

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATIONS NO. 25/2021 OF 16TH FEBRUARY 2021

BETWEEN

BIOMED HEALTHCARE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

DEPARTMENT OF HEALTH SERVICES,

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.....2ND RESPONDENT

MEDIONICS HEALTHCARE.....INTERESTED PARTY

Review against the decision of The County Government of Uasin Gishu with respect to Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Njeri Onyango | -Member |
| 3. Dr. Paul Jilani | -Member |
| 4. Mr. Ambrose Ngare | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

The Bidding Process

The County Government of Uasin Gishu (hereinafter referred to as “the Procuring Entity”) invited sealed bids for Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic (hereinafter referred to as “the subject tender”) through an advertisement in the Daily Nation Newspaper on 29th October 2020. An Addendum was also published in the Daily Nation Newspaper on 10th November 2020.

Bid Submission Deadline and Opening of Bids

By the bid submission deadline of 19th November 2020, the Procuring Entity received thirty-nine (39) bids through the Integrated Financial Management System (IFMIS). The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

NO.	NAME OF BIDDER
1	Advanced Medical Solutions Limited
2	Benir Company Limited
3	Biomed Health Limited
4	Commodore International Limited
5	Crown Solutions Limited
6	County Chemicals Limited
7	Duke Agencies Limited
8	Elmart Pharma Limited
9	Eyeland Africa
10	Faram E.A. Limited
11	Fidancy Enterprises Limited
12	Finescope Systems Limited
13	First Quality Supplies Limited
14	Fortec Medix Supplies Limited
15	Fema Healthcare Limited

NO.	NAME OF BIDDER
16	Grenas Enterprises Limited
17	Greenlife Pharma Limited
18	Jolidah General Supplies
19	Kerman Trading Company Limited
20	Lablink (East Africa) Company Limited
21	Macknox Contractors And General Supplies Limited
22	Mandera Drug Mart Limited
23	Morphic Systems Limited
24	Medionics Healthcare Limited
25	Medipal Medical Supplies Limited
26	Milestep Medical And Surgical Supplies Limited
27	Nairobi Enterprises Limited
28	Pasaiba Tourmaline Limited
29	Pharmatrade Pharmacy Limited
30	Phraise Techno Limited
31	Palmprints Limited
32	Reale Medical Centre
33	Salihiya Pharmacy And Medical Centre Limited
34	Skyla Chemist. Limited
35	Total Hospital Solutions Limited
36	Tramex Mediquip Limited
37	Villa Surgicals And Equipment Limited
38	Biomax Africa Limited
39	Nesher Pharma Limited

Evaluation of Bids

The evaluation process was conducted in the following stages: -

- 1) Preliminary Evaluation;
- 2) Detailed Technical Evaluation;
- 3) Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee evaluated bids against the mandatory requirements in the Tender Document which were outlined as follows: -

CODING	REQUIREMENTS
R1	Must upload valid company registration certificate
R2	Must upload Valid Tax Compliance Certificate
R3	Must upload current CR12
R4	Must upload Bid security in the amount of Kshs.4,000,000
R5	Must upload Duly signed and filled Price Schedule
R6	Must upload power of attorney.
R7	MUST submit tenders in the correct Format (All forms filled, signed and rubber stamped. i.e. Tender form, Business Questionnaire, price schedule, Corruption declaration form.
R8	Attach a sworn statement or declaration stating that: <i>(i)The firm has not been debarred from participating in any public procurement by PPRA.</i> <i>(ii)No person related to the firm has any spouse or children working at Uasin Gishu County Government</i> <i>(iii)The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.</i> <i>(iv)The firm has not been declared bankrupt, insolvent or under receivership.</i>

Bidders who were found to fail any of the mandatory requirements were to be considered by the Evaluation Committee as non-responsive and not subjected to the second stage of the evaluation process.

Eighteen (18) bidders were found responsive to the mandatory requirements hence qualified to proceed to the next stage of evaluation while twenty-one (21) bidders were found non-responsive to the mandatory requirements and disqualified from further evaluation.

The eighteen (18) bidders who qualified to progress for Technical Evaluation were as follows: -

S/No.	Bidder
1	Advanced Medical Solutions Limited
2	Benir Company Limited
3	Biomed Health Limited
8	Elmart Pharma Limited

10	Faram E A. Limited
12	Finescope Systems Limited
13	First Quality Supplies Limited
16	Grenas Enterprises Limited
17	Greenlife Pharma Limited
22	Mandera Drug Mart Limited
24	Medionics Healthcare Limited
25	Medipal Medical Supplies Limited
29	Pharmatrade Pharmacy Limited
32	Reale Medical Centre
33	Salihya Pharmacy And Medical Centre Limited
35	Total Hospital Solutions Limited
38	Biomax Africa Limited
39	Nesher Pharma Limited

2. Detailed Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated bids against the following five (5) items as indicated in the Tender Document: -

TECHNICAL EVALUATION	SCORE
Financial capability (audited accounts and bank statements for the last 1 yr	20
Past relevant experience in related supplies (attach evidence – LPO'S, Contracts, award letters etc)	30
<ul style="list-style-type: none"> Compliance to specifications (attach brochures and related attachments)/safety standards Should have local service facility. The service provider should have the necessary equipment's recommended by the manufacturer to carry out preventive maintenance test as per guidelines provided in the service/maintenance manual. (5Marks) 	15
<ul style="list-style-type: none"> List of important spare parts and accessories with their part number and costing (4Marks) Log book with instruction for daily, weekly, monthly and quarterly maintenance checklist. The job description of the hospital technician and company service engineer should be clearly spelt out (2Marks) Service and User manuals must be in English (4Marks) 	10
<i>Letter of commitment from a authorized distributor (for assurance of genuine supplies)</i>	10
Warranty for medical equipment	10
TOTAL	100

The pass mark for bidders to qualify to proceed for further evaluation was set at 70%.

Four (4) bidders, including the Applicant, M/s Biomax Africa Limited scored 70% and above and thus qualified to proceed for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee compared bid prices of the four (4) bidders who qualified for Financial Evaluation as follows: -

S/No	Bidder Name	Technical points	BID AMOUNT	Ranking
24	Medionics Health Care Limited	90	131,135,000.00	1
17	Greenlife Pharma Limited	78	188,028,500.00	2
22	Mandera Drug Mart Limited	74	194,035,000.00	3
3	Biomed Health Limited	72	136,642,084.00	4

Upon conclusion of this stage of evaluation, M/s Medionics Health Care Limited was evaluated to have submitted the best rates in the subject tender.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Medionics Health Care Limited** at its total quoted price of **Kshs. 131,135,000.00 (One Hundred and Thirty-One Million, One Hundred and Thirty-Five Thousand Shilling only)** as the lowest evaluated bidder.

Professional Opinion

In a professional opinion dated 21st December 2020, the Head of Supply Chain Management expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and thus, concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Medionics Health Care Limited. This professional opinion was thereafter approved by the Accounting Officer on 21st December 2020.

Notification to Bidders

In letters dated 22nd December 2020, the Accounting Officer notified the successful bidder and the unsuccessful bidders of the outcome of their respective bids.

REQUEST FOR REVIEW NO. 25 OF 2021

M/s Biomed Healthcare Limited (hereinafter referred to as 'the Applicant') lodged a Request for Review dated and filed on 16th February 2021 together with the Statement of Kelly Nandasaba Watimah in Support of the Request for Review sworn and filed on even date, an Amended Request for Review dated 24th February 2021 and filed on 25th February 2021 together with the Statement of Kelly Nandasaba Watimah in Support of the Amended Request for Review sworn on 24th February 2021 and filed on 25th February 2021, a Supplementary Affidavit sworn and filed on 2nd March 2021 and written submissions dated and filed on 2nd March 2021, through the firm of Chege & Sang Company Advocates, seeking the following orders: -

- i. An order allowing the Request for Review;***
- ii. An order annulling or setting aside the Financial Evaluation proceedings and/or deliberations relating to Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic and the resultant letter dated 22nd December 2020;***
- iii. An order directing the Accounting Officer of the Procuring Entity to re-instate the Applicant's bid at Financial Evaluation and direct the Evaluation Committee to conduct a re-evaluation;***
- iv. An order directing for a re-evaluation at Financial Evaluation with respect to Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic;***
- v. An order awarding the tender to the Applicant following a re-evaluation at Financial Evaluation;***
- vi. An order directing the Accounting Officer of the Procuring Entity to proceed with the procurement process to its logical conclusion including making of an award within fourteen (14) days from the date of the Board's decision;***
- vii. An order for costs of this review to be awarded to the Applicant.***

In response, the 1st and 2nd Respondents lodged an Affidavit in Response to the Request for Review sworn on 23rd February 2021 and filed on 24th February 2021, together with Respondents Submissions in

Response to Request for Review dated and filed on 1st March 2021 and Respondents Further Submissions in Response to the Request for Review dated and filed on 4th March 2021, through the firm of G & A Advocates LLP.

M/s Medionics Healthcare Limited (hereinafter referred to as 'the Interested Party') lodged a Memorandum of Response dated and filed on 26th February 2021 and written submissions dated and filed on 5th March 2021, through the firm of Kiugu & Company Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, 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 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 Act.

BOARD'S DECISION

The Board has considered each of the parties' cases, the pleadings and written submissions filed before it, including confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of Act and thus, finds that the following issues call for determination: -

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

Depending on the outcome of the first issue: -

II. Whether the Procuring Entity issued the Applicant with a letter of notification which meets the threshold of section 87 of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 and Article 47 of the Constitution.

II. Whether the Interested Party was awarded the subject tender in accordance with Clause 2.27.4 of Section II Instructions to Tenderers

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

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, which stated that jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

Further, the Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

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

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

It therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the Request for Review Application.

The Interested Party took the position that the Request for Review is fatally defective and bad in law as the Applicant has failed to disclose any breach of duty imposed upon the Procuring Entity by the Act, its attendant Regulations 2020 or the Constitution, thus has suffered no loss or damage as a result.

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that: -

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed...

The Board observes that section 167 (1) of the Act as cited hereinbefore has two limbs within which a request for review application may be lodged before this Board. Firstly, a party should either be a "candidate" or a "tenderer". Secondly, a party filing a request for review ought to demonstrate that it has suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity.

The Board observes that the Black's Law Dictionary defines 'loss' to mean: -

"the act of losing or the thing lost; synonymous with, or equivalent to, "damage", "damages", "deprivation", "detriment", "injury", and "privation"

It further defines 'risk of loss' to mean: -

"The chance of bearing the costs associated with destruction, damage or the inability of locating goods, documents and other property"

In view of the above definitions, it is clear that in accordance with section 167 (1) of the Act, a candidate or tenderer ought to demonstrate or prove that it has borne or risks bearing the cost associated with the loss or damage caused by breach of a duty by a procuring entity

The Board perused the Applicant's Amended Request for Review Application filed on 25th February 2021 and observes the following grounds therein: -

"5. The Procuring Entity deliberately failed to communicate the decision to the Applicant in time or the letter was backdated in an effort to frustrate the Applicant.

5a. The Procuring Entity has failed to award the subject tender to the Applicant whereas its bid was substantially responsive to the tender document contrary to section 86

(1) of the Act and Regulation 50 (3) of the Public Procurement and Asset Disposal Regulations 2006....

7. The Applicant's right to fair and administrative action under Article 47 of the Constitution of Kenya were violated by the Procuring Entity's failure to communicate the decision in time...

9. The successful tenderer lacks the capacity to deliver as per the tender specifications and as such fails under section 86 (1) of the Public Procurement and Asset Disposal Act.

10. The tender submitted by the successful tenderer was not responsive as per section 79 (1) of the Public Procurement and Asset Disposal Act"

From the foregoing excerpt, the Board notes that the Applicant avers that the Procuring Entity failed to communicate its decision within reasonable time thus contravened the Applicant's constitutional right to fair administrative action as espoused under Article 47 of the Constitution. Further, that the successful tenderer in the subject tender lacks the capacity to implement the subject tender thus its bid was not responsive as per section 79 (1) and further, its tender fails under section 86 (1) of the Act.

In view of the foregoing, it is evident that the Applicant is alleging a breach of duty on the part of the Procuring Entity as relates to the Procuring Entity's duty to notify the Applicant of the outcome of its bid in a timely manner in accordance with Article 47 of the Constitution and

its duty to evaluate bids received in the subject tender, in accordance with section 79 (1) of the Act and section 86 (1) of the Act. The Applicant specifically alleges that the Procuring Entity failed to award the Applicant the subject tender, despite submitting a substantially responsive tender, in breach of section 86 (1) of the Act. Noting that the Applicant participated in the subject tender in the hopes of being awarded the said tender, it follows that any alleged breach of duty on the part of the Procuring Entity may affect its chances of success, which would amount to a risk of loss on the part of the Applicant. It is not lost to the Board that bidders invest significant time and resources in the preparation of their bids in the hopes that their submissions will be successful.

In this regard therefore, it is evident from the Applicant's Amended Request for Review and Statement in Support that it has disclosed an alleged breach of duty by the Procuring Entity in the subject procurement proceedings in accordance with section 167 (1) of the Act to invoke the jurisdiction of this Board. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and now turns to address the issues raised in the substantive Request for Review application.

The Board observes that on 12th February 2021, the Applicant received a letter of notification via email from the Procuring Entity stating as follows: -

"Pursuant to Section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, the County Government of Uasin Gishu has concluded the process of evaluation of the above cited tender and you were not successful.

- You did qualify in the financial stage.***

The tender was awarded to Medionics Health Care at Kshs 131,135,000.00.

Thank you for showing interest by participating in the tender."

The Applicant avers that the Procuring Entity failed to communicate its decision to the Applicant on time or in the alternative backdated its letter of notification in an effort to frustrate the Applicant. The Applicant took the view that the Procuring Entity had a duty to inform the Applicant of the outcome of its bid within reasonable time as the Applicant had a legitimate expectation that the Procuring Entity would communicate its decision to the Applicant in a timely manner. In support of its position, the Applicant referred the Board to Article 47 of the Constitution and submits that the Procuring Entity violated its right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. As concerns the contents of its letter of notification, the Applicant avers that the said letter is contradictory as it states on one hand that the Applicant's bid was unsuccessful and on the other hand that the Applicant's bid qualified at the financial stage.

In response, the Procuring Entity disputes the Applicant's allegation that it backdated its letter of notification to the Applicant and avers that all letters of notification were sent to the successful and unsuccessful bidders simultaneously via email on 12th February 2021, well within the tender validity period.

On its part, the Interested Party submits that the Procuring Entity issued letters of notification to all bidders who participated in the subject tender within the tender validity period and thus the Applicant's allegation that its right to fair administrative action was violated holds no water. According to the Interested Party, the Applicant's letter of notification disclosed the name of the successful bidder and its respective tender price and thus the letter of notification substantially complied with the provisions of section 87 of the Act read together with Regulation 82 of the Regulations 2020.

Having considered parties' submissions, the Board observes section 87 of the Act provides as follows: -

- (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***
- (2)***
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer***

of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof. [Emphasis by the Board]

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This provision further requires that in the same breath, a procuring entity must also notify other bidders who participated in the subject tender that their respective bids were not successful and also disclose the successful bidder and the reasons the said bidder was found successful.

As regards, notification to unsuccessful bidders, the procedure for notification under section 87 (3) of the Act is outlined in Regulation 82 of Regulations 2020 which provides as follows: -

- "(1) The notification to the unsuccessful bidder under section 87(3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified***
- (2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and***

the reason why the bid was successful in accordance with section 86 (1) of the Act”

Having compared the provisions of section 87 (3) of the Act to Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer’s tender, (iii) it includes the name of the successful tenderer, the tender price and the reason why the successful tenderer’s bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be that the successful tenderer submitted the lowest evaluated tender price.

The Procuring Entity furnished the Board with email extracts annexed to its Affidavit in Response to the Request for Review marked as JM 3 (a) and (b), as proof that it sent emails dated 12th February 2021, with letters of notification attached, to all bidders who participated in the subject tender. Notably both the Applicant and the Interested Party aver that they received their letters of notification via email on 12th February 2021, demonstrating that letters to both the successful and unsuccessful bidders were sent out by the Procuring Entity simultaneously.

However, the Board observes from the Procuring Entity’s confidential file that letters of notification to the successful and unsuccessful bidders were all dated 22nd December 2020 and thus it is not clear why letters that were prepared on this date were dispatched almost two months later, on 12th February 2021. The Procuring Entity did not provide any

explanation for this delay but merely stated that all letters of notification were sent out well within the tender validity period.

Article 47 of the Constitution of Kenya provides as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

Fair Administrative Action dictates that a person has the right to administrative action that is expeditious and efficient. In the Board's considered view, one way that the right to administrative action is protected is for a procuring entity to inform bidders of the outcome of their bids as soon as such a determination is made so that such bidders decide whether or not to challenge the outcome of their bids, pursuant to section 167 (1) of the Act.

Nevertheless, the Board would like to point out that the fourteen (14) day period specified in section 167 (1) of the Act would start running a day after a bidder receives its letter of notification of unsuccessful bid. Noting that the Applicant received its letter of notification on 12th February 2021 and was able to approach this Board within the stipulated timelines, no prejudice was suffered as a result.

With respect to the contents of the Applicant's letter of notification, the Board observes on one hand that it states that the Applicant's bid was unsuccessful while on the other hand it states that the Applicant's bid qualified in the financial stage. The Procuring Entity contended that this was an inadvertent typographical error which amounted to a mere technicality and the position is that the Applicant's bid was unsuccessful at the Financial Evaluation Stage. This notwithstanding, it is evident that the Applicant's letter of notification does not provide reasons why its bid was unsuccessful. It would have been prudent for the Procuring Entity to indicate the reasons why the Applicant's bid was unsuccessful at the financial evaluation stage, in that, the Applicant failed to submit the lowest evaluated tender since the award criteria was that of lowest evaluated tender price specified in Clause 2.27.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

In this regard therefore, the Procuring Entity failed to take the overall objective of Article 47 of the Constitution into account, that is, to uphold the rules of natural justice, and ought to have specifically informed the Applicant of the specific reasons why its bid was unsuccessful and further dispatched a letter of notification to all bidders, including the Applicant, as soon as it arrived at a determination on the outcome of the evaluation of bids. The letter of notification dated 22nd December 2020 does not contain any specific reasons why the Applicant's bid was found non-responsive to enable it challenge the said reasons in this review.

Evidently, the Applicant's letter of notification of unsuccessful bid dated 22nd December 2020 does not meet the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 and thus cannot be allowed to stand.

Accordingly, the Board finds that the Procuring Entity did not issue the Applicant with a letter of notification of unsuccessful bid which meets the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

On the third issue for determination, the Applicant avers that the Procuring Entity awarded the subject tender to the Interested Party disregarding the fact that the Interested Party omitted key components in its bid so as to appear to be the lowest evaluated bidder in the subject tender. It is therefore the Applicant's contention that the Interested Party lacks the capacity to implement the subject tender as per the tender specifications and thus its bid is non-responsive as per section 79 (1) of the Act and section 86 (1) of the Act.

In response, the Procuring Entity contends that the Interested Party's bid met the criteria set out under section 86 of the Act since its bid was the most technically and financially responsive. However, the Procuring Entity submits that the Applicant has failed to provide particulars of the alleged non-responsiveness of the Interested Party's bid and thus the said allegations remain unproven and unfounded.

The Interested Party shares the Procuring Entity's sentiments in this regard and submits that the Applicant's failure to substantiate its allegations invites the Board to embark on a fishing expedition in this review. According to the Interested Party, the Applicant's allegations make direct reference to the Interested Party's bid which presupposes that the Applicant obtained access to the Interested Party's bid or the Procuring Entity's Evaluation Report, which actions are prohibited by section 67 of the Act. The Interested Party took the view that disclosure of confidential information is an offence under section 176 (1) of the Act and thus the Applicant has committed an illegality in purporting to rely on confidential information to flesh out its case before this Board contrary to section 67 of the Act read together with section 176 (1) (f) of the Act.

Having considered parties' submissions, the Board observes that the right of access to information is guaranteed by Article 35 of the Constitution of Kenya which provides as follows: -

"(1) Every citizen has the right of access to—

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicize any important information affecting the nation. [Emphasis by the Board]

This provision of the Constitution is categorical that information held by the state or by any other person which is required for the exercise or protection of any right or fundamental freedom is accessible by citizens.

Notably, the right to information as espoused under Article 35 of the Constitution is not absolute, noting that it is not listed among the fundamental rights and freedoms that cannot be limited or abridged under Article 25 of the Constitution.

With reference to administrative review proceedings, the Board observes that the right to access to information pertaining to procurement proceedings is limited as disclosure of information relating to procurement proceedings by a procuring entity or its agents is prohibited under section 67 (1) of the Act which provides as follows: -

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2)

(3)

(a)

(b).....

(c)

(d) ***or***

(e)

(4)

During or after procurement proceedings, a procuring entity including its employees or agents is prohibited from disclosing information relating to a procurement, whose disclosure among others would be information relating to the evaluation, comparison or clarification of tenders, proposals or quotations.

With this in mind, the Board notes the Applicant's allegation that the Interested Party omitted key components in its bid so as to appear as

the lowest evaluated bidder in the subject tender makes reference to confidential information in form of the Interested Party's bid, access to which is strictly limited to the Procuring Entity and its agents. However, the Board observes from the Applicant's pleadings that it does not provide any further information or substantiate the said allegation and more so, does not disclose the source of this information.

It is not lost to the Board that bidders in any procurement process are entitled to access certain confidential information in the following instances: -

Section 78 (8) of the Act provides as follows: -

"The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender."

Further, section 67 (4) of the Act provides as follows: -

"Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2) (d) (iii)"

Section 68 (2) (d) (iii) of the Act provides as follows: -

(d) for each tender, proposal or quotation that was submitted—

(i);

(ii); and

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

In view of the foregoing provisions, the Board observes that a bidder may request for a copy of the tender opening register from the accounting officer of a procuring entity. Moreover, any applicant seeking administrative review of procurement and asset disposal proceedings before this Board is entitled to a summary of the proceedings of the opening of tenders, a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used in a procurement process.

In view of the foregoing and as observed by this Board, the Applicant did not provide any further information or substantiate its allegation concerning the Interested Party's bid and more so, does not disclose the source of this information. It is therefore not possible for this Board to conclusively determine the means by which the Applicant obtained this information, noting that there no evidence to assist the Board in making such a determination.

In any event, the Board studied the Evaluation Report signed on 18th December 2020 and observes on page thirteen thereof the following remarks: -

"The technical evaluation Committee therefore recommended based on the specifications in the bid document to The Chief Officer Health Services through the Director Supply Chain Management Services that, the contract for Supply and delivery Delivery of Medical Equipment for Mitigation of Covid 19 pandemic tender number CGU/HLTH/T/001/2020-2021 be Awarded to M/s Medionics Health Care Limited at their tender Sum of Kshs. 131,135,000.00 (One Hundred and thirty-one million, one hundred and thirty-five thousand Shilling only.) having satisfied the conditions of responsiveness, qualified technically and was the Lowest Evaluated bidder.

Furthermore, the committee recommends that the following items be retendered since all of them did not meet the minimum technical specifications.

1. STANDBY GENERATOR

2. OXYGEN MANIFOLD SYSTEM

3. ENGRAVING MACHINE.

Accordingly, upon conclusion of the evaluation process, the Evaluation Committee recommended award of the subject tender to the Interested Party as the lowest evaluated bidder. Further, the Evaluation Committee recommended that three items be retendered since all of them did not

meet the minimum technical specifications, that is, standby generator, oxygen manifold system and engraving machine.

The Board then examined the Professional Opinion dated 21st December 2020 and observes on page 2 thereof the following remarks by the Head of Supply Chain Management: -

"Pursuant to section 84 of the PPADA 2015, having noted the evaluation report and the report of due diligence, I recommend Medionics Health Care Limited for award be at their tender sum of Kshs 131,135,000.

The bidder with the lowest bid did not quote for four items:

a) Standby Generator

b) Oxygen Manifold System

c) Mobile Xray

d) Engraving Machine.....

18 bidders met the entire mandatory (Preliminary) requirements and were recommended for further technical evaluation

4 Bidders met the minimum technical score...

The Oxygen Manifold System, The Standby Generator, Mobile Xray and Engraving Machine should be re-tendered."

From the above excerpt, the Board notes, the Head of Supply Chain Management observed that the lowest bidder did not quote for four items; (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine and thus advised that the said items ought to be re-tendered.

The Board then examined the Procuring Entity's Tender Document in order to establish what items it sought to procure and observes from its title thereof that the subject tender is for '**Supply and Delivery of Medical Equipment for Mitigation of Covid -19 Pandemic.**'

The Board then examined Section VI Price Schedule and observes that bidders were required to provide quotes for the following items: -

No.	Equipment	Quantity Required	Unit Price	Total
1 (a)	Suction Machine	20		
(b)	Patient Monitors	20		
(c)	Pulse Oximeter	50		
(d)	Oxygen Manifold: 6+6 size system	2		
2(a)	ICU Beds	20		
(b)	Mobile Ventilator	5		
3 (a)	Standby Generator	1		
(b)	Mobile X-Ray			
4 (a)	Ventilators	20		
(b)	Infusion Pump	30		
5 (a)	Patient Beds	100		
(b)	Mattresses with Mackintosh	100		
(c)	Bedsheets	400		
(d)	Cellular Blankets	100		
(e)	Pillow cases	100		
(f)	Hospital Blanket	200		

(g)	Engraving Machine	1		
(h)	Crash Cart	10		
TOTAL PRICE TO FORM OF TENDER				

Accordingly, bidders were required to provide both a unit price and a total price for all the items listed in the Price Schedule and the total amount would then be put in the Form of Tender.

The Board examined the Interested Party's Financial Proposal submitted to the Board by the Procuring Entity in accordance with section 67 (3) (e) of the Act and observes from the Interested Party's Price Summary dated 17th November 2020 that it did not provide quotes for the four items; (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine. However, the Board observes that at the bottom of its Price Summary it quoted a total sum of Kshs. 131,135,000.00.

The Board then examined the Interested Party's Form of Tender dated 18th November 2020 and observes the following details therein: -

"...We the undersigned offer to supply, deliver and install and commission Medical Equipment for Mitigation of Covid 19 pandemic in conformity with the said tender documents for the sum of Kenya Shillings One Hundred Thirty-One Million, One Hundred Thirty-Five Thousand (Kshs. 131,135,000.00)."

From the foregoing, the Board observes that the Interested Party offered to supply, deliver, install and commission medical equipment for

mitigation of Covid 19 pandemic as outlined in the Tender Document at its tender sum of Kenya Shillings One Hundred Thirty-One Million, One Hundred Thirty-Five Thousand (Kshs. 131,135,000.00).

The Board is cognisant of section 82 of the Act which provides as follows: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

In view of this provision, the Board notes that the tender sum as read out at the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

It is worth noting, that the Board has consistently held in its previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where the Board stated the importance and the primacy of the form of tender in any tender process in the following words: -

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It

is the offer that the procuring entity would consider an either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created. The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act.”

This means that the total amount in the Interested Party’s Form of Tender dated 18th November 2020 would be the total amount it proposes to supply, deliver, install and commission medical equipment for mitigation of Covid 19 pandemic as outlined under Section VI Price Schedule of the Tender Document, including the four items that it did not quote for in its Price Summary dated 17th November 2020, noting that the tender sum as indicated in a Form of Tender is absolute and final.

The question that now arises is what recourse is available to a procuring entity where there is a discrepancy between the amount indicated in a bidder’s Form of Tender and its Price Schedule?

Section 81 of the Act states that: -

"(1) A procuring entity may, in writing request a clarification of a tender from a tenderer to assist in the evaluation and comparison of tenders.

(2) A clarification shall not change the terms of the tender" [Emphasis by the Board]

According to the above provision, a Procuring Entity may seek clarifications from a tenderer to assist in the evaluation and comparison of tenders, but such a clarification should not change the terms of the tender.

Furthermore, this clarification from a procuring entity should be made in writing and the response from the tenderer be received by the procuring entity in writing. This is in line with section 64 (1) of the Act which provides that: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing" [Emphasis by the Board]

The Board observes Clause 2.21 of Section II Instructions to Tenderers on page 15 of the Tender Document which reads as follows: -

"2.21.1 To assist in the examination, evaluation and comparison of tenders the Procuring Entity may, at its discretion, ask the tenderer for a clarification of its tender. The request for clarification and the response shall be in writing and no change in the prices or substance of the tender shall be sought, offered or permitted.

2.21.2 Any effort by the tenderer to influence the Procuring Entity in the Procuring Entity's tender evaluation, tender comparison or contract award decisions may result in the rejection of the tenderer's tender."

The Board finds, a clarification was needed in this instance in order for the Procuring Entity to clearly establish whether the Interested Party would be bound by the total amount indicated in its Form of Tender, that is, Kenya Shillings One Hundred Thirty-One Million, One Hundred Thirty-Five Thousand (Kshs. 131,135,000.00) for the provision of all the items that the Procuring Entity sought to procure under the subject tender, including the four items that it did not quote for; (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine.

This clarification would be sought by the Procuring Entity with the understanding that the Interested Party would not be offered an opportunity to change the amount as quoted in its Form of Tender thus the Interested Party would be bound by the tender sum as is.

If the Interested Party agrees to be bound by the amount as indicated in its Form of Tender, the Procuring Entity would proceed with Financial Evaluation of the Interested Party's bid as outlined under the Tender Evaluation Criteria on page 30 of the Tender Document which clearly states that: -

"Financial Evaluation

This will be done through tender sum comparison against prevailing market prices. The committee shall recommend the lowest evaluated bidder.”

If the Interested Party is found to be the lowest evaluated bidder, based on its evaluated tender price, an award of the subject tender would be made to it at the amount quoted in the Form of Tender. If the Interested Party does not agree to be bound by the total amount as indicated in its Form of Tender, the Procuring Entity shall proceed to consider the next lowest evaluated bidder and follow the procedure for financial evaluation as outlined hereinabove.

Upon conclusion of financial evaluation, the Procuring Entity ought to make an award, as provided under Clause 2.27.4 Award Criteria of Section II Instructions to Tenderers on page 17 and 18 of the Tender Document which reads as follows: -

“(a) Award Criteria

2.27.4 The Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender.

Provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.”

In view of the foregoing, the Board would like to point out that the Procuring Entity does not have leeway to re-tender for items which have not been quoted by the lowest evaluated bidder, noting that the said items (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine form part of items to be procured under the subject tender thus if the Interested Party refuses to be bound by its tender price, the Procuring Entity ought to consider the next lowest evaluated bidder, who may have quoted for the four items missing from the Interested Party's Price Schedule.

In the Board's considered view, a re-tender in this instance would run contrary to the public procurement principle of fairness, since other bidders who submitted bids in the subject procurement process may have quoted for the four items which were not quoted by the Interested Party, but now have been denied an opportunity to be considered for award of the subject tender. The Board observes that fairness is one of the principles that guide public procurement processes pursuant to Article 227 (1) of the Constitution. Bidders who submitted bids in response to the subject tender had a legitimate expectation that their bids would be considered and evaluated in accordance with the provisions and criteria outlined in the Tender Document. Furthermore, it disenfranchises bidders who complied with all the requirements in the Tender Document to learn later that a particular bidder was awarded the subject tender yet the said bidder did not quote for four items in its bid. The principle of fairness under Article 227 (1) of the Constitution, requires all bidders to compete on an equal footing for award of a tender.

In this regard therefore, it is evident that the Procuring Entity's award of the subject tender to the Interested Party excluding the four items (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine is unlawful and cannot stand.

It is therefore the finding of this Board that the Interested Party was not awarded the subject tender in accordance with the award criteria in Clause 2.27.4 of Section II Instructions to Tenderers.

In determining the appropriate orders to grant in the circumstances, the Board is cognizant of section 173 (b) of the Act, which states that: -

“ Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings

The Board has established that the Procuring Entity did not issue the Applicant with a letter of notification of unsuccessful bid which meets the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020. Further, the Procuring Entity's award of the subject tender to the Interested Party excluding the four items (i) standby generator, (ii) oxygen manifold system, (iii) Mobile X-Ray and (iv) Engraving Machine was unlawful and therefore the Interested Party

was not awarded the subject tender in accordance with the award criteria under Clause 2.27.4 of Section II Instructions to Tenderers. The Board therefore deems it fit to order the Accounting Officer of the Procuring Entity to direct the Evaluation Committee to re-admit all bids that qualified for Financial Evaluation at the Financial Evaluation Stage and conduct a re-evaluation at the Financial Evaluation Stage, and proceed with the subject procurement proceedings to its logical conclusion, taking into consideration the Board's findings in this review.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Award dated 22nd December 2020 in Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic., issued to M/s Medionics Healthcare Limited, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letters of Notification dated 22nd December 2020 in Tender No. CGU/HLTH/T/001/2020-2021 for the Supply and Delivery of Medical Equipment for Mitigation of Covid-19 Pandemic, issued to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-admit all bids that qualified for Financial Evaluation at the Financial Evaluation Stage and conduct a re-evaluation of bids at the Financial Evaluation Stage in accordance with the Financial Evaluation Criteria on page 30 of the Tender Document, taking into consideration the Board's findings in this review.**
- 4. Further to Order No. 3, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the subject procurement process, including the making of an award in accordance with Clause 2.27.4 of Section II Instructions to Tenderers, within fourteen (14) days from the date of this decision.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review**

Dated at Nairobi, this 9th Day of March, 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB