

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 79/2020 OF 12<sup>TH</sup> JUNE 2020**

**BETWEEN**

**MADISON GENERAL INSURANCE KENYA**

**LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**COUNTY GOVERNMENT OF KWALE.....1<sup>ST</sup> RESPONDENT**

**AAR INSURANCE KENYA.....2<sup>ND</sup> RESPONDENT**

**RESOLUTION INSURANCE LTD.....INTERESTED PARTY**

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

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Ms. Phyllis Chepkemboi | -Member      |
| 3. Ms. Robi Chacha        | -Member      |

**IN ATTENDANCE**

- |                       |                                  |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
|-----------------------|----------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

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

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

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

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

### **Evaluation of Bids**

The bids were evaluated electronically using the Integrated Financial Management Information System (IFMIS) using the evaluation criteria

specified in the Tender Document and as reproduced in the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, in the following three stages: -

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

## **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criteria under Clause 2.1. Preliminary Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document. Having subjected the seven bidders to evaluation, the Evaluation Committee found three bidders responsive (i.e. M/s AAR Insurance Kenya Ltd, M/s Madison General Insurance Kenya Limited and M/s Resolution Insurance Co. Ltd) hence proceeded to Technical Evaluation.

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria under Clause 2.22. Technical Evaluation Criteria of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a technical score of 70 points in order to proceed to Financial Evaluation. According to the IFMIS Evaluation Matrix Report, the Technical Score achieved by the three bidders at the end of evaluation was as follows: -

- M/s AAR Insurance Kenya Ltd -70
- M/s Madison General Insurance Kenya Limited -53

- M/s Resolution Insurance Co. Ltd

-70

At the end of evaluation at this stage, the Evaluation Committee found M/s AAR Insurance Kenya Ltd and M/s Resolution Insurance Co. Ltd responsive therefore proceeded to Financial Evaluation.

### **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criteria under Clause 2.22. Financial Evaluation Criteria of the Appendix to Instructions to Tenderers at page 21 of the Tender Document which required that award of the tender be made to the bidder with the lowest evaluated bid price.

Having considered the bid prices submitted by M/s AAR Insurance Kenya Ltd (Kshs. 284,999,997.00) and M/s Resolution Insurance Co. Ltd (Kshs. 299,920,455.00), the Evaluation Committee found that M/s AAR Insurance Kenya Ltd to be the lowest evaluated bidder.

### **Recommendation**

Upon conclusion of the Financial Evaluation, the Evaluation Committee recommended award of the subject tender to M/s AAR Insurance Kenya Ltd at its tender sum of Kshs. 284,999,997.00.

## **Professional Opinion**

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

## **Notification to Bidders**

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

## **THE REQUEST FOR REVIEW**

M/s Madison General Insurance Kenya Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 11<sup>th</sup> June 2020 and filed on 12<sup>th</sup> June 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement in Support of the Request for Review sworn and filed on 1<sup>st</sup> July 2020, through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders: -

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

***vii. Such other or further relief or reliefs as the Board shall deem just and expedient.***

In response, the 1<sup>st</sup> Respondent lodged a Replying Affidavit sworn on 26<sup>th</sup> June 2020 and filed on 28<sup>th</sup> June 2020 through the firm of Muturi, Gakuo & Kibara Advocates, the 2<sup>nd</sup> Respondent lodged a Replying Affidavit sworn and filed on 29<sup>th</sup> June 2020, another Replying Affidavit sworn and filed on 1<sup>st</sup> July 2020 through the firm of Mbichire & Co. Advocates, while the Interested Party filed Grounds in Support of the Request for Review dated 29<sup>th</sup> June 2020 and filed on 30<sup>th</sup> June 2020 through the firm of Ong'anda & Associates Advocates.

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 Applicant lodged Written Submissions dated and filed on 1<sup>st</sup> July 2020, the 1<sup>st</sup> Respondent lodged Written Submissions dated 25<sup>th</sup> May 2020 (the Board believes that the 1<sup>st</sup> Respondent's written submissions was erroneously dated 25<sup>th</sup> May 2020 noting that the Request for Review was filed on 12<sup>th</sup> June 2020) and filed on 29<sup>th</sup> June 2020, the 2<sup>nd</sup> Respondent lodged Written Submissions dated and filed on 29<sup>th</sup> June 2020 whereas the Interested Party did not lodge any written submissions.

### **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 Procuring Entity executed a contract with the 2<sup>nd</sup> Respondent in accordance with section 135 (3) of the Act thus ousting the jurisdiction of the Board pursuant to section 167 (4) (c) of the Act.***



Depending on the determination of the above issue: -

- II. Whether the Applicant has suffered prejudice as a result of the Procuring Entity's failure to disclose the successful bidder in the Applicant's letter of notification dated 13<sup>th</sup> May 2020; and***
- III. Whether the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation Stage in accordance with the provisions of the Tender Document read together with section 79 (1) of the Act and Article 227 (1) of the Constitution.***

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

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

***"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."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus: -

***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "***

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"***

However, the jurisdiction of this Board can be ousted when the conditions set out in section 167 (4) (c) of the Act have been met. The said provision states as follows: -

***"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"***

It is important to note that section 167 (4) (c) of the Act specifically states that the jurisdiction of this Board would only be ousted where a contract has been signed in accordance with section 135 (3) of the Act. This therefore means that the Board must examine the provisions of section 135 (3) of the Act and further determine whether the contract executed between the

Procuring Entity and the 2<sup>nd</sup> Respondent herein met the conditions set out in the aforementioned provisions.

