

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 161/2020 OF 31ST DECEMBER 2020

BETWEEN

PLAN & PLACE INSURANCE BROKERS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

PEST CONTROL PRODUCTS BOARD.....RESPONDENT

AND

PELICAN INSURANCE BROKERS (KENYA)

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Pest Control Products Board with respect to Tender No. PCPB/11/2020-2021 for Procurement of Enhanced Medical Insurance Cover (Inpatient & Outpatient).

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Rahab Chacha | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Dr. Paul Jilani | -Member |
| 5. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Pest Control Products Board (hereinafter referred to as "the Procuring Entity") invited sealed bids for Tender No. PCPB/11/2020-2021 for Procurement of Enhanced Medical Insurance Cover (Inpatient & Outpatient) through a Tender Notice published in the Standard Newspaper on 24th November 2020 directing prospective bidders to visit the Procuring Entity's Website (www.pcpb.go.ke) and the Supplier's Portal (www.treasury.go.ke) on the manner of submission of bids.

Bid submission deadline and opening of bids

The Procuring Entity received a total of six (6) bids by the bid submission deadline of 8th December 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

- Minet Kenya insurance Brokers Ltd;
- Maj Insurance Brokers Ltd;
- Plan and Place Insurance Brokers Ltd;
- Johncele Insurance Brokers Ltd;
- The Kenya Alliance Insurance Company Ltd.(Underwriter);
- Pelican Insurance Brokers (K) Ltd.

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Chief Executive Officer evaluated bids in the following three stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 6 bidders to evaluation to assess whether bidders provided the mandatory documents outlined in the Tender Document. The following 2 bidders were found responsive and thus eligible to proceed to Technical Evaluation: -

- Bidder No.1: M/s Minet Kenya Insurance Brokers Ltd; and
- Bidder No.6: M/s Pelican Insurance Brokers(K) Ltd.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause (B). Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. Bidders were required to achieve a minimum technical score of 70% to proceed to Financial Evaluation. Bidder No 1 (M/s Minet Kenya Insurance Brokers Ltd) and Bidder No 6 (M/s Pelican Insurance Brokers (K) Ltd.) achieved a score of 100% and were therefore eligible for Financial Evaluation.

3. Financial Evaluation

The Evaluation Committee recorded the prices quoted by the two bidders and ranked them as follows: -

Bidder	Total premium In & out patients cover (with inpatients group excess of loss cover (Kshs)	Ranking
Bidder No 1: M/s Minet Kenya Insurance brokers	10,751,301/- (Option A-Total Premium In Patient and Out Patient cover with In-patient group excess of loss cover) 9,395,681/- (Option B-Total Premium In and Out Patient Cover without group excess of loss cover)	2
Bidder No 6: M/s Pelican Insurance Brokers	Kshs. 10,174,570/- (Option A-Total Premium In Patient and Out Patient cover with In-patient group excess of loss cover) Kshs. 9,305,170/- (Option B-Total Premium In and Out Patient Cover without group excess of loss cover)	1

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Pelican Insurance Brokers (K) Ltd, being the lowest evaluated responsive bidder at its tender price of Kshs. 10,174,570/- (Option A-Total Premium in and out patient cover with In-patient group excess of loss cover) since the Procuring Entity required Inpatient and Outpatient cover with In-patient group excess of loss cover.

Professional Opinion

In a professional opinion dated 18th December 2020, the Procuring Entity's In-Charge Procurement reviewed the manner in which the Evaluation Committee carried out evaluation of bids in the subject tender and further expressed his satisfaction that the subject procurement process met the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He therefore advised the Procuring Entity's Chief Executive Officer to

approve award of the subject tender to M/s Pelican Insurance Brokers (K) Ltd, being the lowest evaluated responsive bidder at its tender price of Kshs. 10,174,570/- (Option A-Total Premium in and out patient cover with In-patient group excess of loss cover). The said professional opinion was approved on 23rd December 2020.

