

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 56/2020 & 61/2020 (CONSOLIDATED)**

**BETWEEN**

**MADISON GENERAL INSURANCE KENYA (LTD).....1<sup>ST</sup> APPLICANT**

**BRITAM GENERAL INSURANCE COMPANY**

**(KENYA) LIMITED.....2<sup>ND</sup> APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**AFRICA MERCHANT ASSURANCE CO. LTD**

**(AMACO).....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Nairobi City County with respect to Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only).

**BOARD MEMBERS**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member      |
| 3. Ms. Robi Chacha    | -Member      |

## **IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

The Nairobi City County (hereinafter referred to as “the Procuring Entity”) advertised Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) (hereinafter referred to as “the subject tender”) at the Public Procurement Regulatory Authority’s website ([www.tenders.go.ke](http://www.tenders.go.ke)), the Procuring Entity’s website ([www.nairobi.go.ke](http://www.nairobi.go.ke)) and on *The Standard* daily newspaper on 28<sup>th</sup> February, 2020.

## **Bid Submission Deadline and Opening of Bids**

The tenders were closed on 16<sup>th</sup> March 2020. The same were opened on the same date at 12.00 noon by a Tender Opening Committee in the presence of bidders who chose to attend the opening. The Tender Advertisement attracted seven (7) bidders as below:-

<b>OPENING SERIAL</b>	<b>FIRM</b>	<b>COPIES SUBMITTED</b>
1	AFRICA MERCHANT ASSURANCE COMPANY LTD	2
2	THE JUBILEE INSURANCE COMPANY LTD	2
3	KENINDIA	2
4	BRITAM GENERAL INSURANCE (K) COMPANY LTD	2

<b>OPENING SERIAL</b>	<b>FIRM</b>	<b>COPIES SUBMITTED</b>
5	CIC GENERAL INSURANCE LTD	2
6	MADISON GENERAL INSURANCE KENYA LTD	2
7	GEMINIA INSURANCE CO. LTD	2

**Evaluation of Bids**

Having appointed an Evaluation Committee, the bids received were evaluated at the Preliminary, Technical and Financial Evaluation Stages.

**1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Stage 1 of the Appendix to Instructions to Tenderers at page 18 of the Document for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) (hereinafter referred to as “the Tender Document”). At the end of evaluation at this stage, it is only Bidder No. 1, M/s Africa Merchant Assurance Company Limited and Bidder No. 6, M/s Madison General Insurance Kenya were found responsive, therefore eligible for evaluation at the Technical Evaluation Stage.

**2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Stage 2 of the Appendix to Instructions to Tenderers at page 19 of the Tender Document. The two remaining bidders were subjected to evaluation at this

stage and were required to achieve a minimum technical score of 70% to qualify for Financial Evaluation. Bidder No. 1, M/s Africa Merchant Assurance Company Limited and Bidder No. 6, M/s Madison General Insurance Kenya achieved a technical score of 75% and 78% respectively and were therefore found to be responsive and eligible to proceed to Financial Evaluation.

### **3. Financial Evaluation**

After the financial bids of the two remaining bidders were opened, the Evaluation Committee subjected the same to a Financial Evaluation using the criteria specified in Clause (c) of Appendix II at page 26 of the Tender Document. The Evaluation Committee recorded the Price Schedule proposed by bidders with respect to different classes of General Insurance and found that Bidder No. 1, M/s Africa Merchant Assurance Company Limited submitted the lowest evaluated bid.

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to Bidder No. 1, M/s Africa Merchant Assurance Company Limited at the sum of Kshs. 190,619,042.00 considered to be the lowest evaluated bid price.

### **Professional Opinion**

In a professional opinion dated 14<sup>th</sup> April 2020, the Procuring Entity's Head of County Supply Chain Management reviewed the Evaluation Report dated

9<sup>th</sup> April 2020. He also outlined a brief background leading to procurement of General Insurance Services under the subject tender.

He concurred with the Evaluation Committee's recommendation that the subject tender be awarded to Bidder No. 1, M/s Africa Merchant Assurance Company Limited at the sum of Kshs. 190,619,042.00 having been found to be the lowest evaluated bidder. The Procuring Entity's County Chief Officer, Finance and Economic Planning approved the said professional opinion on the same date of 14<sup>th</sup> April 2020.

### **Notification Letters**

In letters dated 14<sup>th</sup> April 2020, the successful and the unsuccessful bidders were notified of the outcome of their bids.

### **REQUEST FOR REVIEW NO. 56/2020**

M/s Madison General Insurance Kenya Ltd lodged a Request for Review dated and filed on 30<sup>th</sup> April 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. On 4<sup>th</sup> May 2020, M/s Madison General Insurance Kenya Ltd lodged an Amended Request for Review dated the same day seeking the following orders:-

- a) An order annulling the award of Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance***

***Services for the year 2020-2021 (Underwriters Only) to Africa Merchant Assurance Co. Ltd and the Notification of Regret to M/s Madison General Insurance Kenya Ltd;***

***b) An order directing the Accounting Officer of the Procuring Entity to award Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) to M/s Madison General Insurance Kenya Ltd;***

***c) In the alternative, an order nullifying the entire procurement process and the Procuring Entity be directed to tender afresh for the Provision of General Insurance Services for the year 2020-2021; and***

***d) An order directing the Procuring Entity to pay the costs of this Request for Review to M/s Madison General Insurance Kenya Ltd.***

M/s Madison General Insurance Kenya Ltd also lodged a Further Statement on 15<sup>th</sup> May 2020. In response, the 1<sup>st</sup> Respondent lodged a Replying Affidavit sworn on 8<sup>th</sup> May 2020 and filed on 11<sup>th</sup> May 2020, through the firm of Njenga Maina & Company Advocates while the 2<sup>nd</sup> Respondent lodged a Preliminary Objection dated and filed on 14<sup>th</sup> May 2020, a Replying Affidavit sworn and filed on even date and a Further Replying Affidavit sworn on 18<sup>th</sup> May 2020 and filed on 19<sup>th</sup> May 2020, through the firm of Nyaanga & Mugisha Advocates.

## **REQUEST FOR REVIEW NO. 61/2020**

M/s Britam General Insurance Company (Kenya) Limited lodged a Request for Review dated 6<sup>th</sup> May 2020 and filed on 7<sup>th</sup> May 2020 together with a Statement in Support of the Request for Review sworn and filed on 7<sup>th</sup> May 2020 through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders:-

- a) An order cancelling and setting aside the Procuring Entity's letter of notification of unsuccessful bid with respect to Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) dated 14<sup>th</sup> April 2020 addressed to M/s Britam General Insurance Company (Kenya) Limited;***
- b) The Board be pleased to review all records of the procurement process relating to Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) and substitute the decision of the Procuring Entity and award the tender to M/s Britam General Insurance Company (Kenya) Limited;***
- c) Consequent to (b) above, an order directing the Procuring Entity to sign a contract with M/s Britam General Insurance Company (Kenya) Limited in accordance with the tender and the decision of the Board;***
- d) Further and/or in the alternative and without prejudice to any of the other prayers sought herein, an order directing the Procuring Entity to re-admit M/s Britam General Insurance***

- Company (Kenya) Limited in the tendering process and evaluate it on its technical and financial proposals in strict adherence to the Tender Document, the Act and the Regulations, and award to the lowest competitive bidder;***
- e) An order directing the Procuring Entity to pay the costs of and incidental to these proceedings; and***
- f) Such other or further reliefs as the Board shall deem just and expedient.***

On 8<sup>th</sup> May 2020, a Notice of Change of Advocates was filed notifying the Board that M/s Britam General Insurance Company (Kenya) Limited appointed the firm of Chiggai, Lusigi & Odongo LLP Advocates to act for them in this Request for Review in place of the firm of Mwaniki Gachoka & Company Advocates.

In response, the 1<sup>st</sup> Respondent lodged a Replying Affidavit sworn on 8<sup>th</sup> May 2020 and filed on 12<sup>th</sup> May 2020.

On 16<sup>th</sup> 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](http://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 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. 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 M/s Madison General Insurance Kenya Limited filed Written Submissions dated and filed on 15<sup>th</sup> May 2020, M/s Britam General Insurance Company (Kenya) Ltd lodged Written Submissions dated and filed on 18<sup>th</sup> May 2020. Further, the 1<sup>st</sup> Respondent lodged Written Submissions with respect to Request for Review No. 56/2020, which submissions are dated 14<sup>th</sup> May 2020 and filed on 15<sup>th</sup> May 2020, together with a List of Authorities dated and filed on even date and also lodged Written Submissions with respect to Request for Review No. 61/2020, which submissions are dated 14<sup>th</sup> May 2020 and filed on 15<sup>th</sup> May 2020, together with a List of Authorities dated and filed on even date. The 2<sup>nd</sup> Respondent lodged Written Submissions dated 18<sup>th</sup> May 2020 and filed on 19<sup>th</sup> May 2020 with respect to Request for Review No. 56/2020.

## **CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS**

When the Board met to deliberate on Request for Review No. 56/2020, it noted that a separate application, that is, Request for Review No. 61/2020 was filed relating to the same tender. The Board further noted that the 21-day statutory period under section 171 (1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") for Review No. 56/2020 would lapse on 21<sup>st</sup> May 2020, whereas that of Request for Review No. 61/2020 would lapse on 28<sup>th</sup> May 2020.

When Request for Review No. 61/2020 came up for deliberation, the Board noted that where two Request for Review applications are filed relating to the same tender, it has discretion to exercise the power vested upon it under Regulation 82 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which provides as follows:-

***"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review"***

Accordingly, the Board consolidated the two Request for Review applications pursuant to Regulation 82 of the 2006 Regulations, bearing in mind the fact that any orders issued by the Board upon completing review of either of the

two applications, must be taken up by the Accounting Officer who is the same in both applications, and this would affect both applicants in the two request for review applications since the tender under review before this Board is the same in both applications.

Henceforth, the parties to this Request for Review shall be identified as follows:-

- M/s Madison General Insurance Kenya Limited -1<sup>st</sup> Applicant
- M/s Britam General Insurance Company (Kenya) Limited -2<sup>nd</sup> Applicant
- The Accounting Officer of the Procuring Entity -1<sup>st</sup> Respondent
- M/s Africa Merchant Assurance Co. Ltd -2<sup>nd</sup> Respondent

### **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 issues call for determination:-

- I. Whether the Amended Request for Review dated and filed on 4<sup>th</sup> May 2020 by the 1<sup>st</sup> Applicant was filed outside the statutory period under section 167 (1) of the Act, thus ousting the jurisdiction of this Board;**

- II. Whether the Request for Review dated 6<sup>th</sup> May 2020 and filed on 7<sup>th</sup> May 2020 by the 2<sup>nd</sup> Applicant was filed outside the statutory period under section 167 (1) of the Act, thus ousting the jurisdiction of this Board;**
- III. Whether the contract dated 30<sup>th</sup> April 2020 between the Procuring Entity and the 2<sup>nd</sup> Respondent was executed in accordance with section 135 (3) of the Act, thus ousting the jurisdiction of this Board pursuant to section 167 (4) (c) of the Act.**

Depending on the determination of Issue (III) above:-

- IV. Whether the Applicants suffered prejudice as a result of the Procuring Entity's failure to disclose the successful bidder in the letters of notification of unsuccessful bid dated 14<sup>th</sup> April 2020; and**
- V. Whether the 1<sup>st</sup> Applicant's letter of notification of unsuccessful bid dated 14<sup>th</sup> April 2020 was signed by an authorized person in law.**

- VI. Whether the 2<sup>nd</sup> Respondent was qualified for award of the subject tender in accordance with Clause 2.25.2 and Clause 2.24.2 read together with section 3, 80 and 83 of the Act, and Articles 10 and 227 of the Constitution.**
- VII. Whether the Procuring Entity fairly evaluated the 2<sup>nd</sup> Applicant's bid with respect to the following two criteria outlined in the Tender Document:-**
- a) Clause 1 under Stage 2 of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document as amended by the Addendum dated 11<sup>th</sup> March 2020; and**
  - b) Clause 19 under Stage 1 of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document.**

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

It is now trite law that jurisdiction is everything following the decision of Justice Nyarangi in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where it was held as follows:-

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the***

***issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

***"27. Establishment of the Public Procurement Administrative Review Board***

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

Further, Section 28 of the Act provides as follows:-

***"28. Functions and powers of the Review Board***

***(1) The functions of the Review Board shall be—***

***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in Section 167 (1) of the Act, which provides as follows:-

***"Subject to the provisions of this Part, a candidate or a 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 by this Act or the Regulations, may seek administrative 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 as in such manner as may be prescribed”**

In order to determine whether the Amended Request for Review is properly filed before this Board, it is important to determine whether the same was filed within the statutory period under section 167 (1) of the Act. The Board considered parties’ submissions on this issue and notes the following:-

In its Preliminary Objection, the 2<sup>nd</sup> Respondent contends that the Amended Request for Review was filed out of time since in the 2<sup>nd</sup> Respondent’s view, the 1<sup>st</sup> Applicant was notified of the outcome of its bid on 15<sup>th</sup> April 2020. The 1<sup>st</sup> Respondent on the other hand, admitted at paragraph 4 of its Replying Affidavit, the Applicant’s assertion that it received the letter of notification of unsuccessful bid dated 14<sup>th</sup> April 2020, on 23<sup>rd</sup> April 2020. However, in its Written Submissions, the 1<sup>st</sup> Respondent submits that it supports the 2<sup>nd</sup> Respondent’s Preliminary Objection to the jurisdiction of this Board. In the said Written Submissions, the 1<sup>st</sup> Respondent only asserts that the 1<sup>st</sup> Applicant received a regret letter dated 14<sup>th</sup> April 2020, but fails to specify when this regret letter was furnished to the Applicant.



Having considered parties' submissions, the Board observes that the 2<sup>nd</sup> Respondent merely makes an allegation that the 1<sup>st</sup> Applicant received its letter of notification on 15<sup>th</sup> April 2020 without any proof to support this allegation. It is a well-established principle that, the burden of proof lies on he who alleges. In the absence of proof to substantiate this allegation, the most appropriate party that ought to verify when the 1<sup>st</sup> Applicant was furnished with the letter of notification should have been the 1<sup>st</sup> Respondent. However, the 1<sup>st</sup> Respondent admitted to the 1<sup>st</sup> Applicant's assertion that it received the letter of notification on 23<sup>rd</sup> April 2020, only to change this position, having had sight of the 2<sup>nd</sup> Respondent's Preliminary Objection.

The Board observes that the 1<sup>st</sup> Respondent's admission that the 1<sup>st</sup> Applicant received its letter of notification on 23<sup>rd</sup> April 2020, was made in the 1<sup>st</sup> Respondent's Replying Affidavit, sworn by its Chief Finance Officer, deponing that what is stated in the said Affidavit is true to the best of his knowledge. Furthermore, it is a well-established principle that parties are bound by their pleadings, especially in this instance where a sworn Affidavit (made under oath) was furnished to the Board representing the sequence of events in the procurement process undertaken by the Procuring Entity.

The mere fact that the 1<sup>st</sup> Respondent, in its Written Submissions, states that it is supporting the Preliminary Objection to the jurisdiction of the Board without specifying the date when notification was done to the 1<sup>st</sup> Applicant,

does not change the fact that the 1<sup>st</sup> Respondent did not dispute the 1<sup>st</sup> Applicant's position that it received its letter of notification on 23<sup>rd</sup> April 2020.

The 1<sup>st</sup> Applicant's assertion that it received its letter of notification on 23<sup>rd</sup> April 2020 is supported by the 1<sup>st</sup> Respondent's admission of the same in its Replying Affidavit. Accordingly, this Board is persuaded that the 1<sup>st</sup> Applicant received its letter of notification and hence notified on 23<sup>rd</sup> April 2020, and not 15<sup>th</sup> April 2020 as alleged by the 2<sup>nd</sup> Respondent.

In determining the period within which the 1<sup>st</sup> Applicant ought to have lodged its Request for Review, section 57 (a) of the Interpretation and General Provisions Act, provides guidance on computation of time as the same states as follows:-

***"In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.***

Hence, 23<sup>rd</sup> April 2020 is excluded when computing the fourteen (14) day period when the 1<sup>st</sup> Applicant ought to have lodged its Request for Review under section 167 (1) of the Act. The fourteen-day period would therefore

start running on 24<sup>th</sup> April 2020 and would lapse on 7<sup>th</sup> May 2020. The 1<sup>st</sup> Applicant filed its Request for Review on 30<sup>th</sup> April 2020 and subsequently filed an Amended Request for Review on 4<sup>th</sup> May 2020 and in both circumstances, the filing was within the statutory period under section 167 (1) of the Act.

It is important at this point to note that the 1<sup>st</sup> Applicant originally filed a Request for Review on 30<sup>th</sup> April 2020 joining the Procuring Entity as the 1<sup>st</sup> Respondent and the Accounting Officer of the Procuring Entity as the 2<sup>nd</sup> Respondent. However, through the Amended Request for Review, the 1<sup>st</sup> Applicant struck off the Procuring Entity and joined M/s Africa Merchant Assurance Co. Ltd (AMACO) as the 2<sup>nd</sup> Respondent, whilst retaining the Accounting Officer of the Procuring Entity as the 1<sup>st</sup> Respondent.

Section 170 of the Act outlines parties to a Request for Review to include the following:-

***"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."***

The 1<sup>st</sup> Applicant complied with section 170 (b) and (c) of the Act by joining the necessary parties through its Amended Request for Review, which the Board has established was filed within the statutory period under section 167 (1) of the Act.

Accordingly, the Board finds that it has the jurisdiction to entertain the Amended Request for Review filed by the 1<sup>st</sup> Applicant on 4<sup>th</sup> May 2020.

On the second issue for determination, the 2<sup>nd</sup> Applicant asserts in its Request for Review and Written Submissions that it received its letter of notification of unsuccessful bid dated 14<sup>th</sup> April 2020, on 24<sup>th</sup> April 2020. In its Written Submissions, the 1<sup>st</sup> Respondent avers that the 2<sup>nd</sup> Applicant was furnished with the letter of notification, but fails to clarify the date when such letter of notification was furnished to the 2<sup>nd</sup> Applicant.

The 2<sup>nd</sup> Applicant further referred the Board to the letter of notification of unsuccessful bid attached to its Request for Review which contains a receiving stamp of the 2<sup>nd</sup> Applicant dated 24<sup>th</sup> April 2020, to support its allegation that it received the said letter of notification on that date. The 1<sup>st</sup> Respondent in its Written Submissions alleged that the Request for Review filed by the 2<sup>nd</sup> Applicant was out of time but did not specify the date when it notified the 2<sup>nd</sup> Applicant of the outcome of its bid. The burden of proof regarding the date when the 2<sup>nd</sup> Applicant was notified of the outcome of its bid rests on the 1<sup>st</sup> Respondent who failed to discharge this burden to the

satisfaction of the Board. The Board is therefore persuaded that the 2<sup>nd</sup> Applicant received its letter of notification and hence notified of the outcome of its bid on 24<sup>th</sup> April 2020.

Having established that the day of the happening of an event is excluded from computation of time pursuant to section 57 (a) of the Interpretation and General Provisions Act, the Board notes that the time within which the 2<sup>nd</sup> Applicant ought to have lodged its Request for Review started running on 25<sup>th</sup> April 2020, and lapsed on 8<sup>th</sup> May 2020. The 2<sup>nd</sup> Applicant filed its Request for Review on 7<sup>th</sup> May 2020 and the same is therefore within the statutory period under section 167 (1) of the Act.

Accordingly, the Board finds that it has the jurisdiction to entertain the Request for Review filed on 7<sup>th</sup> May 2020 by the 2<sup>nd</sup> Applicant.

On the third issue, the 2<sup>nd</sup> Respondent raised a second objection to the jurisdiction of the Board on the grounds that the same is ousted by dint of section 167 (4) (c) of the Act, since a contract was executed between it and the Procuring Entity.

Section 167 (4) (c) of the Act states that:-

**167 (1) .....**

- (2) .....
- (3) .....
- (4) ***The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
  - (a) .....
  - (b) .....; and
  - (c) ***where a contract is signed in accordance with section 135 of this Act.***

Further, Section 135 (3) of the Act provides as follows:-

- Section 135 (1) .....***
- (2) .....
  - (3) ***The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"***

From the foregoing, it is evident that, the mere fact that a contract exists does not mean that the jurisdiction of the Board would automatically be ousted by dint of section 167 (4) (c) of the Act. That provision is conditional that a contract must be signed in accordance with section 135 (3) of the Act, that is, within the tender validity period but not before the lapse of fourteen (14) days following the giving of the said notification.

This Board observes that one of the most important functions that a letter of notification serves is to enable an aggrieved tenderer to exercise its right to administrative review within fourteen (14) days from the date of receiving such letter of notification. The issuance of notification to bidders is not deemed to be the date of the letters of notification, but the date when bidders receive their respective letters of notification.

It is also required of a procuring entity to notify the successful and unsuccessful bidders of the outcome of their bids simultaneously, so that all bidders receive their respective letters of notification around the same time for the fourteen-day stand-still period to start running. In this instance, the 1<sup>st</sup> Applicant received its letter of notification on 23<sup>rd</sup> April 2020 and had up to 7<sup>th</sup> May 2020 to approach this Board, whereas the 2<sup>nd</sup> Applicant received its letter of notification on 24<sup>th</sup> April 2020 and had up to 8<sup>th</sup> May 2020 to approach this Board. However, the 2<sup>nd</sup> Respondent was furnished with its letter of notification on 15<sup>th</sup> April 2020 as admitted in its Replying Affidavit.

The earliest that the 1<sup>st</sup> Respondent could execute a contract with the 2<sup>nd</sup> Respondent is 9<sup>th</sup> May 2020, if the latest date of 24<sup>th</sup> April 2020 is considered, being the date when the 2<sup>nd</sup> Applicant received its letter of notification.

In **Miscellaneous Civil Application 53 of 2010, Republic v. Public Procurement Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited & 3 Others [2010] eKLR** the Court held as follows:-

***"The purported signing of the contract could not be done before the Applicants exhausted their right to challenge the decision of the Board. I find and hold that the said contract is therefore illegal and null ab initio. In Kusugu Quarries Ltd v. Administration General (1999) EAI R 63, the Supreme Court of Uganda held that a court of law cannot sanction what was illegal or enforce obligations arising out of an illegal contract or transaction. That is the law. What the Interested Parties purported to do on 8th or 9/7/2010 is illegal and a nullity ab initio and smacks of bad faith because they seem to have been preempting the filing of these Judicial Review proceedings in the High Court. No contract that can be recognized by law was ever signed on 8/1/00 or 9/1/00 and the purported contract cannot bar the Review Board from considering the request for review by the Applicant"***



From the foregoing case, the fact that the Procuring Entity signed a contract with the 2<sup>nd</sup> Respondent before the lapse of the 14-day stand-still period interfered with the Applicants' right to administrative review. The said contract amounts to a nullity ab initio and cannot therefore have the force of law.

Accordingly, the Board finds that the contract executed between the Procuring Entity and the 2<sup>nd</sup> Respondent on 30<sup>th</sup> April 2020 before the lapse of fourteen (14) days fails to meet the threshold of section 135 (3) of the Act and the same is therefore null and void.

In totality, the Board finds that it has jurisdiction to entertain the Request for Review and now proceeds to address the remaining substantive issues framed for determination.

On the fourth issue, the Board observes that both Applicants aver that the Procuring Entity failed to issue them with letters of notification in accordance with section 87 (3) of the Act, since the Procuring Entity failed to disclose the successful bidder. In response, the 1<sup>st</sup> Respondent avers that the failure to disclose the successful bidder was inordinate and does not invalidate the award made to the 2<sup>nd</sup> Respondent.

Having considered parties' submissions, it is worth noting that section 87 of the Act states as follows:-

***"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted***

***(2) .....***

***(3) 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 requires the accounting officer of a procuring entity to inform unsuccessful bidders of the specific reasons why their bids were found unsuccessful and to disclose the successful bidder in the said notification. Disclosure of the successful bidder in the said notification satisfies one of the principles of public procurement processes enshrined in Article 227 (1) of the Constitution that provides for procurement of goods and services must be undertaken in a system that is transparent.

It is not lost to the Board that after a procuring entity enters into a contract with a successful bidder, such a contract is to be published for the public's consumption. This is a requirement under section 138 (1) of the Act, which states as follows:-

***"138 (1) The accounting officer of a procuring entity shall publish and publicize all contract awards on their notice boards at conspicuous places, and website if available within a period as prescribed"***

The details of the contract would therefore be open to all including the amount at which award has been made to a successful bidder. The letters of notification addressed to the Applicants contained the specific reason why the Applicants' respective bids were found non-responsive thereby enabling them to challenge the same by way of administrative review pursuant to section 167 (1) of the Act.

It is evident from the foregoing that the Applicants suffered no prejudice having been informed of the specific reasons why their bids were found non-responsive, in their letters of notification, despite the Procuring Entity's omission to disclose the successful bidder. In any case, the 1<sup>st</sup> Applicant, in one way or another, learnt of the successful bidder therefore joined the successful bidder as the 2<sup>nd</sup> Respondent in its Request for Review filed on 30<sup>th</sup> April 2020. However, this is not a reason for procuring entities to choose whether or not to join successful bidders in the letters of notification issued

to unsuccessful bidders and at all times the 1<sup>st</sup> Respondent must observe the principle of transparency under Article 227 (1) of the Constitution.

Accordingly, the Board finds that the Applicants suffered no prejudice as a result of the Procuring Entity's failure to disclose the successful bidder in the letters of notification issued to the Applicants having informed the Applicants of the specific reasons why their bids were found non-responsive.

On the fifth issue, the 1<sup>st</sup> Applicant challenged the manner in which its letter of notification of unsuccessful bid was issued, on the grounds that the same was not made in accordance with section 87 (1) of the Act, since it was not signed by the 1<sup>st</sup> Respondent. In response to this assertion, the 1<sup>st</sup> Respondent referred the Board to a Memo dated 9<sup>th</sup> April 2019 forming part of the Procuring Entity's confidential file submitted to the Board, to support its view that the authority to issue notification letters to unsuccessful bidders was delegated to the Procuring Entity's Director, Supply Chain Management Services.

The Board has considered the above submissions and notes that section 2 of the Act states that:-

***"accounting officer" has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012)"***

Section 2 (1) (b) of the Public Finance Management Act further provides that:-

***"2 (1) In this Act, unless the context otherwise requires—***

***accounting officer means:-***

***(a) .....***;

***(b) an accounting officer of a county government entity referred to in section 148"***

Further, section 103 of the Public Finance Management Act provides that:-

***"103. (1) There is established for each county government, an entity to be known as County Treasury.***

***(2) The County Treasury shall comprise —***

***(a) the County Executive Committee member for finance;***

***(b) the Chief Officer; and***

***(c) the department or departments of the County Treasury responsible for financial and fiscal matters.***

***(3) The County Executive Committee member for finance shall be the head of the County Treasury."***

On its part, section 148 of the Public Finance Management Act provides as follows:-

**"148. (1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.**

**(2) Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.**

Further to this, section 45 (3) and (4) of the County Governments Act, 2012 provides that:-

**"45 (1) .....**

**(2) .....**

**(3) A county chief officer shall be responsible to the respective county executive committee member for**

**the administration of a county department as provided under section 46.**

**(4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.**

The court in **Miscellaneous Civil Application No. 3 of 2017, Republic v County Secretary Migori County Government & another [2018] eKLR** had the occasion to consider the foregoing provision when it held as follows:-

***"Section 103 of the Public Finance Management Act, 2012 (hereinafter referred to as 'the Finance Act') establishes a County Treasury for each County to be comprised of the Executive Committee Member for Finance, the Chief Officer and the department or departments of the County Treasury responsible for financial and fiscal matters. The Executive Committee Member for Finance is the head of the County Treasury. Under Section 148 of the Finance Act the Executive Committee Member for Finance must designate accounting officers responsible for managing the finances of the County Government entities. Such officers are the ones ordinarily responsible for the administration of a county government entity. Section 45 (3) of the County Government Act provides that a Chief Officer shall be responsible to the respective Executive Committee Member for the administration of a***

**county department. The Chief Officers by virtue of their offices hence become the accounting officers of their respective county departments.**

***I therefore find and hold that the accounting officer for the Department of Finance is the Chief Officer who is responsible for administration and as such responsible for managing the finances of that department.”***

Having considered the above provisions, this Board must address its mind to the question; who is the Accounting Officer of the Procuring Entity herein?

The Board studied the Procuring Entity’s confidential file and notes that the subject procurement process emanated from the Procuring Entity’s Department of Finance and Economic Planning. From the Procuring Entity’s Official Website (i.e. [www.nairobi.go.ke](http://www.nairobi.go.ke)), several sectors/departments are listed therein including; Roads and Transport, Environment, Energy, Water and Natural Resources, Housing, Lands, Urban Renewal, Urban Planning and Projects Management, Education, Youth and Social Services, Devolved Public Service Management, Trade, Tourism, Industry and Cooperative Development, Health Services, Finance and Economic Planning, among others.



The Department of Finance and Economic Planning deals with procurement of goods and services on behalf of the Procuring Entity and is headed by a County Executive Committee Member and has the responsibility to designate accounting officers to be responsible for managing the finances of the Procuring Entity pursuant to section 148 (1) of the Act.

In this instance, the person designated as the Accounting Officer of the Procuring Entity is the County Secretary and Head of Public Service. In addition to this, the County Secretary and Head of Public Service may designate in writing, Chief Officers to be accounting officers who would in turn be responsible to the County Executive Committee Member under the Department of Finance and Economic Planning by virtue of section 45 (3) of the County Governments Act.

According to section 87 of the Act, an accounting officer of a procuring entity is the person designated to issue notification letters to the successful and unsuccessful bidders. It is clear from section 45 (4) of the County Governments Act that Chief Officers are authorized officers (who would act as accounting officers) in respect of the exercise of delegated power. It is however not lost to the Board that in exercise of his function as a public officer, the Accounting Officer (in this case, the Chief Officer, Finance and Economic Planning) is bound by principles of leadership and integrity under the Constitution and other legislations.

Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Constitution puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 further requires public officers to maintain high standards of professional ethics in that:-

***"Section 5 (1) Every public officer shall maintain high standard of professional ethics***

***(2) For the purposes of sub-section (1), a public officer maintains high standards of professional ethics if that officer***

***(a) .....***

***(b) .....***

***(c) is transparent when executing that officer's functions;***

***(d) can account for that officer's actions;***

***(e) .....***

***(f) .....***

**(g) .....**

**(h) *observes the rule of law.***

From the above provisions, the Board notes that the Accounting Officer of the Procuring Entity in the department of Finance and Economic Planning (that is, Chief Officer, Finance and Economic Planning) has the obligation to observe high standards of public service as he is held accountable for administrative acts, whether performed personally or through delegated authority.

An Accounting Officer has power to delegate his authority, but he must still remain accountable for his actions and other actions undertaken by person to whom he has granted express authority to act on his behalf. To meet the national values and principles of governance, it is more efficient for the Accounting Officer to specify the tender for which the delegated authority is given to avert any abuse that may occur without his knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific and not open to any form of abuse.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert abuse by the person to whom authority has been delegated, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that an accounting officer (in this instance, the Procuring Entity's Chief Officer, Finance and Economic Planning) has the power to delegate his authority to issue letters of notification to unsuccessful bidders.

The Board studied the letter of notification of unsuccessful bid issued to the 1<sup>st</sup> Applicant and all other unsuccessful bidders in the subject procurement process and notes that the same were signed by one Joshua Kimeu for the Procuring Entity's County Secretary and Head of County Public Service. Upon studying the Procuring Entity's confidential file, the Board notes that a Memo dated 9<sup>th</sup> April 2019 was issued by the Chief Officer, Finance and Economic Planning to the Director, Supply Chain Management Services with the following details:-

***"FROM: CHIEF OFFICER, FINANCE AND ECONOMIC PLANNING***

***TO: DIRECTOR, SUPPL CHAIN MANAGEMENT SERVICES***

***REF: NCC/SCM/JK/PN/485/2019/2020***

**DATE: 9<sup>TH</sup> APRIL, 2019**

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**RE: DELEGATED AUTHORITY**

***The above matter refers.***

***Pursuant to section 69 (4) of the Public Procurement and Asset Disposal Act, 2015 you have been appointed to sign regret letters for non-responsive bidders.***

***Upon conclusion of the ongoing evaluation process of tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021.***

***In view of the above ensure every participant gets feedback'***

***[signature affixed]***

**HALKANO D. WAQO**

**CHIEF OFFICER, FINANCE AND ECONOMIC PLANNING"**

It is worth noting that the Chief Officer, Finance and Economic Planning dated the said memo as 9<sup>th</sup> April 2019 delegating authority with respect to a tender advertised on 28<sup>th</sup> February 2020. This in the Board's view must have been an erroneous date since the tender number and name for which the

authority was given is specified and is similar to the tender in dispute before this Board. It is evident from the foregoing that the Procuring Entity's Accounting Officer (Chief Officer, Finance and Economic Planning) delegated his authority in writing to the Procuring Entity's Director, Supply Chain Management Services specifying the subject tender for which authority was delegated and that the said authority could only be exercised in respect of issuance of letters of notification of unsuccessful bid. Therefore, the erroneous date of "2019" does not in the Board's view invalidate the said letter, given that the substance of the above memo meets the purpose for which it was intended.

Accordingly, the Board finds that the letter of notification of unsuccessful bid issued to the 1<sup>st</sup> Applicant was issued by an authorized person in law.

On the sixth issue for determination, the 1<sup>st</sup> Applicant challenged the award made to the 2<sup>nd</sup> Respondent on the grounds that the 1<sup>st</sup> Respondent failed to take the provisions of Clause 2.25.2 and Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 3, 80 and 83 of the Act and Articles 10 and 227 of the Constitution. To support this view, the 1<sup>st</sup> Applicant submitted that the 2<sup>nd</sup> Respondent is undergoing liquidation/receivership and/or bankruptcy and cannot therefore be awarded the subject tender pursuant to Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document.

In challenging the award made to the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Applicant referred the Board to Gazette Notice No. 1929 of 6<sup>th</sup> March 2020 with respect to Insolvency Petition No. E008 of 2020 and submitted that the same is pending in court against the 2<sup>nd</sup> Respondent herein. Secondly, the 1<sup>st</sup> Applicant made reference to Gazette Notice No. 12216 of 16<sup>th</sup> December 2019 with respect to Insolvency Petition No. E163 of 2019 against the 2<sup>nd</sup> Respondent. The Applicant in its Further Statement referred to a third Insolvency Petition No. E004 of 2020 alleging the same was filed at the High Court on 12<sup>th</sup> February 2020 against the 2<sup>nd</sup> Respondent. In the Applicant's view, the three petitions are still pending in Court therefore, Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document precludes the 1<sup>st</sup> Respondent from awarding the subject tender to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Applicant further took the view that the 1<sup>st</sup> Respondent failed to conduct a due diligence exercise on the 2<sup>nd</sup> Respondent, the same having been provided in clause 2.24 of Section II. Instructions to Tenderers of the Tender Document, therefore the award did not meet the principles enshrined under section 3 read together with Articles 10 and 227 of the Constitution.

In response to the 1<sup>st</sup> Applicant's allegation, the 1<sup>st</sup> Respondent submits in its Replying Affidavit that the documents adduced by the 1<sup>st</sup> Applicant to support its allegations cannot be verified since they did not emanate from the Registrar of the High Court and that even assuming the petitions do exist the 2<sup>nd</sup> Respondent could not be disqualified on the basis of petitions that are still active, noting that any company may be the subject of proceedings

before a court but that should not invalidate their participation in a tender process.

The 2<sup>nd</sup> Respondent in its Replying Affidavit submitted that vide a court order issued on 22<sup>nd</sup> January 2020 and a Gazette Notice No. 468 of 24<sup>th</sup> January 2020, Insolvency Petition No. E163 of 2019 was marked as withdrawn before the subject tender was advertised by the Procuring Entity. To support this, the 2<sup>nd</sup> Respondent attached a Court Order and a Gazette Notice referred to hereinbefore to its Replying Affidavit. Secondly, the 2<sup>nd</sup> Respondent depones that vide a consent letter dated 4<sup>th</sup> April 2020 between the Petitioner's Advocates and the Advocates of the 2<sup>nd</sup> Respondent in Petition No. E008 of 2020, the said petition was duly settled. The 2<sup>nd</sup> Respondent further submits that due to prevailing circumstances where court registries have slowed down activities and others closed because of the Corona Virus Pandemic, a certified court order is yet to be secured, but that the 2<sup>nd</sup> Respondent herein is pursuing the same.

Having noted that the 1<sup>st</sup> Applicant referred to a third Insolvency Petition in its Further Statement, the 2<sup>nd</sup> Respondent filed a Further Replying Affidavit stating that it is not aware of the said petition as referred to by the 1<sup>st</sup> Applicant and that the said allegation was made out of time and is a new issue that ought to be ignored by the Board.



Having considered parties' submissions, at this juncture the Board deems it necessary to revisit Clause 2.25.2 outlined in Section II. Instructions to Tenderers at page 13 of the Tender Document. The said provisions states as follows:-

***"To qualify for contract awards, the tenderer shall have the following:-***

***Necessary qualifications, capability experience, services, equipment and facilities to provide what is being procured***

***Legal capacity to enter into a contract***

***Shall not be insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing***

***Shall not be debarred from participating in public procurement" [Emphasis by the Board]***

The dispute before this Board relates to the clause underlined hereinabove which provides that for a bidder to qualify for an award, such a bidder should not be insolvent, in receivership, bankrupt or in the process of being wound up and should not be subject of legal proceedings relating to insolvency, receivership, bankruptcy or winding up.

The Black's Law dictionary, 2<sup>nd</sup> Edition defines insolvency as follows:-

***"The condition of a person or company being insolvent; inability to pay one's debts as they fall due, or in the usual course of trade and business."***

The Preamble of the Insolvency Act. No. 18 of 2015 specifies that the same deals with the following:-

***"AN ACT of Parliament to amend and consolidate the law relating to the insolvency of natural persons and incorporated and unincorporated bodies; to provide for and to regulate the bankruptcy of natural persons; to provide alternative procedures to bankruptcy that will enable the affairs of insolvent natural persons to be managed for the benefit of their creditors; to provide for the liquidation of incorporated and unincorporated bodies (including ones that may be solvent); to provide as an alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors; and to provide for related and incidental matters."***

It is also important to note that the Insolvency Act deals with bankruptcy of natural persons (and not "artificial persons") as can be seen by the provisions of Part III thereof, since "artificial persons" (incorporated and unincorporated bodies) are covered under provisions relating to liquidation of companies under Part VI thereof.

**Mukherjee and Hanif, Amitabha Mukherjee Mohammed Hanif**, in their book on **Corporate Accounting (2005)** explain the relation between liquidation and winding up as follows:-

***"A company is formed by law and its existence can be terminated also by law. Winding up or liquidation is the process by which the management of a company's affairs is taken out of its director's hands. Its directors usually become defunct.***

***The assets of the company are realized by a liquidator and its liabilities are paid off by him. If any money is left after paying company's debts, the surplus is distributed among members of the company. From the date of commencement of winding up, a liquidator is appointed to conduct the dissolution of the company and the company ceases to be a going concern. The legal process through which a company is being wound up is called liquidation."***

In order for a company to remain as a going concern, a company that is unable to meet its debts (i.e. one that risks becoming completely insolvent) may be put under administration. Section 522 of the Insolvency Act explains that:-

***522. (1) The objectives of the administration of a company are following:***

***(a) to maintain the company as a going concern;***

***(b) to achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company were liquidated (without first being under administration);***

***(c) to realise the property of the company in order to make a distribution to one or more secured or preferential creditors***

Company Administration is entered into with a view to rescue the company so that the company can avoid the harsh effects of liquidation, whereby realization of the company's assets is done by a liquidator prior to closing it down (i.e. winding up) and therefore cease doing business. Administration and liquidation are however part and parcel of the same problem, that is, looming or existing insolvency which manifests itself in inability to pay debts or an excess of liabilities over the total value of assets.

As regards "receivership", the Black's law Dictionary, 2<sup>nd</sup> Edition defines the term as follows:-

***"After filing for bankruptcy or insolvency an overseer is assigned until the courts decide to liquidate or reorganize."***

With respect to bankruptcy of individuals or insolvency of companies, the Board notes that receivership is whereby a receiver is appointed (either by

court or creditors) to oversee the financial affairs of the bankrupt or insolvent before a court decides on liquidation or administration (for the company) or whether alternatives to bankruptcy are a more viable option for the individual.

Hence, insolvency as covered in the Insolvency Act relates to winding up, liquidation, bankruptcy and receivership. This explains why the Petitions for Liquidation referred to by the 1<sup>st</sup> Applicant were brought under the Insolvency Act.

Having considered parties' submissions on the three allegations raised by the 1<sup>st</sup> Applicant, the Board makes the following findings:-

**a) Insolvency Petition No. E008 of 2020**

Having studied Gazette Notice No. 1929 of 6<sup>th</sup> March 2020, the Board notes that the same was published in the Kenya Gazette, Vol. CXXII—No. 42 at page 1221 thereof on 6<sup>th</sup> March 2020 (available at [www.kenyalaw.org](http://www.kenyalaw.org) ) with the following details:-

**"GAZETTE NOTICE NO. 1929  
REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL & ADMIRALTY DIVISION  
INSOLVENCY PETITION NO. E008 OF 2020  
INVOLVING  
IN THE MATTER OF INSOLVENCY ACT NO. 18 OF 2015**

**AND**  
**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015**  
**AND**  
**IN THE MATTER OF AFRICA MERCHANT ASSURANCE**  
**COMPANY LIMITED**  
**PETITION FOR LIQUIDATION**

***NOTICE is given that a petition for the liquidation of the above mentioned company by the High Court was on the 2nd March, 2020, presented to the said court by Bernard Kihiu Magothe and the said petition is directed to be heard before the High Court sitting at Nairobi on the 17th April, 2020 and any creditor or contributory of the said company desirous to support or oppose the making of an order on the said petition may appear at the time of hearing in person or by his advocate for that purpose and a copy of the petition will be furnished by the undersigned to any creditor or contributory of the said company requiring such a copy on payment of regulated charge for the same.***

***Dated 4th March, 2020.***

***NJOROGE BAIYA & COMPANY,  
Advocates for the Petitioner.***

***Drawn By:-  
Njoroge Baiya & Company Advocates  
Kamindi House, 2nd Floor  
P.O. BOX 584-00900  
Kiambu  
Mobile: 0740-522223  
Email:njorogebaiyaadvocates@gmail.com"***

The 2<sup>nd</sup> Respondent alleged that it had difficulties securing a court order demonstrating that the dispute in the above petition was settled as a result of scaled down operations of courts in view of the Corona Virus Pandemic. The 2<sup>nd</sup> Respondent further made reference to a consent letter dated 4<sup>th</sup>

April 2020 (between the Petitioner's Advocates and the Advocates of the 2nd Respondent in the above Petition) but failed to furnish the Board with the said consent letter at least for the Board to verify its assertion that the dispute relating to the said petition was settled.

Even assuming the Board considers the 2<sup>nd</sup> Respondent's argument that it has not yet secured a court order in relation to the said consent due to the Corona Virus pandemic, the consent letter (whether filed in court or not) was never furnished before the Board, to verify the 2<sup>nd</sup> Respondent's assertion that the dispute relating to the Insolvency Petition under consideration, was settled. In the absence of proof of the existence of the said consent, the Board is not persuaded that Petition No. E008 of 2020 has been settled by way of a consent.

Accordingly, the Board finds that Petition No. E008 of 2020 is still active.

**b) Insolvency Petition No. E163 of 2019**

The 2<sup>nd</sup> Respondent attached a court order issued on 22<sup>nd</sup> January 2020 of the High Court Commercial Tax Division under Insolvency Petition No. E163 of 2019, which contains the following details:-

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL AND TAX DIVISION  
INSOLVENCY PETITION NO. E163 OF 2019**

**BETH WAIRIMU  
KIHARA.....PETITIONER**

**VERSUS**

**AFRICA MERCHANT ASSURANCE COMPANY  
LIMITED.....RESPONDENT**

**IN CHAMBERS ON 22<sup>ND</sup> JANUARY 2020 BEFORE  
THE HON. S.A OPANDE, DEPUTY REGISTRAR  
ORDER**

**THIS MATTER coming up for mention on 22<sup>nd</sup> January 2020 before Honourable S. O Opande, Deputy Registrar. AND UPON HEARING the Counsel for the Petitioner and Counsel for the Respondent:**

**IT IS HEREBY ORDERED BY CONSENT:**

- 1. THAT by consent of both parties the Statutory Demand dated 3<sup>rd</sup> September 2019 and filed in court on 23<sup>rd</sup> August and the Petition dated 28<sup>th</sup> October 2019 and filed in court on 7<sup>th</sup> November 2019 against Africa Merchant Assurance Company Ltd herein be and is hereby marked as withdrawn with no orders as to costs.**
  - 2. THAT the Notice issued to the Public via Gazette Notice No. 12216 dated 16<sup>th</sup> December 2019 on the above Petition be and is hereby revoked.**
  - 3. THAT the Judgement Debtor be at liberty to place the extract at this order in the local dailies at its own cost.**
- GIVEN under my hand and Seal of the Honourable Court at Nairobi this 22<sup>nd</sup> day of January 2020**

**ISSUED at Nairobi this 22<sup>nd</sup> day of January 2020  
DEPUTY REGISTRAR  
HIGH COURT OF KENYA, NAIROBI  
MILIMANI COMMERCIAL AND TAX DIVISION**

The 2<sup>nd</sup> Respondent also attached Gazette Notice No. 468 of 24<sup>th</sup> January 2020 to support its submission that the said Insolvency Petition was published after the High Court order outlined hereinbefore was issued. This



prompted the Board to visit the official website of the National Council for Law Reporting ([www.kenyalaw.org](http://www.kenyalaw.org)) to verify this position. The Board established that Gazette Notice No. 468 of 24<sup>th</sup> January 2020 relating to Insolvency Petition No. E163 of 2019 was published in the Kenya Gazette, Vol. CXXII—No. 16 at page 582 thereof with the following details:-

**GAZETTE NOTICE NO. 468**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**INSOLVENCY PETITION No. E163 OF 2019**  
**BETH WAIRIMU KIHARA—(Petitioner)**  
**VERSUS**  
**AFRICA MERCHANT ASSURANCE COMPANY LIMITED—**  
**(Respondent)**

**IN CHAMBERS ON 22ND JANUARY, 2020 BEFORE**  
**THE HON. S. A. OPANDE, DEPUTY REGISTRAR**  
**ORDER**

***THIS MATTER coming up mention on 22<sup>nd</sup> January, 2020 before the Honourable S. A. Opande, Deputy Registrar. AND UPON HEARING the Counsel for Petitioner and Counsel for the Respondent:***

***It Is Hereby Ordered by Consent:***

***1. THAT by consent of both parties the Statutory Demand dated 3rd September, 2019 and filed in court on 23rd August and the Petition dated 28th October, 2019 and filed in court on 7th November, 2019 against Africa Merchant Assurance Company Limited herein be and is hereby marked as withdrawn with no orders to costs.***

***2. THAT the Notice issued to the Public via Kenya Gazette Notice No. 12216 dated 16th December, 2019 on the above Petition be and is hereby revoked.***

***3. THAT the Judgment Debtor be at liberty to place the extract of this order in the local dailies at its own cost.***

***GIVEN under my hand and the Seal of this Honourable Court at Nairobi this 22<sup>nd</sup> day of January, 2020.***

***ISSUED at Nairobi this, 22<sup>nd</sup> January. 2020.***

***DEPUTY REGISTRAR,  
HIGH COURT OF KENYA, NAIROBI,  
MILIMANI COMMERCIAL AND TAX DIVISION.***

The foregoing Gazette Notice corroborates the High Court order adduced by the 2<sup>nd</sup> Respondent thereby settling the issue in dispute herein and the Board finds that Insolvency Petition No. E163 of 2019 was withdrawn and the same is not pending before the High Court.

Accordingly, the 1<sup>st</sup> Applicant's allegation that Insolvency proceedings relating to Insolvency Petition No. E163 of 2019 against the 2<sup>nd</sup> Respondent are still active, have not been substantiated.

**c) Insolvency Petition No. E004 of 2020**

The 1<sup>st</sup> Applicant attached to its Further Statement, pleadings relating to Insolvency Petition No. E004 of 2020 that is, a Liquidation Petition dated 12<sup>th</sup> February 2020 and an undated Verifying Affidavit. The 1<sup>st</sup> Applicant filed these documents whilst introducing a new issue in the said Further Statement and its Written Submissions filed on 15<sup>th</sup> May 2020, not previously covered in its Amended Request for Review and Supporting Statement. These two documents were filed way after the 2<sup>nd</sup> Respondent had already filed its pleadings before this Board, thereby necessitating the 2<sup>nd</sup> Respondent to file a Further Replying Affidavit.

The Board is cognizant of Article 50 of the Constitution which protects the right to a fair hearing as it states as follows:-

***"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body***

***(2) Every person has the right to a fair trial, which includes the right—***

***(a) .....***

***(b) to have adequate time and facilities to prepare a defence;***

***(c) .....***

***(d) .....***

***(e) .....***

***(f) .....***

***(g) .....***

***(h) .....***

***(j) .....***

***(k) to adduce and challenge evidence"***

The Board observes that all parties to a dispute have the right to a fair hearing, including the right to have adequate time and facilities to prepare a defence and to adduce and challenge evidence. Further, in order to mitigate the challenges faced as a result of the Covid-19 Pandemic, the Board provided timelines within which parties ought to file their respective

pleadings. Circular No. 2/2020 issued on 24<sup>th</sup> March 2020 gives applicants the right to a rejoinder (in terms of filing a further response) once respondents and interested parties have filed their respective pleadings. This does not mean that an applicant, with full knowledge that the Board dispensed with physical hearings can now circumvent the operations of the Board to introduce new issues that other parties may not have adequate time and facilities to prepare a defence in response to such a new issue.

The 1<sup>st</sup> Applicant acted in bad faith having introduced a third allegation of an Insolvency Petition after the 2<sup>nd</sup> Respondent filed its responses to the Request for Review and outside the time given to parties to file their respective pleadings.

Accordingly, the Board finds that the 1<sup>st</sup> Applicant's allegation that the 2<sup>nd</sup> Respondent is subject to ongoing proceedings before the High Court through Insolvency Petition No. E004 of 2020 was filed out of time thereby interfering on the 2<sup>nd</sup> Respondent's right to a fair hearing and the Board will not entertain this specific issue to avoid interfering with the 2<sup>nd</sup> Respondent's right to a fair hearing under Article 50 of the Constitution.

From the foregoing, the Board has established that it is only Gazette Notice No. 1929 of 6<sup>th</sup> March 2020 which supports the Applicant's allegation that Insolvency Petition No. E008 of 2020 is in existence.

This means, the moment the 1<sup>st</sup> Respondent found the 2<sup>nd</sup> Respondent qualified for award of the subject tender, it ought to have addressed its mind on the impact of Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document. In particular, Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document already provided one of the ways the 1<sup>st</sup> Respondent could have confirmed and verified whether or not the 2<sup>nd</sup> Respondent is qualified for award of the subject tender, or whether the 2<sup>nd</sup> Respondent is subject to any of the legal proceedings outlined in Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document.

Clause 2.24 referred to above provides as follows:-

***"2.24. Post Qualification***

***2.24.1. The Procuring Entity will verify and determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily***

***2.24.2. The determination will take into account the tenderer financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.11.2 as well as such other information as the Procuring Entity deems necessary and appropriate***

***2.24.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative***

***determination will result in rejection of the tenderer's tender, in which event the Procuring Entity will proceed to the next lowest evaluated tender to make a similar determination of that tenderer's capabilities to perform satisfactorily"***

It is also worth noting that section 80 (2) of the Act, states that:-

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"***

The Procuring Entity's Tender Document already outlined due diligence as a Post Qualification process to be conducted on the lowest evaluated responsive tenderer as provided under section 83 (1) of the Act. Having noted that the 2<sup>nd</sup> Respondent has been the subject of Insolvency proceedings, the stage at which such proceedings have reached (whether concluded or ongoing) can be verified in a due diligence exercise prior to award of the subject tender.

One of the guiding principles under section 3 (a) of the Act states that:-

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

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

Article 10 of the Constitution referred to above further provides that:-

***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

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

***(a) .....***

***(b) .....***

***(c) good governance, integrity, transparency and accountability”***

On its part, 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”***

In order to ensure that the principles outlined in Article 227 (1) of the Constitution are achieved, a public entity such as the Procuring Entity herein

ought to take into consideration, the guiding principles under section 3 of the Act read together with Article 10 (2) (c) of the Constitution, in particular to ensure that the procurement process is carried out in a transparent manner and accountability to the public.

The fact that the 2<sup>nd</sup> Respondent has been involved in legal proceedings relating to insolvency as identified in Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document should prompt the Procuring Entity to conduct a due diligence exercise before awarding the subject tender to confirm and verify the 2<sup>nd</sup> Respondent's qualifications in order to achieve the overriding principles under section 3 of the Act read together with Articles 10 and 227 of the Constitution.

As already noted, the Procuring Entity, pursuant to section 80 (2) of the Act had the obligation to stick to the procedures and criteria set out in the Tender Document. One such criterion is identified in Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document, that a bidder would not qualify for award if such bidder is subject to legal proceedings relating to insolvency, receivership, bankruptcy or winding up.

The Board has established that the 2<sup>nd</sup> Respondent herein is subject of insolvency proceedings under Insolvency Petition No. E008 of 2020, Gazette Notice No. 1929 of 6<sup>th</sup> March 2020 therefore does not qualify for an award pursuant to Clause 2.25.2 of Section II. Instructions to Tenderers of the



Tender Document. This criterion was provided in the Tender Document as forming part of the criteria for determining the bidder to be awarded the subject tender and the Procuring Entity had no option but to apply the same.

Accordingly, the Board finds that the 2<sup>nd</sup> Respondent was not qualified for award of the subject tender in accordance with Clause 2.25.2 and Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document, section 3 (a), 80 (2) of the Act read together with Articles 10 (2) (c) and 227 (1) of the Constitution, in awarding the subject tender to the 2<sup>nd</sup> Respondent.

On the seventh issue for determination, the Board notes that the 2<sup>nd</sup> Applicant challenged the reasons why its bid was found non-responsive as outlined in its letter of notification of unsuccessful bid dated 14<sup>th</sup> April 2020. The same is reproduced hereinbelow as follows:-

***"This is to notify you that Nairobi City County has finalized the process of evaluating bids for the above tender. We regret to inform your bid for the above tender was unsuccessful due to the reason indicated below;***

***(a) Did not provide proof of annual gross premium of Shs. 3.5 Billion (Refer No. 11)***

***(b) Did not attach 5 recommendation letters as required (Refer No. 17)..."***

In its Request for Review, the 2<sup>nd</sup> Applicant contends that the Procuring Entity failed to conduct evaluation of the bids submitted to it as per the requirements of the Tender Document and the Act, therefore failed to ensure fairness and as a result prejudiced the legitimate expectations of the 2<sup>nd</sup> Applicant.

The Board observes that fairness is one of the principles that guide public procurement processes pursuant to Article 227 (1) of the Constitution, and this applies during evaluation of bids. As a result, the Board studied the 2<sup>nd</sup> Applicant's bid submitted to the Procuring Entity to establish whether the Procuring Entity fairly evaluated the 2<sup>nd</sup> Applicant's bid with respect to the two criteria challenged by the 2<sup>nd</sup> Applicant.

#### **A. Annual Gross Premium**

Clause 1 under Stage 2. Technical Evaluation of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document previously identified this criterion as follows:-

***"Annual Gross premiums of Kshs. 3.5 Billion and above for General Insurance Business for each of the years 2017, 2018, 2019 cumulatively (Attach proof) -Score: 15***

However, the Procuring Entity issued an Addendum dated 11<sup>th</sup> March 2020 modifying the said criterion as follows:-

***"...1. ON page 2: Technical evaluation criteria area of examination 1 should read "Annual gross premiums of Kshs. 3.5 Billion and above for general insurance business cumulative years 2016, 2017 and 2018 (attach proof)"***

This means, bidders were required to attach proof demonstrating Annual gross premium of Kshs. 3.5 Billion and above for general insurance business for the cumulative years; 2016, 2017 and 2018. In response to this criterion, the 2<sup>nd</sup> Applicant attached the following:-

The Board notes that the 2<sup>nd</sup> Applicant attached an extract of its Short Term Insurance Business Revenue Account for the year ended 31<sup>st</sup> December 2018 which shows that the Gross premium written amount is "**8,048,802/-**" at page 00000150 of its original bid. At page 00000151, the Gross Premium written amount for 2017 is indicated as "**8,042,402/-**" which is an extract of page 83 of the 2017 Annual Report and Financial Statements as can be seen on page 000000248 of the 2<sup>nd</sup> Applicant's original bid. At page 00000152 of its original bid, the Gross Premium Written amount for 2016 is indicated as "**6,997,226/-**" which is an extract of page 82 of the 2016 Annual Report and Financial Statements as can be seen on page 00000291 of the 2<sup>nd</sup> Applicant's original bid.

The 2<sup>nd</sup> Applicant contended that the Gross Premium Written amount in its Short Term Insurance Business Revenue Account for the respective years;

2018, 2017 and 2016 are in billions and not millions, since the figures outlined hereinbefore (i.e. **"8,048,802/- for 2018; "8,042,402/- for 2017; and "6,997,226/-" for 2016**) were converted in "000" Kenya Shillings.

The Board studied the 2<sup>nd</sup> Applicant's original bid and notes that at pages 00000150, 00000151 and 00000152 thereof, there was no indication as to whether the amounts of **"8,048,802/- for 2018; "8,042,402/- for 2017; and "6,997,226/-" for 2016** were in "Kenya Shillings", in "millions" or in "billions".

This prompted the Board to study the 2018, 2017 and 2016 Annual Reports and Financial Statements found between pages 00000164 and 00000291 of the 2<sup>nd</sup> Applicant's original bid. The Board found that at pages 00000205, 00000248 and 00000291, the figures therein did not indicate "Kenya Shillings" neither was there indication of "millions", "billions" or "000".

It was therefore not clear whether the figures indicated therein were in "millions", "billions" or in "Kenya Shillings"

Accordingly, the Board finds that the Procuring Entity fairly evaluated the 2<sup>nd</sup> Applicant's bid under the criterion of Clause 1 under Stage 2 of Appendix II.

Instructions to Tenderers on Scores for Evaluation of the Tender Document as amended by the Addendum dated 11<sup>th</sup> March 2020.

## **B. Recommendation Letters**

Clause 19 under Stage 1 of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document required bidders to provide the following:-

***"Attach 5 Performance Recommendation letters from clients with premiums of Shs. 10 Million and above"***

The Board studied all the 2<sup>nd</sup> Applicant's bid submitted to the Procuring Entity to establish whether the Procuring Entity fairly evaluated the 2<sup>nd</sup> Applicant with respect to this criterion and proceeds to make the following findings:-

In response to this criterion, the 2<sup>nd</sup> Applicant provided the following:-

- At page 00000303 of its original bid, a letter dated 22<sup>nd</sup> December 2019 issued by Kenya Wildlife Services (KWS) stating that the 2<sup>nd</sup> Applicant has been its insurer in the year 2014/2015 and 2015/2016 and that the premium in the respective years was Kshs. 42,907,279/- and 40,113,792/-. KWS further asserts that the performance indicators of the 2<sup>nd</sup> Applicant have been excellent with respect to Claims Handling, Underwriting Responsiveness and General Customer Care;

- At page 00000304 of its original bid, a letter dated 17<sup>th</sup> January 2019 issued by Central Bank of Kenya stating that they are insured by **Britam Life Assurance Co. (K) Ltd** for the years 2018-2020 at a premium of Kshs. 72,820,090/-. Central Bank of Kenya further asserts that **Britam Life Assurance Co. (K) Ltd** take 48 hours to settle claims upon documentation of all requisite information;
- At page 00000305 of its original bid a letter dated 28<sup>th</sup> August 2018 issued by National Social Security Fund (NSSF) stating that they have been insured by the 2<sup>nd</sup> Applicant for the years 2011-2013 and 2017 to date in various categories of General Insurance with a total premium of 74 Million Kenya Shillings demonstrating high degree of professionalism;
- At page 00000306 of its original bid, a letter dated 12<sup>th</sup> March 2019 by KENGEN stating that the 2<sup>nd</sup> Applicant has been providing its General insurance services for the last 2 years at a premium of Kshs. 18,210,081.65 demonstrating efficiency and high degree of professionalism;
- At page 00000307 of its original bid, a letter dated 12<sup>th</sup> March 2019 issued by National Cereals and Produce Board stating that the 2<sup>nd</sup> Applicant has been providing its General insurance services for the last 2 years at a premium of over 10 Million Kenya Shillings demonstrating efficiency and high degree of professionalism;
- At page 00000308 of its original bid, a letter dated 14<sup>th</sup> March 2019 issued by Majani Insurance Brokers Ltd confirming that their client Kenya Tea Development Agency has their general insurance policy with

the 2<sup>nd</sup> Applicant for over 10 years and that the total premium underwritten for the year 2018 is Kshs. 670,190,450/-, demonstrating exemplary services, efficiency, professionalism and problem solving. At the foot of the said letter, Majani Insurance Brokers Ltd states that is a wholly owned subsidiary company of Kenya Tea Development Agency Ltd.

Section 3 of the Companies Act, No. 17 of 2015 (hereinafter referred to as "the Companies Act") states that:-

***"wholly-owned subsidiary company" (of another company) means a company that has no members other than that other company and that other company's wholly owned subsidiaries (or persons acting on behalf of that other company or its wholly-owned subsidiaries)"***

Hence, Majani Insurance Brokers Ltd, can be considered a wholly owned subsidiary company of Kenya Tea Development Agency if the members of Majani Insurance Brokers Ltd are the ones in Kenya Tea Development Agency.

Having considered the above documentation, the Board observes that the letter dated 17<sup>th</sup> January 2019 issued by Central Bank of Kenya stating that

they are insured by Britam Life Assurance Co. (K) Ltd, is a separate entity from the 2<sup>nd</sup> Applicant.

Accordingly, only five letters outlined hereinabove met this criterion and the 1<sup>st</sup> Respondent ought to have found the 2<sup>nd</sup> Applicant responsive under this this criterion.

The Board observes that section 79 (1) of the Act provides that a responsive bid is one that meets the eligibility and mandatory requirements in the tender document. Further to this, in determining the responsiveness of bidders, a procuring entity has the obligation to apply criteria that is fair and equitable to bidders in accordance with Article 227 (1) of the Constitution.

The Board notes, the criteria challenged by the 2<sup>nd</sup> Applicant were both mandatory requirements to be satisfied by a bidder, failure to which such bidder could not proceed to Technical Evaluation. This means, even though the 2<sup>nd</sup> Applicant provided the required 5 recommendation letters, it could not be subjected to further evaluation having failed to meet the mandatory requirement of Annual Gross Premium of 3.5 Billion Kenya Shillings and above in General Insurance Business in Clause 13 of Stage 1 of Appendix II. Instructions to Tenderers on Scores for Evaluation (also outlined in Clause 1 under Stage 2 of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document) as amended by the Addendum dated 11<sup>th</sup> March 2020.



The Board finds that 1<sup>st</sup> Respondent rightfully found the 2<sup>nd</sup> Applicant's bid non-responsive with respect to the mandatory requirement in Clause 13 of Stage 1 of Appendix II. Instructions to Tenderers on Scores for Evaluation (also outlined in Clause 1 under Stage 2 of Appendix II. Instructions to Tenderers on Scores for Evaluation of the Tender Document) as amended by the Addendum dated 11<sup>th</sup> March 2020, read together with section 79 (1) of the Act and Article 227 (1) of the Constitution and could not therefore proceed to Technical Evaluation.

In totality of the foregoing, the Board finds that the grounds of the Request for Review as concerns the 2<sup>nd</sup> Applicant fails, whilst only one ground of the 1<sup>st</sup> Applicant's Request for Review on Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document succeeds in terms of the following specific 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 of Unsuccessful bid dated 14<sup>th</sup> April 2020 with respect to Tender No. NCC/F & EP/AM/T/318/2019-2020 for Provision of General Insurance Services for the year 2020-2021 (Underwriters Only) addressed to the 1<sup>st</sup> Applicant herein, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification of Intention to Enter into a Contract dated 14<sup>th</sup> April 2020 with respect to the subject tender addressed to the 2<sup>nd</sup> Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Contract dated 30<sup>th</sup> April 2020 signed between the Procuring Entity and the 2<sup>nd</sup> Respondent herein with respect to the subject tender, be and is hereby nullified and set aside.**
- 4. The Procuring Entity is hereby directed to proceed with the procurement process from the Financial Evaluation Stage to its logical conclusion including the making of an award, taking into consideration the Board's findings in this matter in respect of Clause 2.25.2 of Section II. Instructions to Tenderers of the Tender Document read together with Section 80 (2) of the Act and Article 227 (1) of the Constitution, within seven (7) days from the date of this decision.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 21<sup>st</sup> day of May 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**