Section 135 (3) of the Act provides that: -

***"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"***

Section 135 (3) of the Act provides that a procurement contract is signed after the lapse of fourteen (14) days following the giving of that notification and within the tender validity period. The fourteen (14) day period specified in section 135 (3) of the Act is an automatic stand-still period within which a procuring entity and a successful bidder are precluded from signing a contract to enable aggrieved tenderers to approach the Board seeking administrative review under Section 167 (1) of the Act.

The Board in **PPARB Application No. 169 of 2018, Arid Contractors & General Supplies Limited v. Kangaroo School**, while considering the import of section 87 (3), 135 (3) and 167 (1) of the Act held as follows: -

***"To exercise the right to administrative review, the manner of notification of the outcome of a bidder's bid is explained in Section 87 of the Act 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
- (3) When a person submitting the successful tender is notified under sub-section (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.***

***The Board observes that Section 87 of the Act cannot be read as a standalone clause. Therefore, the same must be interpreted in its entirety alongside Sections 135 (3) and 167 (1) of the Act. When this is done, the Board observes that the letter of notification serves the following functions: -***

- i. It guarantees and protects the successful and unsuccessful bidder's right to be informed of the outcome of their bids;***

- ii. It allows the successful bidder to promptly signify its acceptance of the award but subject to the fourteen (14) day standstill period under Section 167 (1) of the Act;***
- iii. It allows an unsuccessful bidder aggrieved by a procuring entity's decision on its bid to exercise the right to administrative review under Section 167 (1) of the Act;***
- iv. It marks the beginning of the fourteen (14) day stand still period within which a procuring entity and a successful bidder are precluded from entering into a written contract pursuant to the right to an administrative review afforded to an aggrieved candidate or tenderer under Section 167 (1) of the Act;***
- v. It informs the parties that the contract must be entered into within the tender validity period."***

Having considered the finding in the foregoing case, the Board observes that one of the most important functions that a letter of notification serves is to enable an aggrieved candidate or 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 the letter of notification.

This therefore leads the Board to address its mind on the date when the Applicant received its letter of notification of unsuccessful bid. At paragraph 7 of its Request for Review, the Applicant submits that it received the letter of notification of unsuccessful bid dated 13<sup>th</sup> May 2020, on 29<sup>th</sup> May 2020. On the other hand, the 1<sup>st</sup> Respondent at paragraph 20 of its Replying Affidavit states that unsuccessful tenderers were notified that their tenders were not successful vide letters dated 13<sup>th</sup> May 2020. According to the 1<sup>st</sup> Respondent, the letter dated 13<sup>th</sup> May 2020 was emailed to the Applicant but the date when this email was sent is not stated in the 1<sup>st</sup> Respondent's pleadings. On its part, the 2<sup>nd</sup> Respondent at paragraphs 14 and 15 of its Replying Affidavit states that it received its letter of notification of award dated 13<sup>th</sup> May 2020 on 14<sup>th</sup> May 2020 via email and that it proceeded to signify its acceptance of the award on 19<sup>th</sup> May 2020. Thereafter it signed a contract with the Procuring Entity on 1<sup>st</sup> June 2020 since no Request for Review challenging the 1<sup>st</sup> Respondent's decision in the subject tender had been filed by any bidder as at 1<sup>st</sup> June 2020.

Having considered parties' submissions, the Board observes that whereas the 1<sup>st</sup> Respondent maintains its position that it sent the letter of notification of unsuccessful bid dated 13<sup>th</sup> May 2020 to the Applicant via email, no evidence of such emails were furnished to the Board by the 1<sup>st</sup> Respondent, in its pleadings and in the confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act. The 1<sup>st</sup> Respondent bears the burden of proof in so far as the date when it notified the Applicant of the outcome of its bid is concerned, but has failed to discharge this burden having failed to



furnish the Board with the emails that were sent to all bidders, and more specifically, the Applicant herein.

In the absence of proof of when the notification of unsuccessful bid was emailed to the Applicant herein, we are inclined to find that the Applicant received its letter of notification of unsuccessful bid on 29<sup>th</sup> May 2020.

In determining the 14-day period within which the Applicant was required to lodge its Request for Review, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which provides that: -

***"57. 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"***

In **Judicial Review No. 589 of 2017, Lordship Africa Limited v. Public Procurement Administrative Review Board & 2 Others (2018) eKLR**, the court held that: -

***"Even assuming that the letters of notification were served on 4<sup>th</sup> August 2017, the 14 days given to an aggrieved party to lodge a request for review to the Review Board would have***

***been until 18<sup>th</sup> August, 2017 and not 17<sup>th</sup> August, 2017, when the contract was signed. Time is computed excluding the first day and including the last day. It follows that the 17<sup>th</sup> August, 2017 fell on the 13<sup>th</sup> day. The Act [2015 Act] mandates that a person who is dissatisfied with the decision of the procuring entity, or who may have suffered or risked suffering loss or damage due to breach of a duty imposed on a procuring entity may seek for 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***

Having considered the import of section 57 (a) of the Interpretation and General Provisions Act and the finding in the above case, the Board notes that the first day in which an event happens is not included when computing time within which such event ought to have been undertaken. The Applicant received its letter of notification of unsuccessful bid on 29<sup>th</sup> May 2020, which is an excluded day that is not reckoned (i.e. not counted) when determining the time within which the Applicant was required to file its Request for Review. The Applicant therefore had up to 12<sup>th</sup> June 2020 to lodge its Request for Review. This means, the period between 29<sup>th</sup> May 2020 to 12<sup>th</sup> June 2020 was a stand-still period under section 135 (3) of the Act when the Procuring Entity and the 2<sup>nd</sup> Respondent were precluded from signing a contract.

It is a requirement under section 87 (3) of the Act for 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. The Procuring Entity in this instance failed to adhere to this requirement therefore interfered with the Applicant's right to administrative review by signing a contract on 1<sup>st</sup> June 2020, a day that fell within the stand-still period under section 135 (3) of the Act.

The contract signed between the Procuring Entity and the 2<sup>nd</sup> Respondent offends the underlying objective of sections 87 (3), 135 (3) and 167 (1) of the Act that create a fourteen-day stand-still period to enable aggrieved tenderers to exercise their right to administrative review. A contract that is signed in breach of the provisions of the law cannot be allowed to stand as the same is null and void ab initio.

Accordingly, the Board finds that the contract dated 1<sup>st</sup> June 2020 between the Procuring Entity and the 2<sup>nd</sup> Respondent was not signed in accordance with section 135 (3) of the Act and the same is therefore null and void. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and now turns to address the issues raised in the substantive Request for Review application.

On the second issue for determination, the Board observes that at paragraph 8 of its Request for Review, the Applicant submits that the letter of notification of unsuccessful bid dated 13<sup>th</sup> May 2020 addressed to it failed to disclose the successful tenderer in breach of section 87 (3) of the Act. At paragraph 9 of its Request for Review, the Applicant submits that it learnt from industry circles that the tender has been awarded to AAR Insurance Kenya (the 2<sup>nd</sup> Respondent herein) hence joined it as a party to the Request for Review pursuant to section 170 (c) of the Act.

Having considered parties' submissions, the Board observes that section 87 (3) of the Act states as follows: -

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

***(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 published for the public's consumption as required by section 138 (1) of the Act which provides as follows: -

***"138. Publication of procurement contract***

***(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 the public including the identity of the successful bidder and the amount at which award has been made to such a successful bidder. In the instant case, the Applicant admits that it already learnt of the identity of the successful bidder from industry circles and even joined it as a party to the Request for Review pursuant to section 170 (c) of the Act which provides as follows-

***"The parties to a review shall be—***

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

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

***(c) the tenderer notified as successful by the procuring entity..."***

It is evident from the foregoing that the Applicant suffered no prejudice having admitted that it learnt of the identity of the successful bidder therefore joined it as a party to the Request for Review. However, procuring entities must at all times comply with provisions of the law and in this instance, to disclose the identity of a successful bidder in the letter of notification issued to unsuccessful bidders.

Accordingly, the Board finds that the Applicant suffered no prejudice despite the Procuring Entity's omission to disclose the successful bidder in the letter of notification of unsuccessful bid dated 13<sup>th</sup> May 2020 issued to the Applicant.

On the third issue for determination, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 13<sup>th</sup> May 2020 stated as follows: -

***"This is to notify you that your application for the subject tender has not been successful.***

***Reasons for disqualification: -***

- ***Letter from clients were not original recommendation letters***
- ***There was no evidence of calculation premium for additional members and dependant***
- ***Audited accounts were not certified”***

Having considered parties’ submissions on the reasons why the Applicant’s bid was found non-responsive, the Board proceeds to make the following findings: -

**i. Recommendation Letters**

Clause 2.22 (1). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	<b>Criteria</b>	<b>Max Score</b>
1	Provide list of at least five (5) clients from reputable institutions, through original recommendation letters on the clients letterheads whom similar services have/are been offered	5

It is important at this point to note that the 1<sup>st</sup> Respondent’s contention is that the Applicant provided recommendation letters save that the letters were not original recommendation letters. In addressing this criterion, the Board observes that the Procuring Entity’s Advertisement Notice dated 21<sup>st</sup> April 2020 read together with Section I. Invitation to Tender at page 4 of the Tender Document states as follows: -

***"The County Government of Kwale through the Department of Finance and Economic Planning invites sealed bids from interested and eligible firms for the tender listed hereunder***

.....

***Duly filled bids are to be submitted via [www.tenders.go.ke](http://www.tenders.go.ke) so as to be received on or before Tuesday 5<sup>th</sup> May 2020 at 10.30am"***

At paragraph 15 of its Written Submissions, the 1<sup>st</sup> Respondent submits that evaluation of bids in the subject tender was carried out through the Integrated Financial Management System (IFMIS) e-procurement tool, which is a module developed to enhance transparency of procurement processes in furtherance of the provisions of Article 227 (1) of the Constitution and section 121 (1) (e) of the Public Finance Management Act, 2012.

The Board notes that, bidders were required to submit their bids electronically through [www.supplier.go.ke](http://www.supplier.go.ke) and that the Procuring Entity's Evaluation Committee would use the IFMIS system to evaluate the bids received electronically by the tender submission deadline. This method of procurement where bidders are instructed to submit their tender documents electronically and evaluation undertaken using the IFMIS system is commonly referred to as e-procurement.



Section 2 of the Act provides that: -

***"e-procurement" means the process of procurement using electronic medium such as the internet or other information and communication technologies***

In the **Handbook of Research on Information Management and the Global Landscape**, edited by Hunter, M. Gordon, Tan and Felix B (IGI Global Publishers, 2008), ways in which "e-procurement" facilitates some methods of procurement is explained at page 446 and 448 as follows: -

***"[446] E-procurement provides functions for gathering RFI (Request for Information), RFP (Request for Proposal) and RFQ (Request for Quotation) and for purchasing through the online market...***

***[448] In an ideal online market, market making activities that is, from request for quotation, supplier selection, competitive bidding to contract award are mediated through an internet based system. Through an online market, buyers may achieve cost-saving and ensure transparency while suppliers may benefit from reduced transaction cost and achieve exchange efficiency"***

Further, Jaijit Bhattacharya in his Book on **“Technology in Government”** (2006) provides a chapter on “Suitability of Service Oriented Architecture for E-Procurement” at page 32 thereof, where he states as follows: -

***“Advances in Information and Communication Technology (ICT) has led to a paradigm shift in the way governments have begun to think about public administration and execution of activities through greater participation of the public and other enterprises. Among others, purchase of goods is a frequently occurring activity in most of the government organizations, yet a cumbersome and time-confusing one.***

***Electronic procurement (e-procurement) essentially includes all aspects of procurement related functions that are supported by different electronic communication channels where by information is fed into a system by the potential suppliers, created for the method of procurement used”***

Lastly, in the book, **“E-Democracy for Smart Cities”** (2017) edited by T.M. Vinod Kumar, provides Chapter 14 that deals with “Attaining E-Democracy through Digital Platforms in Kenya”. At page 451 thereof it is stated as follows: -

***“In 2014, Kenya’s government launched an online system for submitting and evaluating government related procurement applications. The e-procurement system which is part of the Integrated Financial Management System (IFMIS) under the***

***National Treasury is set to reduce corruption in government tendering, reduce government spending and expedite procurement processes. The system also contains an in-built price referencing for all tenders, bid submission guidelines and procedures”***

From the foregoing, the Board observes that e-procurement is a process of procurement using electronic medium such as the internet or other information and communication technologies. E-procurement system provides functionalities that can be used for gathering RFI (Request for Information), RFP (Request for Proposal) and RFQ (Request for Quotation) and for purchasing goods and services. In Kenya, the IFMIS portal is a system that the Government uses for e-procurements in order to reduce corruption in government tendering, reduce government spending and expedite procurement processes. As a result, procuring entities are encouraged to adopt the global trend of using e-procurement when purchasing goods and services from potential suppliers and contractors.

The Board studied the Tender Document and notes that there is no provision that required bidders to submit their bids physically and therefore the Procuring Entity only relied on the bids that were submitted electronically. Having noted that e-procurement allows bidders to feed information into an electronic system when submitting their bids, the Board observes that the moment a document is scanned and fed into an electronic system, it ceases

to be an original whether a person uploads a document that is in color, or a document that is in black and white (commonly referred to as grayscale in computer applications).

The Applicant provided 8 letters in its bid with the following details: -

- *At page 329 of its bid, a letter dated 2<sup>nd</sup> September 2019 issued by Kenya Bureau of Standards (KEBS) confirming that the Applicant has been on KEBS' panel of insurers and has previously provided KEBS with a medical insurance cover worth Kshs. 187,075,948.00 and that they recommend the Applicant to any institution for provision of insurance services;*
- *At page 331 of its bid, a letter dated 1<sup>st</sup> August 2017 issued by National Bank of Kenya (NBK) confirming that the Applicant was its staff medical insurance service provider for the year 2017 at an annual medical insurance premium portfolio of Kshs. 212,000,000.00 and therefore NBK recommends them in offering similar services;*
- *At page 333 of its bid, a letter dated 7<sup>th</sup> December 2016 issued by National Bank of Kenya to the Applicant confirming that the Applicant has been awarded Tender No. NBK/Admin/16/029 for Staff Medical Insurance Cover for the year 2017. However, this is not a recommendation letter, but is a letter of notification of award;*
- *At page 335 of its bid, a letter dated 5<sup>th</sup> September 2019 issued by Pwani University confirming that the Applicant was awarded insurance policies for the year 2019 to 2020 worth Kshs. 64,813,577.00 and that*

*Pwani University recommends the Applicant to any organization for provision insurance brokerage services;*

- *At page 337 of its bid, a letter dated 25<sup>th</sup> June 2019 issued by the Commission on Revenue Allocation (CRA) confirming that CRA has been insured by the Applicant on CRA's group medical insurance between 2018 and 2019 and that CRA recommends the Applicant to any organization seeking medical insurance services;*
- *At page 339 of its bid, a letter dated 25<sup>th</sup> June 2019 issued by Pwani University confirming that Pwani University has been insured by the Applicant under a group medical insurance cover from 1<sup>st</sup> July 2018 to 30<sup>th</sup> June 2019 and that Pwani University recommends the Applicant to any organization seeking medical insurance services;*
- *At page 343 of its bid, a letter dated 2<sup>nd</sup> July 2019 issued by Dimkes Sacco/Fosa Ltd confirming that the Applicant provided group medical insurance services to Dimkes Sacco/Fosa Ltd from 1<sup>st</sup> January 2019 to 31<sup>st</sup> December 2019 and that Dimkes Sacco/Fosa Ltd recommends the Applicant to any organization seeking medical insurance services;*
- *At page 347 of its bid, a letter of notification of award dated 17<sup>th</sup> January 2018 issued by the County Government of Kwale confirming that the Applicant has been awarded Tender No. CGK/143/PSA/2017-2018 for Provision of Medical Cover for County Staff for 1 Year (Re-tender) at Kshs. 146,612,276.00. However, this is not a recommendation letter, but is a letter of notification of award.*

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

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

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

**ii. Calculation Premium for Additional Members and Dependants**

Clause 2.22 (10). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	<b>Criteria</b>	<b>Max Score</b>
10	Provide premium chargeable for additional members and dependants as per the job groups provided in the document	10

In response to this criterion, the Applicant at page 1319 of its bid stated as follows: -

***"Additions of New Members***

***A new family or an additional member will be covered at an extra premium computed on pro rata basis. A new dependant will be covered at a premium amounting to the difference between the applicable premium for the newly constituted family and the applicable premium for the previous family. Where the premium applicable is less than the rate for 3 months for the newly constituted family, the rate for 3 months will apply"***

Further to this, the Applicant provided a Medical Quotation at page 27 of its bid with the following details: -

**14 MONTHS COVER  
GOVERNOR**

<b>Inpatient Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
10,000,000	M	0	29,282	-
	M+1	0	40,263	-
	M+2	0	53,349	-
	M+3	0	64,552	-
	M+4	0	75,755	-
	M+5	1	86,959	86,959
	TOTAL INPATIENT PREMIUM			

<b>Dental Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
75,000	M	1	-	-
TOTAL DENTAL PREMIUM				-

<b>PREMIUM SUB TOTAL</b>	<b>209,947</b>
--------------------------	----------------

<b>Outpatient Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
10,000,000	M	0	41,415	-
	M+1	0	56,946	-
	M+2	0	75,453	-
	M+3	0	91,298	-
	M+4	0	107,144	-
	M+5	1	122,989	122,989
	<b>TOTAL OUTPATIENT PREMIUM</b>			

<b>Optical Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
75,000	M	1	-	-
<b>TOTAL OPTICAL PREMIUM</b>				-

#### **DEPUTY GOVERNOR**

<b>Inpatient Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
5,000,000	M	0	25,296	-
	M+1	0	34,782	-
	M+2	0	46,086	-
	M+3	0	55,763	-
	M+4	0	65,441	-
	M+5	1	75,119	75,119
	<b>TOTAL INPATIENT PREMIUM</b>			

<b>Dental Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
75,000	M	1	-	-
<b>TOTAL DENTAL PREMIUM</b>				-

<b>PREMIUM SUB TOTAL</b>				<b>198,108</b>
--------------------------	--	--	--	----------------

<b>Outpatient Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
300,000	M	0	41,415	-
	M+1	0	56,946	-



	M+2	0	75,453	-
	M+3	0	91,298	-
	M+4	0	107,144	-
	M+5	1	122,989	122,989
	TOTAL OUTPATIENT PREMIUM			122,989

<b>Optical Limit</b>	<b>Family Size</b>	<b>Family Units</b>	<b>Premiums (Kshs)</b>	<b>Total</b>
75,000	M	1	-	-
TOTAL OPTICAL PREMIUM				-

From the foregoing, the Board observes that the Applicant specified Premium for a member plus 1, 2, 3, 4 up to 5 additional members, to be charged on a pro rata basis. Further to this, the Applicant stated that “a new dependant will be covered at a premium amounting to the difference between the applicable premium for the newly constituted family and the applicable premium for the previous family”.

This means, the Applicant specified premium chargeable for a member and up to 5 additional members in one family unit and for any new dependant to be covered in a family, a premium amounting to the difference between the applicable premium for the family unit (which is inclusive of the new dependant) and the applicable premium for the old family (which is exclusive of the new dependant). From the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, the Applicant was awarded a score of 0 out of the total score of 10 under this criterion. In the Board’s view, the Applicant ought to have earned some marks since it indicated premium chargeable for a member and

up to 5 additional members and how it would calculate the premium chargeable for a new dependant.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid which ought to have earned some marks under this criterion and not a score of zero, since it indicated premium chargeable for a member and up to 5 additional members in one family unit and further specified how the premium chargeable will be calculated for any new dependant.

### **iii. Certified Audited Accounts for 2018 and 2019**

Clause 2.22 (5). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	<b>Criteria</b>	<b>Max Score</b>
5	Provide Certified Audited Accounts for 2018 and 2019 with Gross Premium for Medical Cover of Kshs. 150 Million per year	10

In response to this criterion, the Applicant provided the following: -

- *At pages 493 to 549 of its bid, its Annual Report and Financial Statements including a Statement of Profit and Loss for the year ended 31<sup>st</sup> December 2019 showing that the Gross Earned Premium is Kshs. 4,211,585,000.00, but the same is not certified;*
- *At pages 553 to 516 of its bid, its Annual Report and Financial Statements including a Statement of Profit and Loss for the year ended*

*31<sup>st</sup> December 2018 showing that the Gross Earned Premium is Kshs. 4,480,216,000.00, but the same is not certified.*

From the foregoing, the Board observes that it was possible for bidders to certify their respective Annual Reports and Financial Statements and upload the certified copies on IFMIS, as opposed to uploading annual reports and financial statements before certifying the same. According to the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, the Applicant was awarded a score of 5 out of the total score of 10 under this criterion.

Accordingly, the Board finds that the Procuring Entity could not award the Applicant full marks under this criterion did not certify its Annual Reports and Financial Statements for the year ended 31<sup>st</sup> December 2018 and 31<sup>st</sup> December 2019.

The Board studied the Professional Opinion dated 11<sup>th</sup> May 2020 that forms part of the confidential file furnished to it pursuant to section 67 (3) (e) of the Act and notes that apart from the three reasons provided to the Applicant, the Head of Procurement function cited three additional reasons why the Applicant's bid was found non-responsive as follows: -

***"...That Bidder 6 lost one mark for not fully providing CVs of Key Management Personnel with their academic testimonials as set out under the technical requirement in the evaluation matrix***

***The Bidder 6 partially met the requirement No. 5 for proof of five (5) similar services executed through award letters and contract agreements with a minimum value of Kshs. 150,000,000 thus losing 4 marks***

***Bidder 6 lost five marks for not meeting the requirements to provide proof of medical services providers, showing specialists, their recommendation letters and international partners”***

The Professional Opinion cited the aforesaid additional reasons, which form part of the reason why the Applicant did not attain the minimum technical score required to proceed to Financial Evaluation. The Board notes that at prayer (c) of the Request for Review, the Applicant urged this Board to review all records of the procurement process relating to the subject tender. In addition to this, the 3 additional reasons cited in the Professional Opinion dated 11<sup>th</sup> May 2020 formed part of the reason why the Applicant was awarded an overall score of 53 points, and according to the Procuring Entity, could not proceed to Financial Evaluation. It is therefore important for this Board to determine whether the Procuring Entity rightfully arrived at the decision on the Applicant’s bid with respect to the reasons cited in the professional opinion dated 11<sup>th</sup> May 2020.

Having studied the Applicant's bid and the manner in which its bid was evaluated in the additional 3 criteria cited in the Head of Procurement function's professional opinion, the Board makes the following findings: -

**iv. Curriculum Vitae and Academic testimonials of Professional Staff and Management Personnel**

The Board studied the Tender Document and notes that Clause 2.22 (4). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	<b>Criteria</b>	<b>Max Score</b>
4	Provide CVs and academic testimonials for at least ten (10) key professional staff and management personnel, specifying the relevant portfolio/tasks	10

In response to this criterion, the Applicant provided the following: -

<b>Staff</b>	<b>Academic Certificates and Testimonials</b>
<b>1. Joshua Gitonga</b>	<p>At pages 407 to 408 of the Applicant's bid, a Curriculum Vitae showing that he is the Managing Director of the Applicant</p> <p>At page 409 of Applicant's bid, Examination Results dated 4<sup>th</sup> July 1997 issued by the Chartered Insurance Institute for undertaking an exam on Principles and Practice of Insurance Management</p> <p>At page 410 of Applicant's bid, a Certificate issued by the Chartered Insurance Institute on 15<sup>th</sup> September 2006 for completing a course as a Chartered Financial Analyst</p> <p>At page 411 of Applicant's bid, a Master of Business Administration Degree Certificate issued on 17<sup>th</sup> May 2004 by the University of Nairobi</p>
<b>2. Samuel Chege</b>	<p>At page 413 to 415 of the Applicant's bid, a Curriculum Vitae showing that he is the Chief Accountant of the Applicant</p> <p>At page 416 of the Applicant's bid, a Bachelor of Commerce Degree Certificate issued on 8<sup>th</sup> November 1993 by the University of Nairobi</p>
<b>3. Heron Wambugu</b>	<p>At page 417 to 418 of the Applicant's bid, a Curriculum Vitae showing that he is the Director and General Manager of the Applicant</p> <p>At page 419, a Bachelor of Commerce Degree Certificate issued on 10<sup>th</sup> December 1994 by the University of Nairobi</p>
<b>4. John Muhindi</b>	<p>At page 420 to 423 of the Applicant's bid, a Curriculum Vitae showing that he is the Assistant General Manager of the Applicant</p> <p>At page 424 of the Applicant's bid, a Bachelor of Education (Arts) Degree Certificate issued on 3<sup>rd</sup> December 1999 by Moi University</p>
<b>5. Patrick Muturi</b>	<p>At page 425 to 426 of the Applicant's bid, a Curriculum Vitae showing that he is the Financial Controller of the Applicant</p> <p>At page 427 of the Applicant's bid, a Master of Business Administration Degree Certificate issued on 7<sup>th</sup> December 2007 by the University of Nairobi</p> <p>At page 428 of the Applicant's bid, Certificate issued by Kenya Accountants and Secretaries National Examination Board issued in December 1999 certifying that he is a Certified Public Accountant</p> <p>At page 429 of the Applicant's bid, a Bachelor of Arts Degree Certificate issued on 16<sup>th</sup> October 1998 by Kenyatta University</p>
<b>6. Kenneth Mathenge</b>	<p>At page 430 to 432 of the Applicant's bid, a Curriculum Vitae showing that he is the Medical Business Development Manager of the Applicant</p> <p>At page 433 of the Applicant's bid, a Bachelor of Commerce (Insurance and Risk Management) Degree Certificate issued on 10<sup>th</sup> August 2007 by Egerton University</p>
<b>7. Winnie Njeri</b>	<p>At page 435 to 438 of the Applicant's bid, a Curriculum Vitae that she has a Bachelor of Science Degree in Nursing</p> <p>At page 439 of the Applicant's bid, a Bachelor of Science in Nursing Degree Certificate issued on 18<sup>th</sup> July 2015 by Kenya Methodist University</p> <p>At page 440 of the Applicant's bid, a Certificate issued by Kenya Hospital Association for completing the Kenya Registered Nurses Training undertaken in September 2003</p>
<b>8. Dr. Michael Gone</b>	<p>At page 443 to 446 of the Applicant's bid, a Curriculum Vitae that he is the Medical Services Manager of the Applicant</p> <p>At page 447 of the Applicant's bid, a Bachelor of Medicine and Bachelor of Surgery Degree Certificate issued on 3<sup>rd</sup> December 2010 by the University of Nairobi</p>

	<p>At page 449 of the Applicant's bid, a Master of Business Administration in Healthcare Management issued on 29<sup>th</sup> June 2018 by Strathmore University</p> <p>At page 451, a Certificate issued by the Health Care Quality Certification Commission certifying that he is a certified professional in health care quality</p> <p>At page 453 of the Applicant's bid, a Certificate of Registration as a Medical Practitioner issued on 23<sup>rd</sup> June 2012 by the Medical Practitioners and Dentists Board of Kenya</p> <p>At page 455 of the Applicant's bid, A Diploma in Professional Marketing (Driving Innovation) (HL) awarded by the Chartered Institute of Marketing in August 2018</p>
<b>9. Ted James Ochola</b>	<p>At page 467 to 472 of the Applicant's bid, a Curriculum Vitae showing that he is the Assistant Underwriting Manager of the Applicant</p> <p>At page 473 of the Applicant's bid, a Diploma in Insurance Certificate issued by the Chartered Insurance Institute on 11<sup>th</sup> July 2013</p> <p>At page 475 of the Applicant's bid, a Certificate issued on 2<sup>nd</sup> April 2015 by the Insurance Institute of Kenya certifying that he is an Associate of the said Institute</p>
<b>10. Loise Njeri</b>	<p>At page 485 to 487 of the Applicant's bid, a Curriculum Vitae that she is the Medical Insurance Officer of the Applicant with no academic certificates and testimonials attached</p>

From the above table, the Board observes that the Applicant provided Curriculum Vitae together with academic testimonials for 9 of its Key Personnel but only provided the Curriculum Vitae of Loise Njeri without attaching her academic testimonials. According to the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, the Applicant was awarded a score of 9 out of the total score of 10 under this criterion.

Accordingly, the Board finds that the Procuring Entity fairly evaluated the Applicant's bid under this criterion.

#### **v. Similar Services Offered/Ongoing**

Clause 2.22 (3). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	<b>Criteria</b>	<b>Max Score</b>
3	Proof of similar services offered/on-going, at least five (5) with a minimum of Kshs. 150,000,000 for the aforementioned institutions, through valid award letters, contract agreement	10
	Any award of less than 150,000,000	0

In response to this criterion, the Applicant provided the following: -

- *At page 351 of its bid, a letter dated 7<sup>th</sup> December 2016 issued by National Bank of Kenya to the Applicant for Staff Medical Insurance Policy Covers offered between 1<sup>st</sup> January 2017 to 31<sup>st</sup> December 2017 worth Kshs. 212,619,604.00;*
- *At page 352 of its bid, a letter dated 24<sup>th</sup> February 2020 issued by Kenya Marine and Fisheries Research Institute to M/s Minet (K) Insurance Brokers Ltd for Provision of Two Years' Staff Medical Insurance Cover at Kshs. 150,717,566.00. However, no documentation was furnished to demonstrate whether M/s Minet (K) Insurance Brokers Ltd would provide this services together with the Applicant;*
- *At page 355 of its bid, a letter dated 25<sup>th</sup> November 2019 issued by Kenya Bureau of Standards for Provision of Staff Medical Insurance to the Applicant for a period of 1 year at Kshs. 163,483,219.00;*
- *At page 357 of its bid, a letter dated 17<sup>th</sup> January 2018 issued by the County Government of Kwale to the Applicant for Provision of Medical Cover for County Staff for 1 year at Kshs. 146,612,276.00, which amount fails to meet the threshold of Kshs 150,000,000.00 specified under this criterion;*
- *At page 359 of its bid, a letter dated 30<sup>th</sup> November 2018 issued by the County Government of Laikipia to the Applicant for Provision for*



*Group Staff Medical Cover Scheme for a period of 1 year at Kshs. 112,266,988.00, which amount fails to meet the threshold of Kshs 150,000,000.00 specified under this criterion;*

- *At page 361 of its bid, a letter dated 19<sup>th</sup> December 2017 issued by Nairobi Bottlers Limited to AoN Kenya Insurance Brokers for Provision of Medical Insurance Services at Kshs. 116,603,345, which amount fails to meet the threshold of Kshs 150,000,000.00 specified under this criterion. Further to this, no documentation was furnished to demonstrate whether M/s AoN Kenya Insurance Brokers would provide this services together with the Applicant.*

The Board notes that it is only the letters dated 7<sup>th</sup> December 2016, 24<sup>th</sup> February 2020 and 25<sup>th</sup> November 2019 that correspond to a minimum of Kshs. 150,000,000.00. According to the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, the Applicant was awarded a score of 6 out of the total score of 10 under this criterion.

Accordingly, the Board finds that the Applicant could not be awarded full marks under this criterion because the letters dated 17<sup>th</sup> January 2018, 30<sup>th</sup> November 2018 and 19<sup>th</sup> December 2017 did not correspond to a minimum premium of Kshs. 150,000,000.00 required under this criterion.

## vi. Evidence of Medical Service Providers

Clause 2.22 (7). Technical Evaluation Criteria of the Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows: -

	Criteria	Max Score
7	Provide evidence of medical service providers, showing specialists, their recommendation letters and international partners	10

In response to this criterion, the Applicant provided the following: -

- *At pages 1207 to 1221 of its bid, 15 recommendation letters dated 28<sup>th</sup> February 2020, 27<sup>th</sup> February 2020, 19<sup>th</sup> February 2020, 21<sup>st</sup> January 2020, 22<sup>nd</sup> January 2020, 28<sup>th</sup> February 2020, 12<sup>th</sup> March 2020, 2<sup>nd</sup> March 2020, 27<sup>th</sup> February 2020, 14<sup>th</sup> February 2020, 19<sup>th</sup> February 2020, 14<sup>th</sup> February 2020, 22<sup>nd</sup> January 2020, 14<sup>th</sup> February 2020, 21<sup>st</sup> January 2020, issued by; The Agha Khan University Hospital, Nairobi Metropolitan Hospital, Mater Misericordiae Hospital, Mediheal Group of Hospitals, The Nairobi Hospital, The Nairobi West Hospital, Diani Beach Hospital, Equity Afia, Agha Khan Hospital-Mombasa, Social Service League-M P Shah Hospital, Gertrude's Hospital, Jocham Hospital, St. Lukes Orthopaedic and Trauma Hospital, The Mombasa Hospital and The Karen Hospital respectively, recommending the Applicant's medical insurance services to any organization; and*
- *At pages 1199 to 1206 of its bid, a list of hospitals, clinics and specialists located in Kenya and Uganda.*

The Board observes that the Applicant provided 15 recommendation letters from medical services providers where the Applicant has offered insurance services who include a list of hospitals, clinics and specialists located in Kenya and Uganda. According to the IFMIS Evaluation Matrix Report dated 11<sup>th</sup> May 2020, the Applicant was awarded a score of 5 out of the total score of 10 under this criterion.

Accordingly, the Board finds that no justification has been given as to why the Applicant lost 5 marks under this criterion even though the Applicant provided 15 recommendation letters from medical services providers where the Applicant has offered insurance services who include a list of hospitals, clinics and specialists located in Kenya and Uganda

From the above analysis, the Board observes that the Procuring Entity unfairly evaluated the Applicant's bid in the following criteria: -

- *Recommendation Letters under Clause 2.22 (1) of the Appendix to Instructions to Tenderers;*
- *Calculation Premium for Additional Members and Dependants under Clause 2.22 (10) of the Appendix to Instructions to Tenderers; and*
- *Evidence of Medical Services Providers under Clause 2.22 (7) of the Appendix to Instructions to Tenderers.*

The Board is cognizant that section 79 (1) of the Act defines a responsive bid as **“one that conforms to the eligibility and mandatory requirements specified in the tender document”**. In determining responsiveness of bidders, Article 227 (1) of the Constitution requires all State organs and other public entities to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective.

The Procuring Entity herein failed to adhere to the principle of fairness specified in Article 227 (1) of the Constitution, in the three criteria outlined hereinbefore.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant’s bid at the Technical Evaluation Stage in accordance with Clause 2.22 (1), (7) and (10) of the Appendix to Instructions to Tenderers at page 20 of the Tender Document read together with section 79 (1) of the Act and the principle of fairness provided in Article 227 (1) of the Constitution.

In totality, the Request for Review is hereby allowed in terms of the following specific orders:-

## **FINAL ORDERS**

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

- 1. The Contract dated 1<sup>st</sup> June 2020 signed between the Procuring Entity and M/s AAR Insurance Kenya Limited, the 2<sup>nd</sup> Respondent herein with respect to Tender No. CGK-797822-2019/2020 for Provision of Medical Insurance Cover for County Government of Kwale Staff, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Award dated 13<sup>th</sup> May 2020 addressed to the 2<sup>nd</sup> Respondent with respect to the subject tender, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Letters of Notification of Unsuccessful bid dated 13<sup>th</sup> May 2020 addressed to the Applicant and the one addressed to the Interested Party with respect to the subject tender, are hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to the following criteria, taking into consideration the Board's findings in this Request for Review:-**
  - Clause 2.22 (1) of the Appendix to Instructions to Tenderers of the Tender Document**

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

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

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

**Dated at Nairobi this 3<sup>rd</sup> day of July 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**