Notification to Bidders

In letters dated 23rd December 2020, the Procuring Entity notified the successful and all other unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Plan & Place Insurance Brokers Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 31st December 2020 and filed on even date together with a Supporting Affidavit sworn by the Applicant's Chief Executive Officer on 31st December 2020 and filed on even date and a Further Affidavit by the Applicant's Chief Executive Officer sworn on 14th January 2021 and filed on even date, through the firm of Shapley Barret & Co. Advocates, seeking the following orders: -

- 1. An order allowing the Applicant's Request for Review;***
- 2. An order annulling the decision of the procuring entity awarding TENDER NO. PCPB/11/2020-2021 for the procurement of enhanced medical insurance brokerage services to M/s Pelican Insurance Brokers (Kenya) Limited;***

- 3. An order annulling the Procuring Entity's decision declaring the Applicant's tender as unsuccessful, as contained in its letter dated 23^d December 2020;***
- 4. An order declaring that provision of a VAT Certificate, or evidence of registration for VAT, was not one of the requirements per the published tender documents;***
- 5. An order declaring the requirement by the Respondent, that the Applicant should be registered for VAT is contrary to law and therefore void;***
- 6. An order directing the Respondent to re-evaluate the tenders submitted by the Applicant and the Interested Party in response to TENDER NO. PCPB/11/2020-2021 and to award the tender to the lowest evaluated bidder within Fourteen days; and***
- 7. An order awarding costs arising from and incidental to the Request for Review Application.***

Through a letter dated 4th January 2021 filed on 5th January 2021 addressed to the Board Secretary, the Respondent responded to the Request for Review while the Interested Party lodged a Replying Affidavit sworn by the Interested Party's Managing Director on 11th January 2021 and filed on even date through A.E Kiprono & Associates.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate Covid-

19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 15th January 2021 and filed on even date while the Interested Party lodged Written Submissions dated 15th January 2021 and filed on even date. The Respondent did not lodge written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions including confidential documents submitted to it pursuant to section 63 (1) (e) of the Act and finds that the following issue calls for determination: -

Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with the criteria on VAT Certificate outlined in Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

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

At paragraph 1 and 2 of its Request for Review, the Applicant avers that the Respondent introduced a new requirement on submission of a Value Added Tax ("VAT") Certificate or submission of a VAT obligation endorsed on a PIN Certificate, yet the Applicant is exempt from providing a VAT Certificate. According to paragraph 11 of its Supporting Affidavit, the Applicant deponed that the Tender Document listed mandatory requirements applicable in the subject tender but that VAT Certificate is not one of such requirements. In the Applicant's view, it learnt of the requirement for submission of a VAT Certificate through its letter of notification of unsuccessful bid dated 23rd December 2020. The Applicant deponed at paragraph 17 of its Supporting Affidavit that since it undertakes the business of insurance brokerage and that the services tendered for, fall in the category of Insurance Agency and Insurance Brokerage, the Applicant is exempt from payment of VAT and thus does not obtain a VAT Certificate by virtue of the provisions found in Part II of Paragraph 11 of the First Schedule to the Value Added Tax Act No. 35 of 2013 (hereinafter referred to as the "Value Added Tax Act").

In response to the Applicant's averments, the Respondent avers at paragraph 1 of his Response that it is dishonest and an abuse of the instant proceedings for the Applicant to claim that the criterion for VAT Certificate was not provided in the Tender Document. The Respondent further states that other bidders responded to the criterion of submission of a VAT Certificate by attaching a VAT certificate, PIN Certificate with VAT obligation and/or letters of exemption from Kenya Revenue Authority as the case may be. At paragraph 2 of his Response, the Respondent avers that the Applicant

ought to have challenged the requirements provided in the Tender Document before submitting its bid.

On its part, the Interested Party deponed at paragraph 9 of its Replying Affidavit that the Tender Document provided a mandatory requirement directing bidders to submit a VAT Certificate and thus refuted the Applicant's allegation that the said requirement was only introduced in its letter of notification of unsuccessful bid dated 23rd December 2020. At paragraph 11 of its Replying Affidavit, the Interested Party depones that the Invitation to Tender required bidders to submit a VAT Certificate if applicable and that since the Interested Party's services are exempt from VAT, the Interested Party submitted a VAT Exemption Certificate.

In addressing the issue framed for determination, the Board observes that a preliminary question arises as to whether submission of a VAT Certificate was a criterion in the Tender Document. If so, whether bidders could provide evidence of exemption, if they were exempt from the requirement of VAT.

On one hand, Clause A (1) of Section I. Invitation to Tender of the Tender Document provides as follows: -

"A. Documents to be submitted

- 1. A fully completed Business Questionnaire including documents specified thereon such as (a) copy of Certificate of Incorporation & Current Trade Licence (b)***

PIN Certificate (c) VAT Certificate if applicable (d) PIN Certificates of Directors

On the other hand, Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document listed one of the mandatory requirements applicable at the Preliminary Evaluation Stage as; **“Submission of VAT Certificate”**. The introductory sentence of Clause (A) of the Evaluation Criteria of the Tender Document provided thus: -

“The following requirement must be met by the tenderers notwithstanding other requirement in the tender documents. Mandatory Requirements (MR)”

Having compared the two provisions outlined hereinbefore, the Board notes that Clause A (1) of Section I. Invitation to Tender of the Tender Document required bidders to submit **VAT Certificate if applicable** whereas Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document stated **“Submission of VAT Certificate”** forms part of the mandatory requirements to be evaluated at the Preliminary Evaluation Stage. This prompted the Board to determine applicability of the Invitation to Tender vis-à-vis the Appendix to Instructions to Tenderers.

In doing so, the Board observes that Clause 2.3.1 of Section II. Instructions to Tenderers of the Tender Document provided thus: -

"The tender document comprises the documents listed below and addenda issued in accordance with Clause 2.5 of these instructions to tenderers: -

- 1. Invitation to Tender.***
- 2. Instructions to Tenderers.***
- 3. General Conditions of Contract.***
- 4. Special Conditions of Contract.***
- 5. Schedule of Requirements.***
- 6. Details of Insurance Cover.***
- 7. Form of Tender.***
- 8. Price/Premium Schedules.***
- 9. Confidential Business Questionnaire.***
- 10. Contract Form.***
- 11. Insurance Company's Authorization Form.***
- 12. Declaration Form.***
- 13. Letter of Notification. "***

It is important for the Board to point out that the Invitation to Tender found in Section I of the Tender Document is different from Instructions to Tenderers found in Section II of the Tender Document as can be seen from the list outlined hereinbefore. This is an important aspect to take into consideration because the introductory clause of the Appendix to Instructions to Tenderers of the Tender Document provides as follows: -

"The following information for the Procurement of an Enhanced Inpatient/Outpatient Medical Insurance

Services shall complement, supplement or amend the provisions of the instructions to tenderers. Wherever there is a conflict between the provisions of the instructions to tenderers and the provisions of the appendix, the provisions of the appendix herein shall prevail over those of the instructions to tenderers

The Board studied all provisions under Section II. Instructions to Tenderers of the Tender Document but did not find the requirement for VAT therein. The said requirement can only be found in Section I. Invitation to Tender which required bidders to provide VAT if applicable and the Appendix to Instructions to Tenderers which makes submission of VAT Certificate a mandatory requirement notwithstanding other requirements in the Tender Document. The criteria for evaluation of bids at the Preliminary, Technical and Financial Evaluation stages were outlined in the Appendix to Instructions to Tenderers and not the Invitation to Tender. This therefore leads the Board to find that it was mandatory for bidders to submit a VAT Certificate pursuant to Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document.

Clause 2.3.2 of Section II. Instructions to Tenderers of the Tender Document states that: -

"The Tenderer is expected to examine all instructions, forms, terms and specifications in the tender documents.

Failure to furnish all information required by the tender documents or to submit a tender not substantially responsive to the tender document in every respect will be at the tenderer's risk and may result in the rejection of its tender"

The Applicant did not furnish the Board with any evidence of having sought clarifications from the Procuring Entity regarding application of Clause A (1) of Section I. Invitation to Tender of the Tender Document vis-à-vis Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document. Failure to seek clarifications from the Procuring Entity means the Applicant examined all instructions, forms, terms and specifications in the Tender Document and was satisfied with such provisions pursuant to Clause 2.3.2 of Section II. Instructions to Tenderers of the Tender Document hence the reason why it participated in the subject procurement process.

It therefore follows that bidders ought to have provided a VAT Certificate because it was a mandatory criterion for evaluation pursuant to Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document and was a requirement known to all bidders who obtained the Tender Document by the tender submission deadline. Pursuant to Clause 2.3.2 of Section II. Instructions to Tenderers of the Tender Document, the Applicant is deemed to have known submission of VAT Certificate pursuant to Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document formed part of the mandatory requirements for evaluation and thus opted to participate in the subject procurement process.

The Board finds the Applicant's assertion that it only learnt of the requirement for VAT in its letter of notification of unsuccessful bid dated 23rd December 2020 to be untrue because, this requirement was stated in Clause A (1) of Section I. Invitation to Tender and Clause A (10) of the Appendix to Instructions to Tenderers of the Tender Document.

The Board would like to point out that bidders ought to ensure that they read and understand all provisions of a tender document as a whole as opposed to selecting some provisions to the exclusion of others. In doing so, bidders should apprise themselves of the provisions amended in the Appendix to Instructions to Tenderers and in this instance, the said Appendix to Instructions to Tenderers outlined the criteria for evaluation of bids. If a bidder is exempt from VAT, such a bidder has the option of seeking clarification after examining the provisions in the tender document and any response from the procuring entity should assist a bidder in preparation of its bid document. In the instant case, bidders had a right to seek clarifications pursuant to Clause 2.4.1 of Section II. Instructions to Tenderers of the Tender Document which provides as follows: -

"A prospective tenderer requiring any clarification of the tender document may notify the Procuring Entity in writing or by post at the entity's address indicated in the Invitation to Tender. The Procuring Entity will respond in writing to any request for clarification of the tender documents, which it receives not later than seven (7) days prior to the deadline for the submission of tenders,

prescribed by the procuring entity. Written copies of the Procuring Entity's response (including an explanation of the query but without identifying the source of inquiry) will be sent to all prospective tenderers that have received the tender document. The procuring entity shall reply to any clarifications sought by the tenderer within 3 days of receiving the request to enable the tenderer to make timely submission of its tender"

The Applicant referred the Board to Clause 10 found in Part II of the First Schedule to the Value Added Tax Act which provides as follows: -

***"The supply of the following services shall be exempt supplies
...10. Insurance agency, insurance brokerage, stock exchange brokerage and tea and coffee brokerage"***

Section 2 of the Value Added Tax Act defines the word "**exempt supplies**" to mean: -

"supplies specified in the First Schedule [of the VAT Act] which are not subject to tax"[Emphasis by the Board]

The Applicant relied on the foregoing provisions to support its view that it is exempt from providing a VAT Certificate because it undertakes the business of insurance brokerage and that the services tendered for, fall in the category of Insurance Agency and Insurance Brokerage.

The Board has established the evaluation criteria outlined in page 22-23 of the Tender Document required bidders to provide VAT Certificate. A bidder claiming to be exempt from the requirement of VAT ought to have provided documentation explaining it is exempt from VAT or a document that is issued by the relevant body in place of a VAT Certificate in instances where a company is exempt from VAT. It is the Board's considered view that nothing could have been easier than for the Applicant to attach documentation in its original bid evidencing its exemption from the requirement of VAT. Instead, the Applicant labelled the divider found at page 29 of its original bid as "**a Certified copy of VAT Registration Certificate**", yet the ensuing document found at page 30 of the Applicant's original bid, is a PIN Certificate No. P051167757L dated 8th April 2015 issued by Kenya Revenue Authority specifying the Tax Obligations of the Applicant as "**Income Tax-Company**" and "**Income Tax-PAYE**". The said PIN Certificate is not a VAT Certificate neither does it have VAT Tax Obligation. Having studied the Applicant's original bid in its entirety, the Board did not find any documentation provided by the Applicant explaining that the Applicant is exempt from VAT or a document that is applicable in place of a VAT Certificate in instances where a company is exempt from VAT. Such documentation would have assisted the Evaluation Committee in establishing whether the Applicant is exempt from VAT so as to make a determination whether the Applicant satisfies the criterion under Clause A (1) of Section I. Invitation to Tender read together with Clause A (10) of the Appendix to Instructions to Tenderers to Tender Document.

The Applicant never provided any documentation in its bid for consideration by the Evaluation Committee evidencing its exemption from VAT but instead directed the Evaluation Committee to a divider labelled as **"a Certified copy of VAT Registration Certificate"** yet the ensuing document is a PIN Certificate with **"Income Tax-Company"** and **"Income Tax-PAYE"** obligations with no VAT obligation specified therein. Interestingly, the Applicant did not provide any evidence of exemption from VAT before this Board but merely stated it is exempt from VAT pursuant to the provisions of the Value Added Tax Act cited hereinbefore.

The letter dated 25th February 2005 attached to the Interested Party's Replying Affidavit shows Kenya Revenue Authority received a letter from the Interested Party's Association (i.e. Association of Insurance Brokers) and while awaiting determination from formal de-registration request, the Interested Party was informed that it will not be required to submit VAT 32 returns.

Contrary to the Applicant's assertion, the Interested Party obtained an exemption from VAT requirement (as a member of the Association of Insurance Brokers in Kenya) from Kenya Revenue Authority evidenced by the letter dated 29th March 2005 found at page 81 of the Interested Party's bid, stating as follows: -

"Further to our previous correspondence, we are pleased to inform you that we have finally received official communication from KRA"

...You are no longer required to submit any returns to the VAT Department neither are you required to withhold any VAT..."

From the foregoing, the Board deduces that there is a formal application process applicable to a company seeking exemption from VAT. Upon consideration of such an application, a company may obtain relevant documentation to show they are exempt from the requirement of VAT.

In that regard therefore the Board observes that the Applicant had an obligation to (i) submit a VAT Certificate, or (ii) submit a PIN Certificate with VAT obligation or (iii) submit relevant documentation explaining why it does not have a VAT Certificate and if such documentation shows the Applicant is exempt from the requirement of VAT, to provide relevant documentation issued by Kenya Revenue Authority as evidence of the Applicant being exempt from VAT.

It is the Board's considered finding that the Applicant has failed to substantiate its allegation that it is exempt from VAT because evidence of such an exemption ought to have been provided in its original bid for consideration by the Evaluation Committee during evaluation of the Applicant's bid at the Preliminary Evaluation Stage. Section 79 (1) and 80 (2) of the Act are the cornerstone in determining a bidder's responsiveness to the requirements in the Tender Document. The said provisions state as follows: -

"79 (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents

80 (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

Section 79 (1) of the Act describes a responsive tender to be the one that conforms to all eligibility and mandatory requirements (including technical specification) in the tender documents. In determining the responsiveness of tenders, an evaluation committee must apply the procedures and criteria set out in the tender document.

The Applicant's bid does not have; (i) a VAT Certificate, or (ii) a PIN Certificate with VAT obligation or (iii) an explanation why the Applicant does not have a VAT Certificate and from such explanation, relevant documentation that is issued by Kenya Revenue Authority as evidence of a company being exempt from VAT. As a result, the Evaluation Committee could only find the Applicant's bid non-responsive for failure to satisfy the criterion outlined in Clause A (10) of the Appendix to Instructions to Tenderers to Tender Document because the Evaluation Committee had an obligation of evaluating tenders in accordance with the criteria set out in the Appendix to Instructions to Tenderers of the Tender Document.

In the circumstances, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with the

criteria on VAT Certificate outlined in Clause A (1) of Section I. Invitation to Tender & Clause A (10) of the Appendix to Instructions to Tenderers to Tender Document read together with section 79 (1) and 80 (2) of the Act.

At this juncture, the Board would like to address the Applicant's contention that it submitted a lower bid price than that of the Interested Party hence ought to have been awarded the subject tender. In response, the Respondent avers at paragraph 3 of his Response that the figures read out during tender opening do not constitute results of evaluation because assessment of the lowest evaluated bidder was done at the Financial Evaluation Stage. On its part, the Interested Party deponed at paragraph 14 of its Replying Affidavit that the Applicant was not the lowest evaluated bidder and thus was not awarded the subject tender.

Having considered parties' rival pleadings, the Board observes that the Applicant quoted a bid price of Kshs. 9,786,875/- (Option A-Total Premium In Patient and Out Patient cover with In-patient group excess of loss cover) and Kshs. 8,531,255/- (Option B-Total Premium In Patient and Out Patient Cover without group excess of loss cover). The Interested Party quoted a bid price of Kshs. 10,174,570/- (Option A-Total Premium In Patient and Out Patient cover with In-patient group excess of loss cover) and Kshs. 9,305,170/- (Option B-Total Premium In Patient and Out Patient Cover without group excess of loss cover).

The Applicant's bid was found non-responsive at the end of Preliminary Evaluation and as already established by the Board, the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with the criteria on VAT Certificate outlined in Clause A (1) of Section I. Invitation to Tender & Clause A (10) of the Appendix to Instructions to Tenderers to Tender Document read together with section 79 (1) and 80 (2) of the Act. This therefore means, the Applicant's bid could not be considered for further evaluation.

At paragraph 19 of his decision in **Miscellaneous Application 122 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR** (hereinafter referred to as "the BABS Security Services Case") the Honourable Justice John Mativo considered the manner in which evaluation is undertaken and held as follows: -

"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 or empowerment. 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."

The Board observes that the court in the BABS Security Services Case held that bids are first evaluated with a view of determining their responsiveness,

because this is the first hurdle that bidders must overcome during evaluation. This in the Board's view means that the Applicant had an obligation of demonstrating its responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price can be made at the Financial Evaluation Stage. In essence, if a bidder submits the lowest bid price at tender opening this does not entitle such bidder to an award of a tender without being responsive to eligibility and mandatory requirements (including technical specifications). A bidder must first demonstrate its responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the financial evaluation stage (assuming a bidder progresses to the financial evaluation stage) to determine whether such bidder has the lowest evaluated bid.

The Applicant's bid was found non-responsive at the Preliminary Evaluation Stage, did not progress to Technical Evaluation neither did it qualify for Financial Evaluation for the Evaluation Committee to assess whether the Applicant had the lowest evaluated bid. Accordingly, the Board's finds that the Applicant's assertion that it ought to have been awarded the subject tender because it had a lower bid price than that of the Interested Party at tender opening, lacks any justifiable basis.

In totality of the foregoing, the Board finds that the Applicant's 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, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 31st December 2020 with respect to Tender No. PCPB/11/2020-2021 for Procurement of Enhanced Medical Insurance Cover (inpatient & outpatient) be and is hereby dismissed.**

- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 20th day of January 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB