

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 16/2021 OF 4TH FEBRUARY 2021

BETWEEN

SCIENCESCOPE LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

LUED (A) CHEMICALS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenyatta National Hospital with respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Dr. Joseph Gitari | -Member |
| 4. Ms. Njeri Onyango | -Member |
| 5. Ms. Isabella Juma, CPA | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso

-Holding brief for Acting Board Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta National Hospital (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper on 10th November 2020.

Bid submission deadline and opening of bids

The Procuring Entity received a total of six (6) bids by the bid submission deadline of 3rd December 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

1. M/s Chem Labs Limited;
2. M/s Sciencescope Limited;
3. M/s Neo Science Africa Ltd;
4. M/s Meditec Systems Ltd;
5. M/s Renaissance Health Limited; and
6. M/s Lued (A) Chemicals Ltd.

Evaluation of bids

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

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether or not bidders submitted mandatory documents required under Stage 1. Preliminary Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation, all the six bidders were found responsive, and thus eligible to proceed to the Technical Evaluation Stage.

2. Technical Evaluation

At this stage, the Evaluation Committee determined bidders' compliance to the tender requirements, their technical capacity and availability of adequate resources to implement the subject tender in accordance with the criteria outlined in Stage 2. Technical Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation at this stage, two bidders were found responsive and thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the price quoted by bidders as follows: -

BIDDER NO.	TOTAL VALUE KSHS
2	63,494,731.36

M/s Sciencescope Limited	
6	24,775,582.45
M/s Lued (A) Chemicals Ltd.	

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Lued (A) Chemicals Ltd at the price of Kshs. 24,775,582.45 for being the lowest evaluated tenderer.

Professional Opinion

In a Professional Opinion dated 9th December 2020, the Procuring Entity's Acting Director, Supply Chain Management reviewed the Evaluation Report dated 8th December 2020 and took the view that the subject procurement process satisfied 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 advised the Chief Executive Officer to award the subject tender to M/s Lued (A) Chemicals Ltd at the price of Kshs. 24,775,582.45. The said professional opinion was approved on 9th December 2020.

Notification to Bidders

In letters dated 10th December 2020, the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 156 OF 2020

M/s Sciencescope Limited (hereinafter referred to as "the Applicant") lodged Request for Review No. 156 of 2020 dated 22nd December 2020 and filed on 23rd December 2020 together with a Supporting Affidavit sworn by the Applicant's Director on 22nd December 2020 and filed on 23rd December 2020 and a Supplementary Affidavit sworn by the Applicant's Director on 8th January 2021 and filed on 11th January 2021, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- I. An order annulling and setting aside the award of Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) to Lued (A) Chemicals Limited;***
- II. An order annulling and setting aside the Respondents' letters of notification of unsuccessful bid in respect to Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) dated 10th December 2020 addressed to Sciencescope Limited;***
- III. An order substituting the Respondents' decision awarding the Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) to Lued (A) Chemicals Limited with a decision awarding the subject tender to the Applicant, M/s Sciencescope Limited on account of having attained the award criteria set out in the Tender Document;***

iv. Any other relief that the Board may deem fit and just to grant; and

v. An order awarding costs of the Review.

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 12th January 2021:

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial**

Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in this case.

- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to ensure the procurement proceedings in Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.**
- 5. Given that the subject procurement proceedings is not complete, each party shall bear its own costs in the Request for Review.**

Re-evaluation of Tenders at the Financial Evaluation Stage

In a letter dated 15th January 2021, the Procuring Entity's Chief Executive Officer referred the Chairman of the Procuring Entity's

Evaluation Committee to the decision rendered by the Board in **PPARB Application No. 156 of 2020, Sciencescope Limited v. The Accounting Officer, Kenyatta National Hospital & Another** (hereinafter referred to as "the Board's decision in Review No. 156/2020"). He then requested the Evaluation Committee to re-evaluate bidders who were found eligible to proceed to Financial Evaluation, taking into consideration the findings of the Board's decision in Review No. 156/2020 and to submit an evaluation report on or before 18th January 2021.

According to the Evaluation Report received on 18th January 2021 by the Acting Director, Supply Chain Management (having compared the signature of the recipient on 18th January 2021 and that of the Acting Director, Supply Chain Management in the Professional Opinion dated 19th January 2021), the Evaluation Committee noted the contents of the letter dated 15th January 2021 received from the Chief Executive Officer and conducted a re-evaluation of Financial Evaluation in the following components: -

A. Determination of evaluated price for each bid as follows:

- (i) The evaluation committee cross checked the bidders price in the subject tender and observed that there was no arithmetic error.

Item Number	Item description	Bidder No 6 M/s Lued (A) Chemicals Limited	Bidder No 2 M/s Sciencescope Limited	Remarks if any
1	There will be no corrections of arithmetic errors as per Public Procurement & Assets Disposal Act 2015 Section 82	No Correction of Arithmetic's done	No Correction of Arithmetic's done	-

On cross checking on the price schedules, the Evaluation Committee established that there was an arithmetic error amounting to Kshs. 2,858,400.28. However, the Evaluation Committee observed that errors and omissions are not considered as per section 82 of the Act and that it shall be guided by the prices as submitted in the form of tender.

- ii. Conversion of all tender to same currency using a uniform exchange rate prevailing at the tender closing date.

Item Number	Item description	Bidder No 6 M/s Lued (A) Chemicals Limited	Bidder No 2 M/s Sciencesope Limited	Remarks if any
1	Conversion of all tender to same currency using a uniform exchange rate prevailing at the Closing date of the Tender.	Quoted on Kenya Shillings as per form of tender	Quoted on Kenya Shillings as per form of tender	No conversion done since all the bidder quoted on Kenya Shillings as per form of tender

- iii. Application of any discount offered on the tender

Item Number	Item description	Bidder No 6	Bidder No 2	Remarks if any
1	Application of any discount offered on the tender	No Discount offered by the bidder as per form of tender	No Discount offered by the bidder as per form of tender	-

- iv. Establish if items quoted for are within prevailing market rates from the known retail outlets & Public Procurement Regulatory Authority price index. A written undertaking that the prices shall remain valid for 12 months from date of contract in line with

the Public Procurement and Asset Disposal Act 2015 section 139(3).

Bidder No	Item description	PPRA Index	Market Rates	Remarks if any
2	Establish if items quoted for are within prevailing market rates from the known retail outlets & Public Procurement Regulatory Authority price index. A written undertaking that the prices shall remain valid for 12 months from date of contract in line with the Public Procurement and Asset Disposal Act 2015 section 139(3).	The items under consideration are not standard and are specific to the equipment associated hence as per the latest PPRA Index the items prices are not indicated on the website and on the latest market price index (Annexed is PPRA Market index)	The Director supply chain may recommend for award based on the previous prices as indicative of market rates since the subject procurement is specialized and it's accompanied by leasing arrangement which from the market knowledge cannot be assessed through market survey.	Annexed is PPRA Market index. The Director supply chain may recommend for award based on the previous prices as indicative of market rates

B. Ranking of Tenders according to their evaluated prices

At this stage of evaluation, the two bids were ranked as follows: -

Bidder No.	Unit Price Quoted By Supplier	Ranking	Preliminary Evaluation	Tec Report	Delivery Period	Country Of Origin	Total Value Ksh
2	63,494,731.37	2 nd	Pass	Pass	2 - 4 Weeks	Germany	63,494,731.36
6	24,775,582.45	1 st	Pass	Pass	8 - 12 Weeks	China	24,775,582.45

The Evaluation Committee's Recommendation

In view of the re-evaluation at the Financial Evaluation Stage, the Evaluation Committee recommends award of the subject tender to **M/s**

Lued (A) Chemicals Limited for being the lowest evaluated bidder at its quoted tender sum tabulated herein below: -

Item Code	Item Description	Model	Annual Qty	Unit Price in Ksh.	Delivery Period	Total Cost in Ksh.	Remarks
1	Operational Leasing of Laboratory Equipment – Automated Clinical Chemistry Analyzer	BS 2000 MODULAR SYSTEM	4	24,775,582.45	2 – 4 Wks	24,775,582.45	M/S Lued (A) Chemicals Ltd. 1 st Lowest Evaluated Bidder

Due Diligence/Post Qualification Exercise

Further to Order No. 4 of the Board’s decision in PPARB Application No. 156 of 2020, the Evaluation Committee conducted due diligence on **M/s Lued (A) Chemicals Ltd**, the lowest evaluated bidder to ascertain the following.

- a) Documentary evidence as submitted by the bidder
- b) Capacity-Human Capacity and other Technical infrastructure
- c) Seeking Confidential references from Manufacturers etc.
- d) Service sustainably and availability of service /Technical Engineers
- e) Statutory Compliance with statutory body(s) i.e. KRA

The findings were as follows: -

1. The Evaluation Committee found that documents as provided in the bid document by the successful bidder were authentic.

2. The Evaluation Committee further noted that the successful bidder has the relevant human capital and fully equipped and installed infrastructure e.g. internet to facilitate the service delivery and ease communication.
3. The Evaluation Committee wrote to the Manufacturer M/s Mindray to confirm whether the manufacturer has authorized the successful bidder to submit the bid, negotiate and sign the resulting contract on its behalf and the manufacturer confirmed through email that they have authorized M/s Lued (A) Chemicals Limited to transact on their behalf.
4. The Evaluation Committee did confirm that service sustainability is guaranteed since the successful bidder has a Service/Technical Engineer well trained hence reducing the machine down time in case of any breakdown.
5. Lastly, the Evaluation Committee undertook a Tax Compliance Checker (TCC) on the Kenya Revenue Authority Official Website and confirmed that the Tax Compliance Certificate submitted by the successful bidder is compliant.

In view of its findings, the Evaluation Committee was satisfied that **M/s Lued (A) Chemicals Ltd** was qualified to perform the subject tender and subsequent contract satisfactorily.

Professional Opinion

In a professional opinion signed on 19th January 2021, the Acting Director Supply Chain Management considered the Evaluation Committee's findings and concurred with its recommendation of award.

The Chief Executive Officer of the Procuring Entity approved the Evaluation Committee's recommendation of award on 19th January 2021.

Notification to Bidders

In letters dated 21st January 2021, the Procuring Entity notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

REQUEST FOR REVIEW NO. 16 OF 2021

The Applicant lodged a Request for Review dated 3rd February 2021 and filed on 4th February 2021 together with a Supporting Affidavit sworn by the Applicant's Director on 3rd February 2021 and filed on 4th February 2021, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. An order quashing and setting aside the Procuring Entity's decision in its letter dated 21st January 2021 awarding Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser to Lued (A) Chemicals Limited;***
- ii. An order annulling and setting aside the Procuring Entity's letters of notification of unsuccessful bid with respect to***

Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 21st January 2021 addressed to Sciencscope Limited and all other unsuccessful bidders;

- iii. An order directing the Procuring Entity to award Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser to Sciencscope Limited;***
- iv. Any other relief that the Board may deem fit and just to grant;***
- v. Costs of the Review be awarded to the Applicant.***

In response, the Procuring Entity, through the Procuring Entity's Board, lodged a Memorandum of Response dated 11th February 2021 on 12th February 2021 together with a Supporting Affidavit sworn on 11th February 2021 and filed on 12th February 2021.

Further, the Interested Party lodged a Memorandum of Response to the Request for Review dated 16th February 2021 on even date together with a Statement in Support of the Response to the Request for Review sworn and filed on 16th February 2021, through the firm of SMS Advocates, LLP.

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 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 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").

The Applicant lodged written submissions dated 22nd February 2021 on even date, the Procuring Entity lodged written submissions dated 22nd February 2021 on 23rd February 2021 and the Interested Party lodged written submissions dated 17th February 2021 on even date.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Act including parties' written submissions and finds that the following issues call for determination: -

- I. Whether the doctrine of res judicata applies to the Request for Review and specifically to the following allegations raised by the Applicant: -**

a) *Whether the Interested Party failed to provide product brochures for essential ancillary equipment required under Clause III Specimen Management, Clause VI Electricals/Water, Clause VII Networking Integration and Clause X General Accessories of the technical specifications at pages 36-37 of the Tender Document*

II. Whether the Procuring Entity complied with the orders of the Board issued on 12th January 2021 in PPARB Application No. 156 of 2020, Sciencescope Limited v. The Accounting Officer, Kenyatta National Hospital & Another

The Board will now proceed to address the issues framed for determination as follows: -

The Interested Party in paragraphs 11, 12 and 13 of its Statement in Support of the Response to the Request for Review raised the plea of res judicata and in so doing, gave a general averment that the Request for Review as filed is res judicata.

The Black's law Dictionary defines *res judicata* as: -

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3)

the involvement of same parties, or parties in privity with the original parties...”

The doctrine is therefore a method of preventing injustice to the parties to a case. It acts to avoid unnecessary waste of resources in the dispute adjudication system. A court or an adjudicating body will thus use *res judicata* to deny reconsideration of a matter.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya (hereinafter referred to as “the Civil Procedure Act”), which codifies the plea of *res judicata* in our laws, states as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

In **Civil Appeal No. 105 of 2017, Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, ([2017] eKLR)**, (hereinafter referred to as ‘the IEBC Case’) the Court of Appeal addressed the components of the doctrine of *res judicata* as outlined in Section 7 of the Civil Procedure Act and in so doing held that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

In the IEBC Case, the Court of Appeal explained the role of the doctrine as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a

multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

From a perusal of the pleadings before this Board, it is evident that the parties to Review No. 156/2020 are the same parties in the instant Request for Review litigating with respect to the same tender. However, from an examination of the Applicant’s Request for Review, the Board observes that the Applicant is challenging the Procuring Entity’s compliance with the orders of the Review Board in Review No. 156/2020, which *inter alia* directed the Procuring Entity to re-admit the Applicant’s bid at the Financial Evaluation Stage, conduct a re-evaluation at the Financial Evaluation Stage and make an award subject to a due diligence exercise. The Interested Party has not particularized the manner in which it believes the doctrine of res judicata applies to the instant Request for Review. On the other hand, the Applicant raised an allegation that the Interested Party failed to provide product brochures for essential ancillary equipment. Having studied the Tender Document, the Board observes that the Applicant referred to technical specifications found in Clause III Specimen Management, Clause VI Electricals/Water, Clause VII Networking Integration and Clause X General Accessories of the technical specifications at pages 36-37 of the Tender Document as can be seen at paragraph 17 (b) of the Request for Review. The Board in Review No. 156/2020 found no fault in the manner in which the Procuring Entity conducted Preliminary and Technical Evaluation, and

such decision has not been challenged by way of Judicial Review at the High Court and is therefore binding to all parties to the instant Request for Review including the Applicant and the Interested Party herein. The Board only faulted the Financial Evaluation conducted by the Procuring Entity hence the reason why it directed a re-evaluation at the Financial Evaluation Stage. The Applicant is now litigating a second time on criteria considered during Technical Evaluation and the Board finds that the question whether the Interested Party failed to provide product brochures for essential ancillary equipment found in Clause III Specimen Management, Clause VI Electricals/Water, Clause VII Networking Integration and Clause X General Accessories of the technical specifications at pages 36-37 of the Tender Document, is res judicata.

The Board is alive to the fact that any new issues raised regarding re-evaluation at the Financial Evaluation stage, due diligence, award and notification to bidders undertaken pursuant to orders of the Board in Review No. 156/2020 would not be res judicata. At paragraph 68 of the decision in Judicial Review Miscellaneous Application No. 283 of 2019, **Republic v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited [2019] eKLR**, the Honourable Justice Nyamweya held as follows: -

"In the second Request for Review, the ex parte Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent's directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's bid. Therefore, the new set

of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's own orders."

Having considered the Board's finding in the above case, the Board observes that in Review No. 156/2020, it directed the Accounting Officer to undertake a re-evaluation at the Financial Evaluation Stage and a due diligence exercise and the Applicant herein is now alleging at paragraph 17 (a) and (b) of its Request for Review that the Procuring Entity failed to undertake due diligence to verify that the Interested Party did not meet the technical qualifications to conduct all tests as per the schedule of requirements and that the Procuring Entity failed to conduct due diligence to verify the product brochures for essential ancillary equipment required in the tender schedule of requirements. At paragraph 15 to 17 of its response, the Procuring Entity explains the manner in which due diligence exercise was conducted on the Interested Party to verify the documentary evidence provided by the bidder.

The question whether the Procuring Entity re-instated the Applicant's tender and the Interested Party's tender at the Financial Evaluation Stage so as to re-evaluate the Applicant's tender and all other tenders (that is, the Interested Party's tender) at the Financial Evaluation Stage is a question of compliance with the orders of the Board in Review No. 156/2020 and thus, are not res judicata. In addition to this, the manner in which due diligence, award of the subject tender and notification to bidders was conducted are also questions of compliance with the orders of the Board in Review No. 156/2020 and are therefore not res judicata.

Accordingly, the Board shall address the foregoing while making a determination on the second issue for determination.

A brief background to the instant Request for Review is that the Applicant participated in the subject procurement proceedings by submitting a tender in response to the Procuring Entity's Advertisement of 10th November 2020. Upon conclusion of evaluation by the Procuring Entity, the Applicant was notified that its bid was found non-responsive through a letter of notification of unsuccessful bid dated 10th December 2020. Being aggrieved by the Procuring Entity's decision on its bid, the Applicant lodged Request for Review No. 156/2020 before this Board.

The Board having considered each of the parties' pleadings including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act, rendered a decision dated 12th January 2021 in Review No. 156/2020 directing as follows: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of**

Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Interested Party, be and is hereby cancelled and set aside.

- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in this case.**

- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to ensure the procurement proceedings in Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause**

2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

5. Given that the subject procurement proceedings is not complete, each party shall bear its own costs in the Request for Review.

It is worth noting that the Board in its orders cited hereinabove nullified the letter of notification of intention to award the subject tender dated 10th December 2020 addressed to the Interested Party and nullified the letters of notification dated 10th December 2020 addressed to the Applicant and all other unsuccessful bidders. Further, the Board directed the Accounting Officer of the Procuring Entity to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in Request for Review No. 156/2020. The Accounting Officer of the Procuring Entity was also ordered to ensure the subject procurement proceedings proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted

on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

With respect to Order No. 3 and 4 of the decision in Review No. 156/2020, the Board in its decision found that the Procuring Entity's Evaluation Committee ranked tenders by recording the tenderer's respective tender sums without first applying the procedure and criteria for financial evaluation outlined in Clause (a) of Stage 3 Financial Evaluation of Section VI Evaluation Criteria of the Tender Document and reiterated the procedure for financial evaluation as set out in the Tender Document. The Board found that there were four components of financial evaluation outlined in Clause (a) of Stage 3 Financial Evaluation of Section VI Evaluation of the Tender Document.

At page 30 and 31 of its decision in Review No. 156/2020, the Board found that the Evaluation Committee must first determine a bidder's responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation Stage so as to arrive at the lowest evaluated tender. Further, at page 34 and 35 of its decision, the Board found that the Procuring Entity had an obligation to determine (i) the tenderer responsive to eligibility and mandatory requirements including technical specifications, (ii) the lowest evaluated tenderer at the Financial Evaluation Stage in accordance with Stage 3 Financial Evaluation of Section VI Evaluation Criteria of the Tender Document and (iii) whether

the lowest evaluated tenderer qualifies to perform the contract satisfactorily through a due diligence exercise on such tenderer undertaken in accordance with Clause 2.26 (a) of Section II Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Thereafter to award the subject tender in accordance with the award criteria specified in Clause 2.26.4 of Section II Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

At page 27, the Board observed that the Tender Document required the Procuring Entity to determine whether the prices quoted by bidders were within the market rates. The Board thereafter made a finding on page 28 that the Procuring Entity failed to evaluate bids at the Financial Evaluation Stage in accordance with Clause (a) of Stage 3 Financial Evaluation of Section VI Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.

At page 32 to 36 of the decision, the Board found that pursuant to Clause 2.26 (a) of Section II Instructions to Tenderers of the Tender Document, the Procuring Entity had an obligation to conduct a post qualification exercise and made a finding that the Procuring Entity did not conduct post qualification evaluation in accordance with Clause 2.26 (a) of Section II Instructions to Tenderers of the Tender Document read with section 83 of the Act. The Board outlined the procedure for post qualification evaluation and underscored that the main objective of post qualification evaluation is to establish whether the lowest evaluated

responsive tenderer is qualified to perform the contract satisfactorily and therefore ought not to be overlooked by the Procuring Entity.

Noting that none of the parties to Review No. 156/2020 challenged the Board's decision in the said review and the same is final and binding to all parties pursuant to section 175 (1) of the Act, it now behooves upon this Board to determine whether the Procuring Entity complied with the orders of the Board, specifically in relation to the findings in Review No. 156/2020 that the Procuring Entity was required to take into consideration in concluding the subject procurement process.

The first limb of the directions given by the Board to the Procuring Entity required the Accounting Officer of the Procuring Entity to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. The Board studied the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that after receiving the written decision of the Board, the Accounting Officer of the Procuring Entity addressed a letter dated 15th January 2021 to the Chairman of the Evaluation Committee stating as follows: -

"RE: RE-EVALUATION OF TENDER NO. KNH/T/85/2021-2026 FOR OPERATIONAL LEASING OF LABORATORY

EQUIPMENT-FULLY AUTOMATED IMMUNOASSAY FOR IMMUCHEMISTRY ANALYSER

Reference is made to the above tender

You are hereby required to urgently re-evaluate the tender. The Board ordered to re-instate the Applicant's tender and all other tenders that made it to the Financial Evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document taking into consideration the Board's findings in this case.

You are expected to complete this report by Monday 18th January 2020 and submit to the Director, Supply Chain Management"

It is the belief of this Board that the Accounting Officer of the Procuring Entity erroneously stated that an evaluation report should be submitted by the Evaluation Committee on Monday 18th January **2020** instead of 18th January 2021 because the above letter is dated 15th January 2021 and the Report on Re-evaluation at the Financial Evaluation Stage forming part of the Procuring Entity's confidential file contains a signature with a date of 18th January 2021 affixed on the face of the said report. According to page 13 of the said report, the Evaluation Committee noted as follows: -

"In compliance with the above orders, we received a letter referenced KNH/SCM/ADM.43 dated 15th January

2020 that we reconstitute as an evaluation committee to consider the findings of the Board and make an award as appropriate”

It is also possible to conclude that the Evaluation Committee erroneously stated they received a letter dated 15th January **2020** instead of 15th January 2021 having noted that the letter addressed to the Chairman of the Evaluation Committee was dated 15th January 2021 by the Accounting Officer of the Procuring Entity. According to the report on Re-evaluation at the Financial Evaluation Stage, the Evaluation Committee reinstated the Applicant’s tender and the Interested Party’s tender at the Financial Evaluation Stage so as to conduct a re-evaluation at the Financial Evaluation Stage.

When addressing the first issue for determination, the Board already held that in Review No. 156/2020, it found no fault in the manner in which the Respondents evaluated the Interested Party at the preliminary and technical evaluation stages, but faulted the Financial Evaluation and ordered for a re-evaluation at the Financial Evaluation Stage. To that end, the Procuring Entity acted in compliance with Order No. 3 of the Board’s decision in Review No. 156/2020 by re-instating the Interested Party’s tender at the Financial Evaluation Stage to enable the Evaluation Committee to determine the evaluated price for each bid through a re-evaluation at the Financial Evaluation Stage.

The first limb of determining the evaluated price as observed by the Board in Review No. 156/2020 was that no correction of errors would be

undertaken as per section 82 of the Act. According to page 13 of the report of Re-evaluation of Financial Evaluation, the Evaluation Committee noted that there was no correction of errors done on the Applicant and the Interested Party. Secondly, the Board noted that the Evaluation Committee needed to convert all tenders to the same currency using a uniform exchange rate prevailing at the closing date of the tender. At page 14 of its report, the Evaluation Committee noted that the Applicant and the Interested Party quoted their respective tender prices in Kenya Shillings and thus there was no need for conversion to the currency of Kenya Shillings. Thirdly, the Board noted that the Tender Document required application of any discount offered on the tender. At page 14 of its report, the Evaluation Committee noted that no discount was offered by the Applicant and the Interested Party as per their respective Forms of Tender. On the fourth limb of determining the evaluated price, the Board noted that the Tender Document required the Evaluation Committee to establish if items quoted are within prevailing market rates from known retail outlets and the Public Procurement Regulatory Authority's (hereinafter referred to as "the Authority") price index. At page 14 of its report, the Evaluation Committee observed that: -

"The items under consideration are not standard and are specific to the equipment associated hence as per the latest PPRA Index the items' prices are not indicated on the website and on the latest market price index (Annexed is PPRA Market Index)"

In its Response to the Request for Review, the Respondents attached the Authority's Market Price Index Survey Results issued on February

2020 containing items running from pages 4 to 58 thereof. However, none of the items being procured by the Procuring Entity are listed on the said Market Price Index issued by the Authority. Regarding confirmation whether the items quoted are within prevailing market rates from known retail outlets, the Evaluation Committee states at page 14 of the report that: -

"The Director, Supply Chain may recommend for award based on the previous prices as indicative of market rates since the subject procurement is specialized and it's accompanied by leasing arrangement which from the market knowledge cannot be assessed through market survey."

At paragraph 11 of its response, the Procuring Entity avers that in a similar tender for the fiscal year 2014/2015, the Procuring Entity awarded the tender at Kshs. 17,949,850.00 per annum for a five-year period ending in 2021 and that if this amount is compared with the award made in the subject tender, the lowest evaluated bidder quoted Kshs. 24,775,582.45 for the five-year period. According to the Procuring Entity, the amount at which award was made in the subject tender compared to the annual contract amount for the five-year period ending in 2021 is reasonable and within the prevailing market rates. This comparison was used as a basis for determining prevailing market rates from known retailers. To support their position, the Procuring Entity referred the Board to a Contract dated 4th June 2015 for Operational Leasing of Laboratory Equipment (Equipment Placement of Clinical

Chemistry Analyzer) between the Procuring Entity and the Interested Party for a contract sum of Kshs. 17, 949,850/- per annum.

Having studied the said contract, the Board observes that the contract of the Procuring Entity's previous supplier can be used as indicative of prevailing market rates because the Interested Party (being the Procuring Entity's previous supplier) is a known retailer/supplier of items required in the subject tender. A procuring entity may establish prevailing market prices by requesting known retailers to provide the amount of money they would charge for specific goods, works or services a procuring entity wants to procure. Therefore, information given by a known retailer who in this case is the Procuring Entity's previous supplier is useful to the Procuring Entity in establishing the market rates of the goods, works or services it is procuring whilst taking into account the inflation rates of prices caused by various factors in an economy. At paragraph 21 (a) of its written submissions, the Applicant avers that the Procuring Entity did not conduct a market survey but instead relied on an internal previous contract dated 4th June 2015 entered into between the Procuring Entity and the Interested Party as a basis for determining the prevailing market price. In addressing the Applicant's allegation, the Board notes that in relying on the contract of its previous supplier as a known retailer, a procuring entity may determine the market rates of its previous contract on the same goods, works or services being procured in the subject tender. In **PPARB Application No. 99 & 100/2019 (Consolidated, CMC Motors Group Limited & Another v. The Principal Secretary, State Department of Interior, Ministry of Interior and Co-Ordination**

of National Government, the Board had occasion to address this question when it held as follows: -

"The Board notes, the National Treasury previously procured for "Leasing of Motor Vehicles" on behalf of the Procuring Entity herein, being the user of such procured services. The National Treasury, issued Addenda extending the contracts of its current service providers which were lapsing in April 2019, for a further 6 months ending on 15th October 2019. The Applicants in this case, confirmed that they agreed to extension of their respective contracts with the National Treasury to from April 2019 to 15th October 2019.

The Procuring Entity used the prevailing market prices of 2019 indicated in the contracts that were extended by the National Treasury from April 2019 to 15th October 2019 including the Applicants' extended contracts.

The Board studied the manner in which the second limb of the market survey was conducted and notes, the Procuring Entity was benchmarking with the National Treasury that extended its own contracts, in respect of the same items that the Procuring Entity is procuring under Phase V. Further to this, the Quantity of vehicles are the same in both phases as captured at page 3 of the Market Survey Report.

Regulation 10 (2) (e) of the 2006 Regulations states that the functions of a Tender Committee is to ensure: - "the

procuring entity does not pay in excess of prevailing market prices". Similarly, Regulation 22 (2) of the 2006 Regulations [that is repealed Public Procurement and Disposal Regulations, 2006] provides that: -

"When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions."

The Board wonders what else would be an up to date economic and market conditions, if not, prices quoted in the extended contracts that are due to lapse in 15th October 2019.

The Board observes, at pages 109 to 112 of the Procuring Entity's confidential file, Secretariat Comments of the Procuring Entity's Head of Procurement Unit are attached as part of the Professional Opinion signed on 9th August 2019. The Head of Procurement function, at Item 8 (g) thereof states that a cumulative amount of Kenya Shillings One Billion, Eighty-Nine Million, One Hundred and Thirty-Eighty Thousand, Two Hundred and Ninety-Four and Thirty-Six Cents (Kshs. 1,089,138,294.36), will be a loss to the Kenyan tax payer, if the Procuring Entity procures the items at the amounts quoted by bidders recommended for award in Lots 1, 2, 3, 6, 7 and 8 in this procurement process. This amount is not little amount, and most importantly, the same is tax-payer's money.

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

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"

In addition to this, Article 201 (d) of the Constitution cites one of the principles of public finance as "public money should be used in a prudent and responsible way"

The Board finds, the Procuring Entity has the responsibility to comply with the provisions of Regulation 8 (3) (z), 10 (2) (e) and 22 (2) of the 2006 Regulations, read together with Articles 201 (d) and 227 (1) of the Constitution. Hence, the Procuring Entity cannot be faulted for establishing the prevailing market prices under which to procure items for the benefit of saving taxpayer's money"
[Emphasis by the Board]

It is evident that a procuring entity may consider the prices of goods, works or services previously procured in a similar contract to determine the prevailing market rates and thus the Procuring Entity herein was well within the provisions of Article 201 (d) of the Constitution in relying on the contract of its previous supplier to determine prevailing market rates for the benefit of saving tax payer's money and to ensure public money is used in a prudent and responsible way.

Clause (b) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document required the Evaluation Committee to rank tenders according to the evaluated prices. According to page 15 of its report on re-evaluation of Financial Evaluation, the Evaluation Committee tabulated the 41 items found in the Applicant’s original bid with a sum total of Kshs. 63,494,731.36. The Evaluation Committee also tabulated the 41 items specified in the Interested Party’s original bid with a sum total of Kshs. 24,775,582.45. Subsequently thereafter, the Evaluation Committee ranked the two bidders according to their evaluated prices as follows: -

Bidder No.	Unit Quoted Price By Supplier	Ranking	Preliminary Evaluation	Tec Report	Delivery Period	Country Of Origin	Total Value Ksh
2	63,494,731.37	2 nd	Pass	Pass	2 - 4 Weeks	Germany	63,494,731.36
6	24,775,582.45	1 st	Pass	Pass	8 - 12 Weeks	China	24,775,582.45

The Evaluation Committee then determined that the Interested Party submitted the lowest evaluated tender at Kshs. 24,775,582.45.

The Applicant further alleges in paragraph 18 of the Request for Review that the Interested Party’s tender price contains an arithmetic error arising from miscalculation of its subtotal and total bid price in that its subtotal bid price for reagents adds up to Kshs 24,006,437.46 and not Kshs. 20,848,037.45. Moreover, the Interested Party’s total tender price adds up to Kshs 27,883,982.46 and not the quoted tender sum of Kshs. 24,775,582.45.

The Board in Review No. 156/2020, found that no correction of errors pursuant to section 82 of the Act was one of the components of determining the evaluated price of a tender and as already observed by the Board herein, the Procuring Entity undertook no correction of errors in compliance with Order No. 3 of the decision in Review No. 156/2020. In any case, pursuant to section 82 of the Act, award of a tender is made based on the tender sum quoted in the form of tender.

The Board noted in Review No. 156/2020 that the Interested Party's Schedule of Requirements contains the 41 items specified at pages 37 to 39 of the Tender Document and runs through pages 000040 to 000041 of the Interested Party's original bid. The Interested Party indicated the total amount of the said 41 items as Kshs. 20,848,037.45.

In essence, the Applicant's allegation that the Interested Party's tender price contains an arithmetic error arising from miscalculation of its subtotal and total bid price lacks basis because the tender price (also known as tender sum) to be relied on by the Procuring Entity is the one stated in the Interested Party's Form of Tender and the Interested Party is bound by its quoted amount.

Accordingly, the Board finds that the Procuring Entity ensured the Applicant's tender and the Interested Party's tender were reinstated at the Financial Evaluation Stage and subsequently, the Evaluation Committee conducted a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI.

Evaluation Criteria of the Tender Document in compliance with Order No. 3 of the Board's decision in Review No. 156/2020.

Having recommended the lowest evaluated tenderer, the next step to be undertaken by the Evaluation Committee was a due diligence exercise in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

The Board in Review No. 156/2020 did not outline the specific parameters for due diligence that the Procuring Entity would apply when conducting a due diligence pursuant to Order No. 4 of the said decision. However, the Board held that such an exercise ought to be undertaken in accordance with Clause 2.26.2 of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Secondly, Clause 2.26.2 of Section II. Instructions to Tenderers of the Tender Document states that due diligence will take into account the: -

"tenderer's financial, technical and production capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, pursuant to paragraph 2.12.3 as well as such other information as the Hospital deems necessary and appropriate"

Clause 2.12.3 of Section II. Instructions to Tenderers of the Tender Document referenced in the above excerpt states that: -

"the documentary evidence of the tenderer's qualifications to perform the contract if its tender is accepted shall be established to the Hospital's satisfaction;

a) That, in the case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the tenderer has been duly authorized by the goods' manufacturer or producer to supply the goods.

b) that the tenderer has the financial, technical and production capability necessary to perform the contract"

From the due diligence report, the Evaluation Committee verified the documentary evidence provided by the Interested Party and found such documents to be true. Furthermore, the due diligence exercise also involved confirming the Interested Party's Human Capacity and other Technical Infrastructure. Therefore, the Applicant's allegation at paragraph 17 (a) and (b) of its Request for Review that the Procuring Entity failed to conduct due diligence on the technical qualifications of the Interested Party lack basis because the Procuring Entity received positive responses after due diligence confirming that the Interested Party's has the necessary Human Capacity and other Technical Infrastructure which the Board observed would assist conducting all tests as per the Interested Party's schedule of requirements.

Furthermore, the other parameter of due diligence was confirmation of the documentary evidence provided by tenderers which the Procuring

Entity undertook in its due diligence exercise on the Interested Party and thus the Applicant's allegation that the product brochure for essential ancillary equipment was not verified, has not been substantiated.

Having found the Evaluation Committee confirmed and verified the qualifications of the Interested Party through a due diligence exercise, what was left for the Evaluation Committee was to prepare a due diligence report. The Board was furnished with a report on due diligence undertaken by the Procuring Entity, which we observe was signed by two Evaluation Committee members and a secretary and the same ought to have been initialled in accordance with section 83 (3) (a) of the Act.

The Board would like to point out that initialling of a due diligence report is a procedural issue that does not invalidate the substance of the due diligence report which in this case, contained positive responses received by the Procuring Entity following a due diligence exercise conducted on the Interested Party.

Having concluded due diligence on the Interested Party, the Accounting Officer of the Procuring Entity had an obligation of awarding the subject tender to the lowest evaluated responsive tenderer in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act. In Review No. 156/2020, the Board observed at page 34 and 35 on the manner in

which award of the subject tender ought to have been made as already outlined hereinbefore.

The Board observes that the Procuring Entity determined the lowest evaluated tenderer at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and further determined whether the lowest evaluated tenderer qualifies to perform the contract (that is, the subject tender) satisfactorily through a due diligence exercise on the Interested Party undertaken in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

Thereafter, the Procuring Entity's Acting Director, Supply Chain Management in his professional opinion signed on 19th January 2021 observed that a re-evaluation at the Financial Evaluation Stage was undertaken by the Evaluation Committee in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and that recommendation for award of the subject tender to the Interested Party was based on previous prices as indicative of market prices since the subject procurement process is specialized and that the Procuring Entity had existing contracts. Having noted the positive responses obtained from the due diligence exercise, he advised the Accounting Officer to award the subject tender to the Interested Party for being the lowest evaluated responsive tenderer. Thereafter,

the Accounting Officer awarded the subject tender to the Interested Party.

Accordingly, the Board finds that the Procuring Entity awarded the subject tender to the Interested Party in accordance with the award criteria specified in Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

Upon conclusion of re-evaluation at the Financial Evaluation Stage, a due diligence exercise and approval of award of the subject tender, the action remaining was for the Accounting Officer of the Procuring Entity to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020.

The Applicant received a letter of notification of unsuccessful bid dated 21st January 2021 with the following details: -

"Pursuant to the provision of section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, and in view of the Public Procurement Administrative Review Board (PPARB) decision on the above mentioned tenders and its orders to the Hospital, this is to inform you that your bid was unsuccessful at financial evaluation stage due to the reason (s) stated below;

- ***Your bid was ranked 2nd Lowest in price***

The tender was awarded to M/s Lued (A) Chemicals Limited at the Tender Sum of Kshs. 24,775,582.45 (Kenya Shillings Twenty-Four Million, Seven Hundred and Seventy-Five Thousand, Five Hundred and Eighty Two, Cents Forty Five Only) having satisfied the conditions for responsiveness, post-qualification and financial evaluation. The bid was the lowest evaluated in price.

Notwithstanding the above, we take this early opportunity to sincerely thank you for your participation and we look forward to working with you in future when other opportunities arise.

Yours Faithfully,

[signature affixed]

Joyce Kiiti

FOR: CHIEF EXECUTIVE OFFICER"

The Applicant's letter of notification (i) was issued in writing and there is no allegation that the same was not made at the same time the Interested Party was notified, (ii) it informed the Applicant that its bid was ranked the 2nd lowest in price as can be seen in the report on re-evaluation at the Financial Evaluation stage as the reason relating to non-responsiveness of the Applicant's tender, (iii) it included the name of the successful tenderer as the Interested Party herein, the tender price of the Interested Party as Kshs. 24,775,582.45.00 and that the Interested Party satisfied the conditions for responsiveness, post-

qualification and financial evaluation and thus had the lowest evaluated price in accordance with section 86 (1) (a) of the Act.

The Applicant alleged at paragraph 21 of its Request for Review that the letter of notification dated 21st January 2021 is defective because it was signed by Joyce Kiiti who is not the Accounting Officer as required under section 87 of the Act.

In addressing this issue, the Board observes that it is not in dispute that the Accounting Officer of the Procuring Entity is the Chief Executive Officer of the Procuring Entity joined as the Accounting Officer herein. According to section 87 of the Act, an accounting officer of a procuring entity is the person designated to issue notification letters to the successful and unsuccessful bidders. In exercising his duties as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislations. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Constitution puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

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

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

- (2) For the purposes of sub-section (1), a public officer maintains high standards of professional ethics if that officer**
- (a)**
 - (b)**
 - (c) is transparent when executing that officer's functions;**
 - (d) can account for that officer's actions;**
 - (e)**
 - (f)**
 - (g)**
 - (h) observes the rule of law.**

From the above provisions, the Board notes that the Accounting Officer of the Procuring Entity has an obligation of observing high standards of public service because he is accountable for administrative acts. Section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act

from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. This therefore means that an accounting officer has power to delegate his or her authority, but he or she remains accountable for his or her actions and other actions undertaken by a person to whom he or she has granted express authority to act on his or her behalf. To meet the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avert any abuse that may occur without his or her knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the accounting officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Accounting Officer to

take necessary steps to ensure that his authority, when delegated, is specific and not open to any form of abuse. It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert abuse by the person to whom authority has been delegated, thus undermining the accounting officer. With respect to delegation of authority, the Board finds that an accounting officer has the power to delegate his authority to issue letters of notification to unsuccessful bidders.

The Procuring Entity furnished the Board with an Internal Memo reference KNH/CEO/63 dated 18th January 2021 from the Office of the Chief Executive Officer of the Procuring Entity addressed to Joyce Nthenya Kiiti, the Procuring Entity's Acting Director, Supply Chain Management with the following details: -

***"RE: DELEGATION OF AUTHORITY TO SIGN DOCUMENTS
UNDER THE PUBLIC PROCUREMENT AND ASSET
DISPOSAL ACT, 2015***

TENDER NO. KNH/T/85/2021-2026

***OPERATIONAL LEASING OF LABORATORY
EQUIPMENT-FULLY AUTOMATED CLINICAL
CHEMISTRY ANALYSER***

The Public Procurement and Asset Disposal Act, 2015 vests the responsibility with the Accounting Officer in the performance of various roles in the supply chain function. Section 69 (4) provides that no procurement approval

shall be made by a person exercising delegated authority as an accounting officer or head the procuring function unless such delegation has been approved in writing by the accounting officer or the Head of Procurement Unit, respectively.

In the absence of the appointed Ag. Director, Supply Chain Management, Mr. John Miring'u, I hereby delegate to you the responsibility of issuing notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings.

This delegation applies only to the subject tender

[signature affixed]

Dr. Evanson Kamuri

Chief Executive Officer"

The Board observes that the Accounting Officer delegated specify authority to Joyce Nthenya Kiiti to issue notification letters to bidders in the subject tender, since the appointed Acting. Director, Supply Chain Management, Mr. John Miring'u was absent and the Accounting Officer deemed it necessary for Joyce Nthenya Kiiti to act on his (Accounting Officer's) behalf. To that end, the Board finds that the letters of notification dated 21st January 2021 issued to all bidders including the Applicant herein were issued by a person authorized in law.

In determining the appropriate orders to grant in the circumstances, the Board observes that the grounds raised by the Applicant have failed and

that alone, dispenses this Request for Review in favour of the Procuring Entity and the Interested Party. However, the Board is mindful of its finding that the Evaluation Committee members who undertook the due diligence exercise ought to have initialled each page of the due diligence report as required by section 83 (3) (a) of the Act.

The Board observes that at paragraph 157 of his decision in **Miscellaneous Application No. 284 of 2019, Republic v Public Procurement Administrative Review Board, & Another Ex Parte CMC Motors Group Limited [2020] eKLR**, the Honourable Justice Mativo cited the decision of the South African Constitutional Court in **Minister of Health & Others v Treatment Action Campaign & Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)** where it was held as follows: -

"Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others v Treatment Action Campaign & Others thus: -

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the

courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

Having considered the finding in the foregoing case, the Board observes that the circumstances call upon this Board to fashion appropriate reliefs in directing the Accounting Officer to ensure the Evaluation Committee members who conducted the due diligence exercise to initial each page of the due diligence report in accordance with section 83 (3) (a) of the Act.

In totality of the foregoing, the Board issues the following orders: -

FINAL ORDERS

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

- 1. The Request for Review filed by the Applicant on 4th February 2021 with respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser be and is hereby dismissed.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to ensure the Evaluation Committee who undertook the due diligence exercise to initial each page of the due diligence report in Tender No. KNH/T/85/2021-**

2026 for Operational Leasing of Laboratory Equipment- Automated Clinical Chemistry Analyser in accordance with section 83 (3) (a) of the Act.

3. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 24th day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB