercise was done. Thereafter,

a new professional opinion ought to be issued by the Head of Procurement function reviewing the Evaluation Report, the Due Diligence Report and advising the Accounting Officer on the appropriate action to take.

Lastly, the Applicant ought to be given the specific reasons of the outcome of its bid as required by section 87 (3) of the Act read together with Article 47 of the Constitution. This would enable the Applicant to challenge the said reasons if it wished to do so.

It is worth noting that all other notification letters issued to the other bidders contained no specific reasons why their bids were found non-responsive even though non-responsiveness of all bidders was the reason given for terminating the subject tender. It therefore behoves upon the Procuring Entity to notify all bidders of the specific reasons why their bids were found non-responsive.

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

FINAL ORDERS

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

- 1. The Procuring Entity's Letter of Notification of Termination of procurement proceedings in Tender No. WRA/T/6/2019-2020 for Provision of Medical Insurance Cover for Board and Staff addressed to all bidders who participated in the subject tender including the Applicant herein, be and is hereby cancelled and set aside.**
- 2. Clause 4.0 contained at page 13 of the Procuring Entity's Evaluation Report dated 10th January 2020, be and is hereby expunged.**

For the avoidance of doubt, the summary of evaluation and comparison of tenders contained in the Evaluation Report dated 10th January 2020 remain valid.

- 3. The Professional Opinion dated 16th January 2020 issued by the Procuring Entity's Chief Supply Chain Management Officer with respect to the subject tender, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity's due diligence exercise on the Applicant with respect to the subject tender, be and is hereby cancelled and set aside.**
- 5. The Procuring Entity's Evaluation Committee is hereby directed to recommend the lowest evaluated responsive tenderer at the Financial Evaluation stage for award of the subject tender.**

6. Further to Order No. 5 above, the Procuring Entity is hereby directed to conduct a due diligence exercise on the lowest evaluated responsive tenderer in accordance with section 83 of the Act, taking into consideration the Board's findings in this case and complete the procurement process to its logical conclusion within fourteen (14) days from the date of receipt of the signed decision of the Board.

7. 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 27th day of February 2020.

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Mr. Ong'anda appearing with Ms. Mwigire for the Applicant; and
- ii.** Ms. Olewe for the Respondents