

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 36/2021 OF 15TH MARCH 2021
BETWEEN

TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT
AND

ACCOUNTING OFFICER,
NANDI COUNTY ASSEMBLY.....1ST RESPONDENT
NANDI COUNTY ASSEMBLY.....2ND RESPONDENT
RESOLUTION INSURANCE.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Nandi County Assembly in relation to Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Isabella Juma, CPA | -Member |
| 4. Mr. Ambrose Ogetto | -Member |
| 5. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|---------------------|-------------------------|
| 1. Mr. Philip Okumu | -Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Nandi County Assembly (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members (hereinafter

referred to as “the subject tender”) through an advertisement published in MyGov Publication Website on 26th January 2021.

Bid Submission deadline and Opening of bids

The Procuring Entity received a total of seven (7) bids by the bid submission deadline of 9th February 2021 through the Integrated Financial Management Information System (IFMIS) as follows: -

- i.** AAR Insurance Kenya Limited
- ii.** APA Insurance
- iii.** CIC Insurance Limited
- iv.** Jubilee Company of Kenya Limited
- v.** Resolution Insurance Company
- vi.** The Kenyan Alliance Insurance Company Limited.
- vii.** Trident Insurance Company Limited.

Evaluation of Bids

The Evaluation Committee undertook evaluation of bids in the following stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated bids against the following requirements: -

MANDATORY REQUIREMENTS	AAR	APA	CIC	RESOLUTION	JUBILEE	KENYAN ALLIANCE	TRIDENT INSURANCE
Certificate of incorporation	YES	YES	YES	YES	YES	YES	YES

MANDATORY REQUIREMENTS	AAR	APA	CIC	RESOLUTION	JUBILEE	KENYAN ALLIANCE	TRIDENT INSURANCE
Signed and stamped form of tender	YES	YES	YES	YES	YES	YES	YES
Valid tax compliance	YES	YES	YES	YES	YES	YES	YES
Business permit/trade license	YES	YES	YES	YES	YES	YES	YES
Bid bond of 100,000/=	YES	YES	YES	YES	YES	YES	YES
Valid IRA certificate	YES	YES	YES	YES	YES	YES	YES
Audited financial statements for the last two years	YES	YES	YES	YES	YES	YES	YES
Filled, stamped and signed business questionnaire form	YES	YES	YES	YES	YES	YES	YES
Evidence of membership to AKI	YES	YES	YES	YES	YES	YES	YES
Litigation history	YES	YES	YES	YES	YES	YES	YES
Must be an insurance company and not a broker	YES	YES	YES	YES	YES	YES	YES

Based on the above results, all the tenderers qualified to proceed to the next stage of evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated tenders against the technical evaluation criteria specified in Stage 2. Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document to assess bidders' technical capacity. Bidders had an obligation of achieving a minimum technical score of 70%. The results were recorded as follows: -

BIDDER	MEAN
AAR Insurance Kenya Limited	100
APA Insurance	94
Jubilee Company of Kenya Limited	100
The Kenyan Alliance Insurance Company Limited	86
Trident Insurance Company Limited.	86.67
Resolution Insurance Company	99
CIC Insurance Limited	100

Based on the results outlined hereinabove, all bidders qualified to proceed to the Financial Evaluation stage.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage 3. Financial Evaluation of the Appendix to Instructions to Tenderers and recorded the scores achieved by tenderers at the Technical and Financial Evaluation stages as follows: -

COMPANY	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL
CIC Insurance Limited	70	17.34	87.34
Resolution Insurance Company	69	28.73	97.73
Trident Insurance Company Limited.	61	30	91
The Kenyan Alliance Insurance Company Limited	60	22.14	82.14
Jubilee Company of Kenya Limited	70	18.53	88.53
APA Insurance	66	22.29	88.29

Recommendation

Clause 2.25 of the Appendix to Instructions to Tenderers of the Tender Document required the Evaluation Committee to recommend award to the lowest evaluated bidder. Based on the above analysis, the Evaluation Committee concluded that M/s Trident Insurance Company Ltd submitted the lowest evaluated responsive bid.

According to an Internal Memo dated 26th February 2021 addressed to the Procuring Entity's Head of Supply Chain Management, the Evaluation Committee stated that they carried out a Due Diligence exercise on M/s Trident Insurance Company Limited through (a) phone calls to various clients of M/s Trident Insurance Company Ltd, (b) confirmation of the Applicant's litigation history through the National Council of Law Reporting (otherwise known as KenyaLaw) website (that is, www.kenyalaw.org) and (c) services provided to Kirinyaga County Assembly, Busia County Assembly, Siaya County Assembly and Baringo County Assembly. According to the Evaluation Committee, M/s Trident Insurance Company Limited failed to meet the due diligence test. The Evaluation Committee also noted that the subject tender should be awarded to the "second lowest responsive bidder."

Professional Opinion

In a professional opinion dated 26th February 2021, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken. He concurred with the Evaluation Committee's findings thus advising the Accounting Officer to

award the subject tender to M/s Resolution Insurance Company Limited for being the next lowest responsive bidder. The Accounting Officer approved the professional opinion on 26th February 2021.

Notification to Bidders

In letters dated 28th February 2021, the Procuring Entity notified tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Trident Insurance Company Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 11th March 2021 and filed on 15th March 2021 together with a Statement in Support of the Request for Review sworn on 11th March 2021 and filed on 15th March 2021, Supporting Affidavit sworn on 11th March 2021 and filed on 15th March 2021 and Further Statement sworn on 29th March 2021 and filed on even date, through the firm of Ong’anda & Associates Advocates, seeking the following orders: -

- 1. An order declaring that the notification of non-responsiveness contained in the letter dated 28th February 2021 for Tender No. NCA/T/004/2020/2021 PROVISION OF MEDICAL INSURANCE COVER TO STAFF AND SERVICE BOARD MEMBERS issued to the Applicant was illegal, null and void;***
- 2. An order setting aside the decision by the Respondents contained in the letter dated 28th February 2021 for Tender No. NCA/T/004/2020/2021 PROVISION OF MEDICAL***

INSURANCE COVER TO STAFF AND SERVICE BOARD MEMBERS;

3. An order setting aside the due diligence conducted by the Respondent upon the Applicant and the resulting report (if any); and

4. An order awarding costs of this Request for Review to the Applicant.

In response, the Respondents lodged a Memorandum of Response dated 19th March 2021 and filed on 22nd March 2021 through the Procuring Entity's Clerk. The Interested Party did not file a response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. However, none of the parties to the instant Request for Review filed written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings including confidential documents submitted pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), this Board finds that the following issues call for determination: -

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

In addressing the above issue, the Board will make a determination on the following: -

a) Whether the Request for Review was filed outside the statutory period of fourteen (14) days specified in section 167 (1) of the Act, thus ousting the jurisdiction of the Board.

Depending on the outcome of sub-issue (a): -

b) Whether the contract dated 16th March 2021 between the Procuring Entity and the Interested Party ousts the jurisdiction of the Board pursuant to section 167 (4) (c) of the Act.

Depending on the outcome of sub-issue (b): -

II. Whether the Procuring Entity awarded the subject tender in accordance with Clause 2.25 read together with Clause 2.24. of Section II. Instructions to Tenderers of the Tender Document, section 64, 83 and 86 (1) (a) of the Act and Article 227 (1) of the Constitution.

In addressing the second issue, the Board shall make a determination on the following: -

- a) *Whether the Procuring Entity undertook a due diligence exercise on the Applicant in accordance with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 64 and 83 of the Act.*
- b) *Whether the Procuring Entity undertook a due diligence exercise on the Interested Party in accordance with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act before award of the tender as required by Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document.*

It is trite law that courts and other decision making bodies can only act when they have jurisdiction to entertain a matter. This has been the finding of our courts in several cases including the following:-

In the famous case of **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, Justice Nyarangi held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter

before it the moment it holds the opinion that it is without jurisdiction."

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

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

To establish whether or not it has jurisdiction, the Board finds it important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court 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. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows:-

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To exercise this mandate, Section 167 (1) of the Act provides the conditions that need to be satisfied for the jurisdiction of this Board to be invoked. The said provision states as follows:-

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”

Section 167 (1) of the Act directs that it is only 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, that 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.

On the first limb of the first issue for determination, the Respondents opposed the Board’s jurisdiction to entertain the Request for Review by alleging at paragraph 32 of their Memorandum of Response that unsuccessful bidders were issued with regret letters dated 28th February 2021 while the Interested Party was issued with a letter of notification of award on 28th February 2021.

The Applicant on the other hand deponed at paragraph 25 to 27 of its Further Statement that its letter of notification of unsuccessful bid dated 28th February 2021 could only be received by it on 1st March 2021 because 28th February 2021 was a Sunday, which is ordinarily a non-working day. According to the Applicant, its offices were closed on Sunday, 28th February 2021.

In addressing this issue, the Board notes that the responsibility of issuing letters of notification to successful and unsuccessful bidders is vested on the 1st Respondent herein pursuant to section 87 (1) and (3) of the Act which states that: -

"(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"

It therefore follows that the onus of proving the date when letters of notification were issued to bidders, rests on the Respondents herein. This therefore leads the Board to determine whether this onus of proof has been discharged by the Respondents.

The Respondents merely stated that letters of notification to unsuccessful bidders were dated 28th February 2021 without stating the date when those letters were sent to bidders. Furthermore, the Board was not informed of

the mode of dispatch of the letters neither did the Procuring Entity furnish the Board with any evidence of dispatch from the Procuring Entity's Response or confidential file submitted pursuant to section 67 (3) (e) of the Act. The Respondents only stated that the Interested Party was given its letter of notification of award on 28th February 2021 whilst remaining silent on the date when the Applicant was given its letter of notification of unsuccessful bid and the mode used to issue such notification.

In the Supreme Court case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court cited an excerpt at page 124 of the book by Cross and Tapper on the "**Law of Evidence**", (**Oxford University Press, 12th edition, 2010, page 124**) where it was stated thus:

"The person who makes an allegation must lead evidence to prove the fact. He or she bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the burden of proof is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue"

Having considered the excerpt of the book by Cross and Taper on the Law of Evidence which was cited with approval by the Supreme Court in the

foregoing case, the Board finds that the Respondents herein have an obligation of proving the date of dispatch of the Applicant's letter of notification. This burden of proof was not discharged by the Respondents, who in any case, merely cited the date of the Applicant's letter of notification but remained silent on the date and mode used for dispatching the same.

The Applicant on the other hand stated that 28th February 2021 was a Sunday and that its offices were closed on that day. In the Applicant's view, it only received its letter of notification on the next working day being Monday, 1st March 2021.

This prompted the Board to consider the provisions of section 57 (a), (b) and (c) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which provide as follows: -

- "(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens***

to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;”

Section 57 (b) of the Interpretation and General Provisions Act refers to Sunday, public holidays and all official non-working days as excluded days in instances where the last period of the happening of an event is a Sunday. On the other hand, section 57 (c) of the Interpretation and General Provisions Act provides that if an event is allowed to be taken on an excluded day such as Sunday, then the act or proceeding is considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day.

In the instant case, the Board is dealing with the first period of an event (the event being notification to the Applicant) which seems to have been undertaken on a Sunday as alleged by the Respondents. The Applicant on the other hand states its offices were closed on that day to support its view that it could only have received notification on the next official day when it usually opens its offices.

Section 87 (3) of the Act which deals with notification to unsuccessful bidders does not state bidders can be notified on Sunday neither did the Tender Document state the official days or hours when bidders would be notified of the outcome of their bids. It is only Clause 1.2 of Section I. Invitation for Tenders of the Tender Document dealing with issuance of tender documents which provided that further information and copies of the tender document

could be obtained at the Procuring Entity's procurement office during normal office working hours. That notwithstanding, Sunday being an excluded day, section 57 (c) of the Interpretation and General Provisions Act directs that even if notification to bidders is allowed on an excluded day, then such notification is deemed to have been done on the next day afterwards, not being an excluded day.

The next day in this instance was Monday, 1st March 2021 (which is not an excluded day), hence the Board finds the Applicant received its letter of notification of unsuccessful bid on 1st March 2021.

In determining the period within which the Applicant ought to have filed its Request for Review, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act which provides that the day an event happens is excluded during computation of time taken for doing an act or thing. In this case, 1st March 2021, being the date when the Applicant received its letter of notification, is excluded when computing the time within which the Applicant was required to file its Request for Review. As a result, the same ought to have been filed by 15th March 2021.

Given the Applicant lodged its Request for Review on 15th March 2021, the Board finds the same was filed within the statutory period of fourteen (14) days specified in section 167 (1) of the Act.

In addressing the second sub-issue of the first issue, the Board observes that section 167 (4) (c) of the Act states that: -

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b); and

(c) where a contract is signed in accordance with section 135 of this Act"

Section 167 (4) (c) of the Act imposes a condition that the Board's jurisdiction can only be ousted where a contract is signed in accordance with section 135 of the Act. The Board is mindful of its finding that the Applicant was notified of the outcome of its tender on 1st March 2021 and thus had up to 15th March 2021 to file a Request for Review before this Board. The timeline of 14 days expressed in section 167 (1) of the Act is hinged on a stand-still period imposed by section 135 (3) of the Act which states that: -

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period"

The Board was furnished with a contract dated 16th March 2021 executed by the Procuring Entity and the Interested Party in respect of the subject procurement proceedings. This prompted the Board to consider applicability of section 168 of the Act which provides that: -

"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting

officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”

Pursuant to section 168 of the Act, the Acting Board Secretary addressed a letter dated 15th March 2021 to the 1st Respondent stating as follows: -

“You are hereby informed that on 15th March 2021, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above tender

.....

Please note that according to the Public Procurement and Asset Disposal Act, 2015, the procurement process should be suspended and no contract subject to the Regulations can be signed between the Procuring Entity and the successful tenderers until the appeal has been finalized”

According to the Posta Dispatch-Acceptance/Contract Customers/Delivery Docket obtained by the Board’s Courier Officer from the Postal Corporation of Kenya, the letter dated 15th March 2021 addressed to the 1st Respondent was taken to the Postal Corporation of Kenya on 15th March 2021 via Express Mail Services (EMS). It is clear that as at 15th March 2021, a request for review was filed with the Board, and notification of the review including suspension of procurement proceedings dispatched by the Board’s Courier Services for delivery to the Respondents.

The Procuring Entity did not provide evidence of the time it received the letter dated 15th March 2021 from the Board Secretary so as to ascertain whether the contract dated 16th March 2021 was signed before receipt of notification of filing of the request for review. Proof of the date of receipt of notification by the Board Secretary ought to have been furnished by the Procuring Entity since it bears the burden of proving the date it was notified of the request for review. This burden of proof was not discharged.

In the absence of any evidence to the contrary, it is the Board's considered opinion that the contract between the Procuring Entity and the Interested Party was signed during suspension of procurement proceedings pursuant to section 168 of the Act.

Accordingly, the Board finds that the contract between the Procuring Entity and the Interested Party signed on 16th March 2021 is null and void having been signed during suspension of procurement proceedings pursuant to section 168 of the Act.

In totality, the Board finds that it has jurisdiction to entertain the Request for Review and shall now address the substantive issue in the Request for Review.

On the second issue for determination, the Board observes that the Applicant received a letter of notification of unsuccessful bid dated 28th February 2021 with the following details: -

"Reference is made to the tender above

We wish to inform you that your application for the above tender was not successful. We therefore wish to take this opportunity to thank you for having participated in the bidding process which enabled the whole exercise to succeed

We awarded the tender to Resolution Insurance Company Ltd at a total sum of Kshs. 10,681,250.00 for being the most technically responsive bidder and lowest quoted amongst those that qualified to proceed to the financial stage of evaluation

Your company did not succeed because due diligence was conducted pursuant to section 83 of the Public Procurement and Asset Disposal Act, 2015 and reports of unsatisfactory performance from previous clients came up

However, we wish you success in all your endeavours ”

The Applicant challenged the due diligence exercise conducted by the Procuring Entity by stating the same fell short of the requirements of section 83 of the Act. At paragraphs 25 to 30 of their Memorandum of Response, the Respondents explain the manner in which due diligence exercise on the Applicant was conducted which included; cross referencing on litigations in the Kenya Law Website (www.kenyalaw.org), telephone calls to individual representatives of past and present clients of the Applicant and review of documents to confirm their authenticity. The Procuring Entity further states that a due diligence report was prepared by the Evaluation Committee and

submitted to the Head of Procurement which report contained negative responses regarding the Applicant's qualifications. Consequently, the Respondents state that they proceeded to award the subject tender to the next lowest evaluated bidder, the Interested Party herein.

The Board studied the Procuring Entity's confidential file to establish the manner in which due diligence was conducted on the Applicant and proceeds to make the following findings: -

A. Phone calls to various clients of the Applicant

According to an Internal Memo dated 26th February 2021, addressed to the Procuring Entity's Head of Supply Chain Management, the Evaluation Committee stated as follows: -

"(1) Upon calling a Mr. Hussein Njuguna, a representative listed in bid as an employee of Premier Flour Mills Ltd, a client to the firm whose contract price was Kshs. 122.3 Million, he responded that he is the employee of Trident Insurance Co. Ltd and not Premier Flour Mills Ltd. It was further noted that:

c) A contract price of Kshs. 122.3 Million for a medium sized entrepreneur appeared to indicate unrealistic. The firm, Premier Flour Mills Limited is a medium sized company that may not be of such a capacity to incur such a cost in insurance premium.

d) The tender award or notice appeared to be fraudulently acquired and efforts to reach out the

company through the numbers indicated were fruitless.

(2) Upon calling a Mr. Tom Nyatika, a representative listed in bid as an employee of County Government of Kirinyaga, the response noted were that Trident Insurance Company Limited;

i. Actually got contracted to deliver medical insurance services at the County Government of Kirinyaga;

ii. Did not offer the appropriate services to employees of the County Government of Kirinyaga;

iii. Does not settle claims when due and as they arise;

iv. Demonstrated inability to continue offering the services under the contract;

v. Led hospitals to seek intervention of the client firms in pursuit to have the insurance company settle claims due to the hospitals”

(3) On calling a Judith Murugi of Machakos County Assembly, the response received was that, Trident Insurance Co. Ltd;

a) Actually got contracted by the Machakos County to render medical insurance services at the County Assembly in the Financial Year 2017/2018

b) Did not offer recommendable services to the Machakos County Assembly and its employees

c) Had very few number of hospitals accepting their insurance cards and in particular some of the hospitals had blacklisted the insurance company

d) Disappointed the staff of Machakos County Assembly and cause the procuring entity embarrassment, in her words, she referred Trident Insurance Company Limited as "that stressful service provider"

(4) On calling one officer of the Nyamira County Assembly, it was reported that after due diligence, the County Assembly of Nyamira did not enter into an agreement with the insurance firm in question even after it arose from the procurement process that Trident Insurance Company Limited was the least evaluated service provider."

Having considered the instances when the Procuring Entity contacted various references of the Applicant, the Board observes that this due diligence was conducted through phone calls. The Internal Memo dated 26th February 2021 only cited names of some individuals without their phone numbers, thus the Board could not ascertain whether indeed the phone numbers of clients listed at page 000176 of the Applicant's original bid were the ones used by the Procuring Entity. Furthermore, there is no evidence of any written communication between the Procuring Entity and the Applicant's references.

Section 64 (1) of the Act which deals with communication in public procurement and asset disposal proceedings provides that: -

"All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing"

Pursuant to section 64 (1) of the Act, it is mandatory for all communications and enquiries between parties on procurement and asset disposal proceedings to be made in writing. This, in the Board's view, includes communications between a procuring entity and references of a bidder because due diligence is one of the components of a procurement process. Pursuant to section 83 (2) of the Act, a procuring entity may obtain confidential references from persons with whom the tenderer has had prior engagement. These confidential references ought to be in the form of written communication pursuant to section 64 (1) of the Act and not phone calls.

Written communication would have assisted the Board in confirming whether indeed the Applicant's references were contacted and the responses received after such communication. The alleged phone calls made to references of the Applicant cannot be verified, thus casting doubt as to whether indeed a due diligence exercise was conducted on the Applicant.

B. Litigation

According to the Internal Memo dated 26th February 2021, addressed to the Procuring Entity's Head of Supply Chain Management, the Evaluation Committee stated that: -

"Litigation History declaration made by the firm, as filed by the bidder at the procurement entity is inconsistent with the factual circumstances surrounding the reputation of Trident Insurance Company Limited. A cross reference of the following cases indicated:

a) In Case No. 24 of 2019, Trident Insurance Company Limited as plaintiff with Maize Milling Company Limited, in a particular case against Spire Bank Kenya Limited and Josrick Merchants Auctioneers, the defendant, the plaintiffs sued against the sale of the property known as Land Reference Number 19841 (Title No. IR 85900) situate in Maanzoni, Machakos County.

b) Civil Suit 389 of 2017, with Trident Insurance Company Limited as a defendant in a case against Saham Assurance Company Limited as plaintiff in which facts were adduced before the court of law as follows;

i. Witness stated in evidence that the plaintiff insured Tusker Mattress Limited (Tuskys) for the period between 1st March 2015 and 1st March 2016. The defendant contractually took up 40% of the risk upon re-insuring Tuskys.

ii. On 17th May 2015, one of Tuskys branches caught fire which led to claims being made by Tuskys branches caught fire which led to claims being made by Tuskys for material damage and loss of

profit. An adjuster was appointed and all reinsurers, including the defendant were notified. The material damage claim was adjusted at Kshs. 67,517,001/- and the adjustment fee for that claim was Kshs. 1,851,360/-. The defendant's liability for 40% of the claim was Kshs. 27,706,725/- and the adjusters' fee was Kshs. 928,000/-. The defendant on receiving demand to pay, from the plaintiff, only made partial payment. The defendant's total liability together with interest and costs of recovery is Kshs. 33,427,695.61 as at 16th August 2017.

Accordingly, the judgement of the court of law on 4th October 2019 was as follows:

i. Judgement is hereby entered for the plaintiff, Saham Assurance Company Limited, against the defendant, Trident Insurance Company Limited for Kshs. 33,427,695.61 with interest at court rate from the date of filing suit until payment in full.

ii. The plaintiff is awarded costs of the suit.

c) In Case 1 of 2016, in which Trident Insurance Company Limited as an applicant lost a case against a respondent Philip Etyanga, where facts were laid out against the insurer, thereby losing the case with costs, Furthermore, it was ruled that the affidavit evidence by Martin Bett (a

legal officer of the applicant's company) that as at the time when the accident occurred on 5th April 2015, the subject motor vehicle KAZ 317K had already been sold to a third party. And by virtue of that sale, the policy of insurance had terminated on the date of sale namely on 6th November 2014. The applicant annexed the sale agreement as Annexure "FCL 2";

d) Several other cases have been filed on diverse dates in the courts of law within the jurisdiction of the Republic of Kenya including Civil Appeal 7 of 2019 where Trident Insurance Company Ltd filed an appeal against the ruling and order in Busia Chief Magistrate's Court Civil Case No. 64 of 2018 by Hon. Maureen A. Odhiambo-Resident Magistrate. The appeal lacked merit and the same was dismissed with costs

The Board observes that at paragraph 25 of their Memorandum of Response, the Respondents aver that confirmation of the Applicant's litigation history was conducted through the National Council of Law Reporting (also known as KenyaLaw) website (that is, www.kenyalaw.org) thereby concluding that the Applicant did not meet the due diligence test.

Having considered the various litigation involving the Applicant outlined hereinbefore, the Board notes that the Procuring Entity cited cases where the Applicant was an aggrieved party (that is, Case No. 24 of 2019 & Case 1

of 2016 as plaintiff and Civil Appeal 7 of 2019 as appellant) and a case where the Applicant was sued for insurance claims (Civil Suit 389 of 2017).

Regarding Case No. 24 of 2019 and Case No. 1 of 2016 where the Applicant was the one seeking remedies available in law, this Board was not furnished with evidence of the nature of the relationship between the Applicant and the defendants in those cases.

It is worth noting that Clause 2.22 (k) of Stage One of the Appendix to Instructions to Tenderers of the Tender Document directed bidders to provide: -

"a written declaration of any pending litigation issues either for or against the company"

At page 000151 of its original bid, the Applicant provided a duly completed Litigation History Form dated 8th February 2021 with the following details: -

LITIGATION HISTORY FORM

Name of contractor Supplier: Trident Insurance Company Limited

Contractor/Suppliers should provide information on any history of litigation or arbitration resulting from contracts executed in the last five years or currently under execution.

Year	Award for Against	Name of Client, Cause of Litigation and matter in dispute	Disputed amount (Current value Kshs. equivalent)
2019	NONE	NONE	NONE
2018	NONE	NONE	NONE
2017	NONE	NONE	NONE
2016	NONE	NONE	NONE
2015	NONE	NONE	NONE

We hereby confirm that there has been no pending legal matter in court against our directors, company, staff and assigns or our organization under similar assignments and that there have not been any convictions in the past against the company, directors or partners

....”

Clause 2.22 (k) of Stage One of the Appendix to Instructions to Tenderers of the Tender Document required bidders to provide a written undertaking on any pending litigation and not concluded litigation.

From the documentation adduced by the Procuring Entity, Civil Suit 389 of 2017 was **concluded** with the Court directing the Applicant herein to pay the amount of Kshs. 33,427,695.61 to Saham Assurance Company Limited with interest at court rate.

As regards, Civil Appeal 7 of 2019, the Board notes the same was also concluded because the High Court dismissed the appeal after agreeing with the Magistrate Court’s finding that the appellant (Trident Insurance Company Limited) failed to file and serve a defence within the timelines provided in law. Further, Case No. 24 of 2019, Case 1 of 2016, (Civil Suit 389 of 2017) (where the Applicant was plaintiff) and Civil Appeal 7 of 2019 (where the Applicant was appellant) were also concluded.

The Procuring Entity did not furnish the Board with any evidence that a process of verification and confirmation revealed that the cases cited hereinbefore were pending before the courts.

C. Counties

In an Internal Memo dated 26th February 2021, the Evaluation Committee informed the Procuring Entity's Head of Supply Chain Management that:

"Frustrations experienced by Kirinyaga County Assembly led to cancellation of award initially issued to Trident Insurance Company Limited before the signing of contract are noteworthy as a reference in the instant tender

In November 2020, another due diligence by Nandi County Assembly on Trident Insurance Company Limited was done by the evaluation committee and the finding of the report was as follows;

- a) In Busia County Assembly, Medical services were suspended by hospitals and other services providers because of non-payment and finally the contract also had to be terminated before maturity***
- b) In Siaya County Assembly, Trident Insurance Company Limited had issues with the county assembly for not settling claims of services providers and the contract also had to be terminated before maturity***
- c) Baringo County Assembly, reported that they engaged Trident Insurance Company Limited in 2018 and most services providers blacklisted them because of accrued payments"***

Just like the other scenarios addressed hereinbefore, the Procuring Entity did not furnish the Board with any written communication to Kirinyaga County Assembly, Busia County Assembly, Siaya County Assembly and Baringo County Assembly verifying and confirming the nature of services provided by the Applicant to these counties and whether or not those services were satisfactory. The Procuring Entity merely gave a narration in an internal memo without furnishing the Board with a due diligence report together with written communication (such as letters) to the aforementioned counties.

At this point, the Board deems it necessary to address its mind on the importance of a due diligence exercise and the manner in which the same ought to be conducted. Due diligence, is a post-qualification exercise whose purpose and procedure is outlined in section 83 of the Act as follows:

- "1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

- (a) initial each page of the report; and***
- (b) append his or her signature as well as their full name and designation”***

Further Regulation 80 of Regulations 2020 provides that: -

- "80 (1) Pursuant to section 83 of the Act a procuring entity may prior to the award of the tender confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act***
- (2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer) who submitted the next responsive bid for goods works or services as recommended by the evaluation committee or***
- (b) who emerges as the lowest evaluated bidder after re computing financial and combined score for consultancy services under the Quality Cost Based Selection method”***

Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document provided for a post-qualification exercise to be undertaken as follows: -

- "2.24.1. The Procuring Entity will verify and determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily**
- 2.24.2. The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, pursuant to paragraph 2.11.2, as well as such other information as the Procuring Entity deems necessary and appropriate.**
- 2.24.3. An affirmative determination will be a prerequisite for award of contract to the tenderer. A negative determination will result in rejection of the tenderer's tender, in which event the Procuring Entity will proceed to the next lowest evaluated tender to make a similar determination of that tenderer's capabilities to perform satisfactorily"**

Clause 2.11.2 referenced in the above provision deals with documentary evidence of a tenderer's qualification to perform the contract if such

tenderer's tender is accepted, which would be used by the Procuring Entity to establish whether the tenderer has the technical and financial capability to perform the contract (subject tender).

It is evident that just like section 83 (1) of the Act and Regulations 2020, the Tender Document recognized that due diligence is conducted on the lowest evaluated responsive tenderer. The Court in **Republic v Public Procurement Administrative Review Board & another Ex-parte Industrial & Commercial Development Corporation [2018] eKLR** (hereinafter referred to as the "ICDC Case") considered the import of section 83 (1) of the Act and held as follows: -

"It is clear that the due diligence which may include obtaining confidential references is supposed to take place after tender evaluation, but prior to the award of the tender."

Further, in **Miscellaneous Civil Application No. 551 of 2017, Consortium of H. Young & Co (E.A) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v Public Procurement Administrative Review Board & 2 others** (hereinafter referred to as the "H. Young Case"), the Court outlined some of the salient features of a due diligence exercise and held as follows: -

"since the evaluation committee's parameters of conducting due diligence are circumscribed by the Act, the committee must, in the exercise of that power, confine itself within the four corners of the said provision. If it acts outside the same,

it would be construed to have acted outside its powers or in excess hereof. Firstly, the conduct of due diligence pursuant to the said provisions can only be undertaken after tender evaluation, but before the award of the tender. Secondly the purpose of the due diligence is restricted to the confirmation and verification of the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. In other words, the Committee cannot purport to conduct due diligence in respect of any other tenderer save for the lowest evaluated responsive tender to be awarded the contract in accordance with the Act.”

Having considered the finding of the Court in the ICDC Case and the H. Young Case, provisions of section 83 of the Act and Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document, the Board notes that in conducting a due diligence exercise, the following procedure must be adhered to: -

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and

Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded.

Further, section 83 (2) of the Act suggests one of the parameters of due diligence that an evaluation committee may adopt when undertaking a due diligence exercise is obtaining confidential references from persons with whom the tenderer has had prior engagement. Pursuant to section 64 (1) of the Act, a procuring entity must request for confidential references in writing and not through phone calls. The Procuring Entity should contact the tenderer's previous clients (in writing) to confirm whether any outstanding claims were settled as directed by a court after a case is concluded. These clients must also provide their feedback to the procuring entity in writing. Section 64 (2) (d) of the Act encourages procuring entities to adopt Information and Communication Technologies requesting for information on the tender or disposal process. Since all communication in procurement proceedings ought to be in writing, one way of obtaining information in a due diligence exercise is through emails sent to a tenderer's clients. These correspondences would form part of the Procuring Entity's records as captured in the due diligence report on the manner in which due diligence was conducted.

After concluding the exercise, a due diligence report (which is separate from an Evaluation Report) must be prepared outlining how due diligence was

conducted together with the findings of the process. The due diligence report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page by the members of the Evaluation Committee who took part in the due diligence exercise.

Assuming the lowest evaluated responsive tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the negative responses received on lowest evaluated responsive tenderer, the Evaluation Committee then recommends award to the next lowest evaluated responsive tenderer. Thereafter, a similar due diligence process is conducted on such tenderer. This procedure is applied until the successful tenderer for award of the tender is determined.

Having considered the manner in which due diligence was conducted on the Applicant, the Board finds that the same fails to satisfy the threshold of Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 64 & 83 of the Act, and Regulation 80 of Regulations 2020.

Despite having conducted a flawed due diligence exercise on the Applicant, the Procuring Entity proceeded to award the tender to the next lowest evaluated responsive bidder, the Interested Party herein without conducting a due diligence exercise on the Interested Party.

The process of due diligence formed part of the procedures and criteria to be applied by the Procuring Entity prior to making a decision on award of

the subject tender to any particular bidder pursuant to Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document which provides that: -

"Subject to paragraph 2.29, [Performance Security furnished by the successful tenderer] the Procuring Entity will award the contract to the successful tenderers 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" [Emphasis by the Board]

Clause 2.24.3 of Section II. Instructions to Tenderers of the Tender Document gives the Procuring Entity an obligation of verifying and confirming a tenderer's capabilities to perform satisfactorily in a due diligence exercise as a prerequisite to award of the tender pursuant to Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document.

Section 86 (1) (a) of the Act also recognizes the award criteria that was applied in the subject tender as follows: -

"The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price"

As already established by the Board, the Procuring Entity ought to have conducted a due diligence exercise on the Applicant in accordance with the procedure outlined hereinbefore. After disqualifying the Applicant, the Interested Party ought to have been subjected to a similar due diligence exercise, because this was a criterion that was already stated in Clause

2.24.3 of Section II. Instructions to Tenderers of the Tender Document and recognized as a prerequisite to award of the subject tender pursuant to Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document. It also amounts to unfairness for the Procuring Entity to conduct a due diligence exercise on the lowest evaluated responsive bidder but fail to conduct a similar exercise on the next lowest evaluated responsive bidder before award of the subject tender to the next lowest evaluated responsive bidder. The principle of fairness is applicable to procurement by state organs and other public entities as provided for in Article 227 (1) of the Constitution which 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."

Having failed to follow the procedures and criteria in its own Tender Document, the Board finds that award of the tender to the Interested Party cannot be allowed to stand because; (a) the due diligence exercise on the Applicant was not undertaken in accordance with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 64 and 83 of the Act and (b) after disqualifying the Applicant, the Procuring Entity did not conduct a similar due diligence exercise on the Interested Party as required by 2.24.3 of Section II. Instructions to Tenderers of the Tender Document as a prerequisite to award of the subject tender pursuant to Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document.

Accordingly, the Board finds that the Procuring Entity failed to award the subject tender in accordance with Clause 2.25 read together with Clause 2.24. of Section II. Instructions to Tenderers of the Tender Document, section 64, 83 and 86 (1) (a) of the Act and Article 227 (1) of the Constitution.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Contract in Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members executed on 16th March 2021 between the Procuring Entity and the Interested Party, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members dated 28th February 2021 addressed to the Interested Party herein, be and is hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members dated 28th February 2021 addressed to the Applicant herein and to all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 4. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to undertake a due diligence exercise on the lowest evaluated responsive tenderer in accordance with Clause 2.24 of Section II. Instructions to Tenderers of the Tender Document read together with section 64 & 83 of the Act, and Regulation 80 of Regulations 2020.**
- 5. Further to Order No. 4 above, the Accounting Officer of the Procuring Entity is hereby directed to ensure the procurement proceedings in Tender No. NCA/T/004/2020/2021 for Provision of Medical Insurance Cover to Staff and Service Board Members proceeds to its logical conclusion including the making of an award in accordance with Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document, section 86 (1) (a) of the Act and Article 227 (1) of the Constitution within thirty (30) days from the date of this decision, taking into consideration the Board's findings in this Review.**

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

Dated at Nairobi this 6th day of April 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB