

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 115/2020 OF 10TH AUGUST 2020

BETWEEN

BOC KENYA PLC.....APPLICANT

AND

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

Review against the decision of the Kenyatta National Hospital with respect to Tender No. KNH/T/18/2020-2021 for the Supply and Delivery of Medical Gases

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

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

The Bidding Process

The Kenyatta National Hospital (hereinafter referred to as "the Procuring Entity) invited interested and eligible tenderers to submit bids in

response to Tender No. KNH/T/18/2020-2021 for Supply and Delivery of Medical Gases (hereinafter referred to as “the subject tender”).

Bid Submission Deadline and Opening of bids

By the bid submission deadline of 8th July 2020, the Procuring Entity received a total of three (3) tenders which were opened by the Procuring Entity’s Tender Opening Committee in the presence of tenderers’ representatives who chose to attend and which tenderers were recorded as follows: -

1. M/s BOC Kenya PLC
2. M/s Noble Gases International Limited;
3. M/s Tunasco Insaat Taahhut Turizm Ticaret Anonim Sirketi

Evaluation of Bids

Vide a memo dated 6th July 2020, the Procuring Entity’s Accounting Officer appointed an Evaluation Committee to carry out evaluation of tenders received in response to the subject tender.

The Evaluation Committee conducted evaluation of tenders in the following three stages: -

- Preliminary Evaluation;
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, tenders were evaluated against the following mandatory requirements: -

- a) Submission of two tender documents securely bound (spiral or book) and clearly marked (original and copy) by the tenderer. No loose documents will be accepted;
- b) All pages of both (original and copy) documents must be sequentially serialized by the tenderer on every printed page;
- c) Tender form duly completed, signed and stamped;
- d) Confidential business questionnaire duly completed, signed and stamped including declaration of conflict of interest and declaration that tenderer is not debarred from participating in procurement proceedings;
- e) Copy of valid Tax Compliance Certificate/Exemption Certificate;
- f) Copy of Certificate of Incorporation/Evidence of Registration whichever is applicable;
- g) Original bid bond of at least Kshs 150,000/- valid for a period of 150 days from date of tender opening.

At this stage of evaluation, the tenderer's submission would either be responsive or non-responsive. The non-responsive submissions in any of the above mandatory requirements would be eliminated from the entire evaluation process and would not be considered further.

Upon conclusion of evaluation, two tenderers were found responsive whereas one tenderer was found non-responsive for the following reason: -

a) M/s BOC Kenya PLC – Insufficient Bid Bond Validity Period

2. Technical Evaluation

At this stage of evaluation, tenders were evaluated against the technical criteria provided in the Tender Document as follows: -

- a) Product Certification
- b) Manufacturer’s Authorization Letter
- c) To meet British Standards on Medical Gases

Technical Specification of Product	Each product will be required to conform to 100% of technical specification which is a maximum of 50 marks (attained marks will be recorded accordingly)
Capability to deliver within schedule	Must demonstrate capacity to deliver similar volumes in not less than 30 days from the date of LPO (attach at least two (2) copies of LPO document and delivery note to satisfy the criteria) 50 marks – 25 marks for each proof

The pass mark was set at 80% and tenderers’ who scored below 80 out of 100 would be eliminated at this stage and would not proceed to financial evaluation.

Upon conclusion of technical evaluation, one firm, M/s Noble Gases International Limited scored 50% due to expired product certification and thus did not qualify to proceed to the next stage of evaluation.

M/s Tunasco Insaat Anonim Sirketi scored 100% and qualified to proceed to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee conducted comparison of prices offered by the tenderer who qualified for financial evaluation.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Tunasco Insaat Anonim Sirketi** at its tender price as tabulated in the table below –

	Item Description	Unit of Issue	Qty	Unit Price	Total	Supplier/Remarks
1.	Medical Liquid Oxygen	Litres	1,300,000	90.00	117,000,000.00	M/s Tunasco 1 st lowest evaluated bidder
2.	Medical Oxygen	Cyl. 8.5 cu.m	3600	2900.00	10,440,000.00	M/s Tunasco 1 st lowest evaluated bidder
3.	Medical Oxygen	Cyl. 1.36 cu.m	4500	520.00	2,340,000.00	M/s Tunasco 1 st lowest evaluated bidder
4.	Industrial Oxygen	Cyl. 8.5 cu.m	36	2900.00	104,400.00	M/s Tunasco 1 st lowest evaluated bidder
5.	Industrial Air	Cyl. 8.5 cu.m	20			No offer, re-quote
6.	Nitrous Oxide	Cyl. 16560	1100			No offer, re-quote
7.	Dissolved Acetylene	Cyl. 7.9m ³	20			No offer, re-quote
8.	Nitrogen	Cylinder 7.9m ³	30			No offer, re-quote
9.	Nitrous Oxide	Litres 900	120			No offer, re-quote
10.	Carbon Dioxide	Cyl. 2kgs	200			No offer, re-quote

	Total				129,884,400.0 0	
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Professional Opinion

The Deputy Director, Supply Chain Management concurred with the recommendation of award made by the Evaluation Committee which was duly approved by the Accounting Officer on 28th July 2020.

Vide a letter dated 28th July 2020, the Chief Executive Officer of the Procuring Entity notified M/s Yunasco Insaat Anonim Sirketi of its successful bid in the subject tender.

REQUEST FOR REVIEW NO. 115 OF 2020

M/s BOC Kenya PLC (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 10th August 2020 (hereinafter referred to as “the Request for Review”) together with an Affidavit sworn and filed on even date (hereinafter referred to as “the Applicant’s Affidavit”) through the firm of Kaplan & Stratton Advocates. The Applicant further filed the same Request for Review dated 10th August 2020 on 11th August 2020 together with an Affidavit sworn and filed on even date (hereinafter referred to as “the Applicant’s Affidavit”).

On 20th August 2020, the Applicant filed Grounds of Opposition dated on even date.

In response, the Procuring Entity, acting in person, filed a Memorandum of Response dated and filed on 17th August 2020 (hereinafter referred to as "the Procuring Entity's Response") together with a Supporting Affidavit sworn and filed on even date (hereinafter referred to as the Procuring Entity's Affidavit").

M/s Tunasco Insaat Anonim Sirket (hereinafter referred to as "the Interested Party") lodged a Notice of Preliminary Objection dated 14th August 2020 and filed on 17th August 2020 together with a Supporting Affidavit sworn and filed on even date through its Advocate, Odhiambo M. T. Adala.

The Applicant sought for the following orders in the Request for Review:

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- i. An order annulling the decision of the Respondent awarding Tender No. KNH/T/18/2020-2021 for the Supply and Delivery of Medical Gases to the successful bidder;***
- ii. An order substituting the Respondent's decision in respect of the award for Tender No. KNH/T/18/2020-2021 for the Supply and Delivery of Medical Gases with the Review Board's Decision that the validity of the Applicant's bid bond until 30th November 2020 instead of 4th December 2020 did not constitute a material deviation from the Tender Document and therefore the Applicant's bid bond was substantially responsive and***

- should qualify for technical and financial evaluation stages of the tender;***
- iii. Alternatively, an award directing the Respondent to re-evaluate the tenders in accordance with the law and criteria set out in the Tender Document;***
- iv. Any other order the Board may deem fit in the circumstances;***
- v. An order awarding the costs of this request for review to the Applicant.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

Accordingly, the Applicant filed written submissions dated 20th August 2020 on even date whereas the Procuring Entity lodged written submissions dated 26th August 2020 on 27th August 2020. The Interested Party also filed written submissions dated 27th August 2020 on even date.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with parties' written submissions.

The issues that call for determination are as follows: -

I. Whether the Board has jurisdiction to entertain the Request for Review;

In order to address the first issue, the Board shall make a determination in respect of the following two sub-issues: -

a) *Whether the Request for Review is fatally incompetent for the Applicant's failure to join the successful tenderer as a party to the Request for Review;*

Depending on the determination of the first sub-issue: -

b) *Whether the Request for Review is fatally incompetent for the Applicant's failure to declare by whom the Request for Review Application is 'Drawn and Filed by' in violation of section 35 (1) read together with section 34 (1) (f) of the Advocates Act;*

Depending on the determination of the second sub-issue: -

II. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to the following mandatory requirement: -

a) *MR 7: Original Bid Bond of at least Kshs 150,000/- valid for a period of 150 days from date of tender opening.*

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

Similarly, in the case of **Kakuta Maimai Hamisi v. 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 and best taken at inception. "

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It 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. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The Board observes that the Interested Party lodged a Notice of Preliminary Objection dated 14th August 2020 and filed on 17th August 2020 alleging as follows: -

- 1. The Application as filed herein by the Applicant should be struck out in limine by reason of being flawed and incurably defective and hence grossly misconceived and seriously incompetent for flagrant violation of for bring in blatant contravention of section 170 of The Public Procurement and Asset Disposal Act, 2015.***
- 2. The Applicant's Application by way of Request for Review dated 10th August 2020 should be struck out in limine or alternatively that the same be dismissed with costs on further grounds that the Applicant has failed to include all the parties to a review application and particularly for failure to include TUNASCO INSAAT ANONIM SIRKET, the Interested Party herein being the tenderer notified as successful by the Procuring Entity;***
- 3. The Applicant's Request for Review Application herein dated the 10th day of August 2020 be struck out in limine for being fatally flawed and incurably defective and hence seriously misconceived and grossly incompetent for***

violation of the mandatory provisions of section 35 (1) as read together with section 34 (1) (f) of the Advocates Act, Cap 16, Laws of Kenya by failure to declare by whom the Application is "DRAWN AND FILED BY" and in particular that the declaration in the Applicant's Affidavit in support of the Application that the Affidavit is drawn and filed by Kaplan & Stratton Advocates, does not ipso facto cure the failure by the Applicant to comply with the said mandatory provisions of the Advocates Act.

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows: -

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

Having considered parties' submissions, the Board will address the first sub-issue framed for determination as follows: -

The Board notes a determination on this issue falls squarely on an interpretation of section 170 (c) of the Act which reads as follows: -

"Parties to review

The parties to a review shall be—

(a).....;

(b)

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

Accordingly, the successful tenderer is a necessary party to a request for review application.

The Board in its examination of section 170 (c) of the Act notes that the mischief that the said section intends to cure is to eliminate instances where a request for review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the request for review nor notified of the hearing. In such an instance, when the successful bidder becomes aware that a decision on the issue was rendered by the Board, such decision may have adversely affected the award made on the successful bidder.

The failure therefore by an Applicant to join a successful bidder or the failure to notify a successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who subsequently learns that a decision was made against its award. The right to a fair hearing is a principle of natural justice recognized under Article 50 (1) of the Constitution which states as follows: -

***"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.”

The Board considered the decision of the High Court in **Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG International Limited & another (2016) eKLR** (hereinafter referred to as “JR. Miscellaneous Application No. 356 & 362 (Consolidated) of 2015”) where it opined as follows: -

“On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the

adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."

It is therefore my view that the mere fact that the interested party did not make the applicants [successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent.

In the above case, the High Court noted that the successful bidder had been notified by the Board of the existence of the request for review and consequently received a letter of notification from the Board Secretariat informing it of the scheduled date of the hearing of the review application. Further, the successful bidder was present on the

hearing date, but contended that the Board had failed to avail other pleadings attached to the filed request for review application. The High Court further addressed the question whether the successful bidder sought an adjournment in order to study the pleadings filed by the applicant and found that the successful bidder intimated that it was ready to proceed with the hearing and did not suffer prejudice by the applicant's failure to strictly comply with section 96 (c) of the Public Procurement and Disposal Act, 2005 (which is now section 170 (c) of the Act).

Accordingly, the High Court found that the request for review was not fatally defective for the applicant's failure to join the successful bidder as a party to the request for review who participated in the review proceedings and therefore suffered no prejudice.

Turning to the circumstances of the case, the Board notes that the Applicant filed the Request for Review Application on 10th August 2020. On 11th August 2020, the Applicant filed an Amended Request for Review Application joining the Accounting Officer of the Procuring Entity as a party to the Request for Review.

Thereafter, the successful bidder of the subject tender filed a Notice of Preliminary Objection to the Request for Review Application on 17th August 2020, challenging the jurisdiction of the Board to hear the said application.

Further, the Board notes that the Interested Party through its Notice of Preliminary Objection also sought to be joined as a party to the Request for Review Application as captured in paragraph 6 therein where the Interested Party stated as follows: -

"This Notice of Preliminary Objection be treated as an Application for Inclusion of the Interested Party to this Review Application and for orders that the Interested Party be permitted to appoint an Advocate to represent it in this Review Application and that the Notice of Appointment of Advocate as filed herein by the Advocate for the proposed Interested Party be deemed as duly and properly filed; and hence lawfully on record."

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender were notified of the existence of the request for review application by the Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings will proceed in their absence.

In this instance, the Interested Party filed its Notice of Preliminary Objection prior to notification from the Board and thus was clearly aware of the existence of the Request for Review Application.

The main purpose for informing a successful tenderer of the existence of a request for review is to ensure that they are afforded an opportunity to participate in the Request for Review proceedings by filing pleadings either in support of a procuring entity or the applicant.

It is worth noting that any orders issued by this Board in the Request for Review Application may affect the outcome of the successful tenderer's bid. Notably, the Interested Party participated in the request for review proceedings when it challenged the Request for Review by filing a Notice of Preliminary Objection.

In view of the foregoing, the Board finds that the successful tenderer's right to a fair hearing has not been affected in these proceedings, noting that the successful tenderer challenged the Request for Review Application by filing a Notice of Preliminary Objection and thus had an opportunity to participate in the review proceedings.

It is therefore the finding of this Board that the successful tenderer has suffered no prejudice by the Applicant's failure to join it as a party to the Request for Review, noting its participation in the administrative review proceedings.

In totality, the Board finds that the Applicant's failure to join the successful bidder to this Request for Review does not render the Request for Review Application fatally incompetent.

With respect to the second sub-issue of the first issue framed for determination, the Interested Party contended that the Applicant's Request for Review was fatally defective for the Applicant's failure to declare by whom the said application was "Drawn and Filed" by and in particular that the declaration in the Applicant's Affidavit in Support of the Application that the Affidavit is drawn and filed by Kaplan and Stratton Advocates does not *ipso facto* cure the failure by the Applicant to comply with section 35 (1) of the Act as read together with section 34 (1) (f) of the Advocates Act.

In response, the Applicant contended that the Request for Review was drawn and filed by the firm of Kaplan and Stratton Advocates who are the advocates on record for the Applicant contrary to the contentions made by the Interested Party.

In its determination of this sub-issue, the Board studied section 35 (1) of the Advocates Act, Chapter 16, Laws of Kenya (hereinafter referred to as "the Advocates Act") which reads as follows: -

"(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand

shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate:

Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm."

Further, section 34 (1) (f) of the Advocates Act provides as follows: -

"(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a).....; or

(b); or

(c); or

(d).....; or

(e).....; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.” [Emphasis by the Board]

From the foregoing provisions, the Board observes, section 35 of the Advocates Act provides that the person who draws or prepares any document or instrument referred to in Section 34 of the Advocates Act which includes, documents or instruments relating to any other legal proceedings, should be a qualified person under the Advocates Act and shall on the instrument or document in question endorse his/her name and address or the name and address of his/her firm.

The Oxford Advanced Learner’s Dictionary of Current English (5th Edition) defines “proceedings” at page 922 as follows-

“The process of using a law court or other official body to settle a dispute or disagreement.”

The 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.

The interpretation section of the Act defines an appeal filed with the Board as follows: -

"appeal" means a request for administrative review or complaint filed with the Appeals Review Board pursuant to section 167 of this Act"

To invoke the jurisdiction of this Board, an applicant filing a request for review is guided by the provisions of section 167 (1) of the Act which reads 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." [Emphasis by the Board]

Accordingly, an aggrieved candidate or tenderer 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, in such manner as may be prescribed.

The manner in which an aggrieved candidate or tenderer may seek administrative review is prescribed under Regulation 202 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which reads as follows: -

"(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i)

(ii); or

(ii)

(d)

(3)

(4)

Accordingly, the above regulation stipulates that a request for review shall be made in the Form set out in the Fourteenth Schedule of these Regulations, stating the reasons for the complaint, including any alleged breach of the Act and/or the Regulations and be accompanied by such statements as an applicant considers necessary in support of its request.

The Form as set out in the Fourteenth Schedule of the 2020 Regulations reads as follows: -

"FORM FOR REVIEW

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO OF 20

BETWEEN

..... **APPLICANT**

AND

..... **RESPONDENT**

(Procuring Entity)

Request for review of the decision of the (Name of the Procuring Entity of dated the..... day of 20 in the matter of Tender No of20..... for (Tender description).

REQUEST FOR REVIEW

I/We, the above named Applicant(s), of address: Physical address P. O. Box No Tel. No Email....., hereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds, namely:

- 1.**
- 2.**

By this memorandum, the Applicant requests the Board for an order/orders that:

- 1.**

2.

***SIGNED (Applicant) Dated on day of
...../....20....."***

From the above form the Board notes, a request for review application is drawn and filed by an aggrieved candidate or tenderer who is referred to as the applicant in the administrative review proceedings. Further, an applicant in filing a request for review application is required to sign its request for review application and file it together with such statements as it considers necessary in support of its request for review application.

The Board notes that the format for a request for review as provided in the fourteenth schedule of the 2020 Regulations, does not require an applicant to indicate who the request for review application was 'Drawn and Filed by' and more so there is no provision in the Act or its attendant regulations which requires a request for review application to be drawn or filed by an advocate.

However, it is worth noting that the Act and the 2020 Regulations do not prohibit an aggrieved candidate or tenderer from engaging an advocate to act on its behalf in administrative review of procurement and disposal proceedings.

The Board examined the Applicant's Request for Review Application and observes the following at the tail end of the said application: -

(signature)

KAPLAN & STRATTON

ADVOCATES FOR THE APPLICANT

Dated on 10th day of August 2020

From the above excerpt it is evident that the Applicant's Request for Review Application indicates that the firm of Kaplan and Stratton, Advocates for the Applicant, prepared and signed the said application. The Advocates for the Applicant did not indicate that it was 'Drawn and Filed' by their respective law firm and further did not indicate their respective address.

However, the Board notes that the Applicant's Affidavit which was filed in support of the Applicant's Request for Review Application indicates that it was 'Drawn & Filed' by Kaplan and Stratton Advocates and further indicates their respective address.

As mentioned hereinbefore, the format for a request for review application as provided in the fourteenth schedule of the 2020 Regulations, does not require an applicant to indicate who the request for review application was 'Drawn and Filed by' and more so there is no provision in the Act or its attendant regulations which requires a request for review application to be drawn or filed by an advocate.

The Board is cognizant of section 5 (1) of the Act which provides that the provisions of the Act shall take precedence in the event of any

inconsistency between the Act and any other legislation as it provides as follows: -

"This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services"

It is therefore the Board's considered view that the format for a request for review application as provided under section 167 (1) of the Act read together with section 202 of the 2020 Regulations supersedes the requirement as stipulated under section 35 (1) of the Advocates Act read together with section 34 (1) (f) of the Advocates Act which requires any documents or instruments relating to any other legal proceedings to be drawn by a qualified person under the Advocates Act and endorsed with the name and address of the drawer or the name and address of the firm.

In view of the foregoing, the Board finds that the Applicant's failure to declare by whom the Request for Review Application is 'Drawn and Filed by' does not render the Request for Review Application fatally incompetent.

Accordingly, the Board dismisses the Preliminary Objection lodged by the Interested Party on 17th August 2020.

In totality of the first issue framed for determination, the Board finds that it has the requisite jurisdiction to entertain the substantive issues raised in the Request for Review and shall now proceed to address the second issue framed for determination as follows: -

Clause 2.14.1 of the Appendix to Instructions to Tenderers on page 25 of the Tender Document provides as follows: -

"Must submit the Tender Security of Kshs 150,000.00 to be furnished in form of bank guarantee, cash or approved insurance companies and must be valid for 150 days from the date of tender opening."

Further, Mandatory Requirement No. 7 of Clause 2.24 Evaluation and Comparison of Tenders on page 26 of the Tender Document provides as follows: -

"Original Bid Bond of at least Kshs 150,000/- valid for a period of 150 days from date of tender opening...."

At this stage, the tenderer's submission will either be responsive or non-responsive. The non-responsive submissions in any of the above mandatory requirements will be eliminated from the entire evaluation process and will not be considered further."

Accordingly, tenderers were required to submit a tender security or an original bid bond of Kshs 150,000/- valid for 150 days from the date of tender opening. Further, the Tender Document stipulated that failure to

comply with a mandatory requirement would result in a tenderer's elimination from the entire evaluation process and the respective tenderer's bid would not qualify for further evaluation.

The Applicant submitted that it procured a bid bond issued by Citibank on 6th July 2020 valid up to 30th November 2020 for the sum of Kshs 150,000/- in compliance with the tender requirements. The Applicant contended that despite the fact that its bid bond was valid until 30th November 2020 instead of 4th December 2020, a difference of four days would not constitute a material deviation to the extent of invalidating the Applicant's tender, especially considering that the Applicant was currently supplying the Respondent with medical gases and had done so for the last fifteen months. It was therefore the Applicant's submission that the Procuring Entity ought to have allowed the Applicant's bid to proceed for Technical Evaluation.

In response, the Procuring Entity submitted that the requirement for a bid bond of at least Kshs 150,000/= valid for a period of 150 days from the date of tender opening was a mandatory requirement in the Tender Document and that any tenderer who did not comply with a mandatory requirement would be automatically disqualified. The Procuring Entity submitted that the Applicant failed to provide a bid bond valid for 150 days from the date of tender opening, that is from 8th July 2020 and was thus disqualified from further evaluation at the Preliminary Evaluation Stage. It was therefore the Procuring Entity's submission that it evaluated the Applicant's bid in accordance with the criteria set out in

the Tender Document, section 80 (2) of the Tender Document as read together with Article 227 (1) of the Constitution.

In its determination of this issue, the Board first addressed its mind to the meaning of a 'tender security' or what may also be referred to as a 'bid bond'.

A 'tender security' is defined under the interpretation section of the Act as follows: -

"...a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed"

A tender security is therefore a guarantee required from tenderers by a procuring entity to secure fulfilment of a tenderer's obligations in a tender process. A tender security may include bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes, bills of exchange, tender securing declaration, or other guarantees from institutions.

Section 61 of the Act further provides that: -

"An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed."

[Emphasis by the Board]

The purpose of a tender security was explained in the case of **Petition No. 255 of 2016 Okiya Omtatah Okoiti & Another v National Transport and Safety Authority & 2 others [2017] eKLR** where the Honourable Justice Odunga held as follows: -

"In my view the performance bond or tender security is meant to ensure that in the event that the successful tenderer fails to perform the contract the procuring entity would be in a position to secure itself without the necessity of having to institute legal proceedings against an entity that may not be in a position to compensate the public for the loss. This must necessarily be in tandem with Article 227(1) of the Constitution which decrees that a State organ or any other public entity, when it contracts for goods or services, shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Cost effectiveness in my view requires that as much as possible the procuring entity secures the public funds against any foreseeable risk of loss hence the need for financial security."

In view of the foregoing the Board observes, a tender security serves to protect a procuring entity in the event a tenderer submits a tender and withdraws it prematurely from the tendering process. A tender security further acts as a guarantee to a procuring entity that the successful tenderer will accept the award of tender. It further secures public funds in the event of any foreseeable risk or loss in accordance with the principle of cost-effectiveness as espoused under Article 227 (1) of the Constitution.

In the Board's considered view, a tender security can be distinguished from a performance bond whereby the latter is payable by a successful tenderer after award of a tender and serves to protect a procuring entity in the event the successful tenderer fails to perform or execute the subject tender.

Having established the meaning and purpose of a tender security, the Board notes that under the subject tender tenderers were required to provide a bid bond valid for 150 days from the date of tender opening.

The Board examined the Procuring Entity's confidential documents submitted to the Board in accordance with section 67 (3) (e) of the Act and observes from the Tender Opening Minutes dated 8th July 2020, that the tender was opened on 8th July 2020. In this regard therefore, bidders were required to provide a tender security valid up to 4th December 2020.

The Board examined the Applicant's original bid which forms part of the Procuring Entity's confidential file and observes that the Applicant on page 1 and 2 of its original bid submitted a bid bond issued by Citibank on 6th July 2020 in the sum of Kshs. 150,000/- (Kenya Shillings One Hundred and Fifty Thousand which indicated that the said bid bond shall expire no later than 30th November 2020.

The Board examined the Procuring Entity's Evaluation Report signed on 16th July 2020 and observes on page 1 therein the Evaluation Committee's remarks following preliminary evaluation of the Applicant's tender where it stated as follows: -

"BOC Kenya PLC

***Reason for failing – Insufficient Bid Bond validity period;
30th November 2020 instead of 4th December 2020"***

From the above excerpt, the Board observes that the Applicant's bid was disqualified at the Preliminary Evaluation Stage since the Applicant had provided a bid bond with an insufficient validity period whereby its bid bond was valid until 30th November 2020 instead of 4th December 2020.

The Board considered the Applicant's submissions that the variation in its bid bond validity period constituted a minor informality which did not amount to a material deviation that could invalidate its otherwise substantially responsive bid.

The question that arises in this regard is what is a mandatory requirement and what is its purpose?

The Board notes that section 79 of the Act is instructive on this aspect as it states as follows: -

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document.

These eligibility and mandatory requirements were considered by the Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid

documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

Accordingly, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are therefore considered at the Preliminary and sometimes at Technical Evaluation stages after which Financial Evaluation is conducted. Further, bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.

The next question that arises is what is a minor deviation?

Following the definition of a responsive tender as provided hereinabove, section 79 (2) and (3) of the Act provides as follows with respect to minor deviations: -

"(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2) (a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders. [Emphasis by the Board]

This provision stipulates that the responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document. It further defines a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review**

Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) considered what amounts to a minor deviation and determined as follows: -

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable.

In this regard therefore, a minor deviation:

- a) Does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents;
- b) Does not touch on the substance of the tender.
- c) Can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

The Honourable Justice Mativo in Miscellaneous Civil Application No. 85 of 2018 continued as follows: -

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation.

As explained by the Honourable Justice Mativo in the aforementioned decision, it is important for bidders to compete on an equal footing and therefore where a procuring entity waives a mandatory requirement in favour of only one bidder, the same runs contrary to the public procurement principles of fairness and equity as espoused under Article 227 (1) of the Constitution which states as follows: -

"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." [Emphasis by the Board]

To buttress this point, the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** stated as follows: -

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements

in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

In the instant case, the Board has established that the Applicant by its own admission failed to provide a tender security/bid bond valid for 150 days from the date of tender opening as required under the Tender Document and was therefore disqualified from further evaluation at the preliminary evaluation stage for failure to comply with a mandatory requirement.

It is therefore the finding of this Board that the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation stage in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement No. 7 of Clause 2.24 Evaluation and Comparison of Tenders on page 26 of the Tender Document read together with Clause 2.14.1 of the Appendix to Instructions to Tenderers on page 25 of the Tender Document.

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed.

FINAL ORDERS

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

- 1. The Request for Review filed on 10th August 2020 with respect to Tender No. KNH/T/18/2020-2021 for Supply and Delivery of Medical Gases be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 31st Day of August 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB