

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 38/2021 OF 15TH MARCH 2021
BETWEEN

TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT

RESOLUTION HEALTH INSURANCE COMPANY

LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of the County Government of Uasin Gishu in relation to Tender No. CGU/PSM/T/001/2020-2021 for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2).

BOARD MEMBERS

- | | |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Jackson Awele | -Member |
| 3. Mr. Ambrose Ogetto | -Member |
| 4. Dr. Joseph Gitari | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

The Bidding Process

County Government of Uasin Gishu (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. CGU/PSM/T/001/2020-2021 for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2) (hereinafter referred to as “the subject tender”) through an advertisement published in the Standard Newspaper, the Procuring Entity’s Website (www.uasingishu.go.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 29th January 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of four (4) bids by the bid submission deadline of 12th February 2021 through the Integrated Financial Management Information System (IFMIS) as follows: -

NO.	BIDDERS	QUOTE NO
1.	AAR Insurance Kenya Ltd	996815
2.	Resolution Insurance Company Ltd	989588
3.	The Kenyan Alliance Insurance Company Limited	996389
4.	Trident Insurance Company Limited	996771

Evaluation of bids

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

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

1. Mandatory Requirements/Preliminary Evaluation

At this stage, the Evaluation Committee evaluated bids against the requirements outlined below and recorded the outcome of evaluation as follows: -

	BIDDER NUMBER			
	1	2	3	4
(i) MUST upload tender security of Kshs. 2,400,000.00 from a PPOA/PPRA authorized organization. Valid for 150 days from the date of opening.	NR	R	R	NR
(ii) Must submit valid Certificate from Commissioner of Insurance for current year as Medical Insurance Provider	R	R	R	R
(iii) Must indicate claims settlement procedures (Attach evidence of 5 highest paid inpatient and outpatient claims) for the last one year (2020)	NR	R	R	R
(iv) Must submit valid Registration certificate as a member of AKI for the current year 2021	R	R	R	R
(v) Submit a copy of Valid Tax Compliance Certificate	R	R	R	R
(vi) Submit a copy of certificate of Incorporation.	R	R	R	R
(vii) Medical benefits structure costing SHOULD be as per the SRC circular dated 19.12.2014 Ref. No. SRC/TS/CGOVT/3/61	R	R	NR	R
(viii) Must upload a signed and stamped letter commitment to abide by the SRC medical cover limits.	R	R	R	R
(ix) Must upload a serialized document (pagination).	R	R	R	R
REMARKS	NR	R	NR	NR

At the end of Preliminary Evaluation, only one bidder (M/s Resolution Insurance Company Ltd) was found responsive and eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated the bid of M/s Resolution Insurance Company Ltd against the following criteria: -

TECHNICAL EVALUATION (POST QUALIFICATION)	SCORES
(i) Must give a list of 5 (five) current reputable clients from public institutions (Attach LS O/Contact agreement)	5
(ii) The cover for each institution should be at least 1,500 employees together with the total client premiums for the last two years (2018, 2019 and 2020). (Attach contract document) (5 marks)	5
(iii) Must have had experience with Medical facilities within the North Rift Region (attach evidence)	5
(iii) List a minimum of ten (10) key professional staff and specify portfolio/tasks (Attach CVs for the personnel) (5 marks)	5
<p>(iv) Liquidity</p> <p>(a) Upload a copy of certified audited accounts for the year 2019 showing the following ratios: -</p> <p>(a) Profitability margin A margin above 30% will score 10 marks;</p> <p>(i) 10-29 % 5 marks;</p> <p>(ii) 1-9% - 1 marks and</p> <p>(iii) below 1% 0 marks</p> <p>(b) Liquidity Ratio</p> <p>(i) 2:1 – 10 marks;</p> <p>(ii) 1:1 – 7 marks;</p> <p>(iii) 0.5:1 - 3 marks</p> <p>(iv) less than 0.5:1 - 0 marks</p>	20
(c) Must have done annual gross premiums in the previous year of Kshs. 600,000,000.00 (Attach evidence)	10
(c) Must have paid up capital of at least Kshs. 500, 000,000.00 for insurance companies. (attach evidence)	10
(v) Exclusions (List 4 Exclusions). The exclusions provided in the cover will be evaluated, the fewer the exclusions, the higher the scores.	10
(vi) List at least 5 additional benefits to the cover.	5
vii) Meets all the requirement listed in the special condition in SECTION V (10 Marks)	10
<p>(viii) Provide a list of health facilities from Major towns:</p> <p>(a) Health facilities within Eldoret to include; Mediheal, St. Lukes, Eldoret Hospital, MTRH, Top Hill Hospital, Elgon View hospital, Fountain hospital and Reale. (5 marks)</p> <p>(b) Specialized facilities to include list of service providers offering specialized services (Dental, Optical and Gynaecology) (5 marks)</p> <p>(c) Give list of facilities in other major towns in Kenya outside Eldoret (5 marks)</p>	15
TOTAL TECHNICAL	100
Minimum technical score	70%

At the end of Technical Evaluation, M/s Resolution Insurance Company Limited achieved an overall technical score of 71% and was found eligible to proceed to Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the bid price of M/s Resolution Insurance Company Limited as follows: -

Bidder No.	Bidders Name	Tender Sum (Kshs)	Ranking
B2	Resolution Insurance Company Limited P.O Box. 46666-00100 Nairobi	219,779,521.00	1

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Resolution Insurance Company Limited for being the lowest evaluated tenderer at its tender price of Kshs. 219,779,521.00.

Professional Opinion

In a professional opinion dated 1st March 2021, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He concurred with the Evaluation Committee's recommendation on award of the subject tender thus advising the Procuring Entity's Chief Officer, Public Service Management to award the subject tender to M/s Resolution Insurance Company Limited for being the lowest evaluated tenderer at its tender price of Kshs. 219,779,521.00. The said professional opinion was approved on 1st March 2021.

Notification

In letters dated 1st March 2021, the Procuring Entity notified all 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 15th March 2021 and filed on even date together with a Supporting Affidavit sworn on 15th March 2021 and filed on even date and a Supplementary Affidavit sworn on 29th March 2021 and filed on 30th March 2021, through the firm of Kibungei & Company Advocates, seeking the following orders: -

- a) An order annulling the decision of the Respondent/ Procuring Entity contained in their letter to the Applicant dated 1st March, 2021 and declaring the Applicant's bid responsive thus allowing it to proceed to technical and financial evaluation;***
- b) An order setting aside the Procuring Entity's decision awarding the tender to Resolution Insurance Company Limited;***
- c) An order awarding costs to the Applicant herein; and***
- d) Any other order that the Review Board may deem fit and just to grant.***

In response, the Respondent, acting in person, lodged a Replying Affidavit sworn on 19th March 2021 and filed on 23rd March 2021. 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. Accordingly, the Applicant lodged Written Submissions dated 29th March 2021 and filed on 30th March 2021. The Respondent and Interested Party did not file 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 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 the above issue: -

II. Whether the Applicant satisfied the criteria outlined hereinbelow in accordance with section 79 (1) of the Act:-

- a) Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers of the Tender Document on providing tender security of Kshs. 2,400,000.00 from a PPOA/PPRA authorized organization; and*
- b) Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers of the Tender Document on providing proof of contractual agreements with emergency air and road ambulance services.*

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.

At paragraph 8 of its Request for Review, the Applicant avers that the Respondent issued a notification letter to the Interested Party on 1st March 2021 whereas the Applicant only received its letter of notification on 5th March 2021 after several phone calls and follow-ups by the Applicant. Having perused the Respondent’s Replying Affidavit, the Applicant deponed at paragraph 9 of the Applicant’s Supplementary Affidavit that it did not receive any email communication from the Procuring Entity. At paragraph 12 of its Supplementary Affidavit, the Applicant states that even if the date of 1st March 2021 (relied upon by the Respondent) is considered, the Request for Review was filed within 14 days as required by section 167 (1) of the Act.

On his part, the Respondent deponed at paragraph 18 of his Replying Affidavit that emails were sent to the Interested Party and all unsuccessful bidders (including the Applicant) on 1st March 2021. To support this position, the Respondent referred the Board to three email extracts attached to the Respondent’s Replying Affidavit, marked as **“Exhibit AJK6”**.

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 Respondent herein. To determine whether the Respondent has discharged this burden of proof, the Board considered the Respondent's argument that all bidders were notified of the outcome of their bids through emails on 1st March 2021. To support this position, the Board was referred to three email extracts marked as **"Exhibit AJK6"** with the following details: -

First email extract

"[attachment] NOTIFICATION LETTER

From: UasinGishu County Supply Chain
<supplychain@uasingishu.go.ke

Date: 01/03/2021 08:46 PM

To: info@aar.co.ke <info@aar.co.ke>

Kindly find the above letter from public service department"

Second email extract

"[attachment] NOTIFICATION LETTER

From: UasinGishu County Supply Chain
<supplychain@uasingishu.go.ke

Date: 01/03/2021 08:35 PM

To: info@trident.co.ke <info@trident.co.ke>

Kindly find the above letter from public service department"

Third attachment

"[attachment] NOTIFICATION LETTER

From: UasinGishu County Supply Chain
<supplychain@uasingishu.go.ke

Date: 01/03/2021 08:50 PM

To: kai@kenyanalliance.com <kai@kenyanalliance.com>

Kindly find the above letter from public service department"

Even though reference is made to an attachment known as "**notification letter**" in the emails cited above, there is no documentation to ascertain whether or not the attachments were indeed notification letters related to

the subject tender given that no tender name was cited in the emails referenced above.

The Applicant on the other hand stated that the Interested Party was notified on 1st March 2021 without explaining the manner in which it became aware of this, noting that procurement proceedings are confidential in nature pursuant to section 67 (1) of the Act. Furthermore, the notification of unsuccessful bid issued to the Applicant pursuant to section 87 (3) of the Act does not expressly state the date when the Interested Party was notified of award of the subject tender. The Applicant further stated that it collected its letter of notification on 5th March 2021 after several phone calls and follow-ups made to the Procuring Entity. However, upon studying the letter of notification attached to the Applicant's Request for Review, the Board observes that the same bears the stamp of the Procuring Entity's Chief Officer, Public Service Management, the Respondent herein, with the date of 1st March 2021. The Board was not furnished with any documentation to support the Applicant's contention that it received its letter of notification on 5th March 2021.

In the circumstances, the Applicant and the Respondent have failed to provide sufficient proof of the date notification was received by the Applicant. That notwithstanding, the Board observes that even though the Applicant relied on 5th March 2021 as the date it received its notification, the Applicant also took the view that if the Board considers the date of 1st March 2021 relied on by the Respondent, then the Board would still hold the opinion that the Request for Review was filed within the period of fourteen days specified

in section 167 (1) of the Act. The Respondent has not disputed the Applicant's reliance on 1st March 2021 as an alternative date of receiving the letter of notification. As a matter of fact, 1st March 2021 is the date relied on by the Respondent.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which deals with computation of time specified in written law states 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"

Section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is excluded during computation of time taken for doing an act or thing. If the Board were to consider the date of 1st March 2021, the Applicant ought to have filed its Request for Review by 15th March 2021, because 1st March 2021 is excluded from computation of time.

On the other hand, if the Board were to consider the date of 5th March 2021 relied on by the Applicant, the Applicant ought to have filed its Request for Review by 19th March 2021, because 5th March 2021 would be excluded when computing the period of 14 days for filing a Request for Review.

From the foregoing, the Board observes that in both circumstances, the Applicant's Request for Review filed on 15th March 2021 is within the statutory period of fourteen (14) days under section 167 (1) of the Act.

Accordingly, 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 first limb of the second issue for determination, the Board observes that one of the reasons why the Applicant's bid was found unsuccessful as stipulated in its letter of notification of unsuccessful bid dated 1st March 2021 was that: -

"You attached a wrongly referenced bid bond..."

Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers of the Tender Document outlined one of the mandatory requirements at the Mandatory Requirements/Preliminary Evaluation Stage to be satisfied by bidders as follows: -

"MUST submit tender security of Kshs. 2,400,000.00 from a PPOA/PPRA authorized organization. Valid for 150 days from the date of opening"

In response to this criterion, the Applicant provided a bid bond from Kenya Orient Insurance Limited at page 000027 of its original bid with the following details: -

"BID BOND

HQS/1309/025890/2021

WHEREAS TRIDENT INSURANCE COMPANY LIMITED OF P.O BOX 55651-00200 NAIROBI (hereinafter called "The Tenderer") has submitted its tender of tender number

CGU/PMSM/T/001/2020-2021 for Provision of Medical Cover
(Hereinafter called "the tender", KNOW ALL PEOPLE by these presents that we, **KENYA ORIENT INSURANCE LIMITED, P.O BOX 34530,00100, NAIROBI TEL 2728603/4,** having our registered office at **CAPITOL HILL TOWERS, NAIROBI** (hereinafter called "the Insurer") are bound to **THE SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET** (hereinafter called "the Procuring Entity") in the sum of **Kshs. 2,400,000 (TWO MILLION, FOUR HUNDERED THOUSAND SHILLINGS ONLY)** being the tender sum for which payment **THE SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET** well and truly to be made to **THE SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET** the Insurance binds itself, its successors, and assigns by these presents.

Sealed with the Common Seal of the said Insurance this **12TH FEBRUARY 2021**

THE CONDITIONS of this obligation are:-

- 1. If the Tenderer withdraws its tender during the period of tender validity specified by the tenderer on the Tender Form; or**
- 2. If the Tenderer rejects the correction of an error upon prompt by the procuring entity; and**

3. If the Tenderer, having been notified of the acceptance of its tender by THE SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET during the period of tender validity
- (a) Fails or refuses to execute the Contract Form, if required; or
 - (b) Fails or refuses to furnish the performance security, in accordance with the Instructions to Tenderers.

We undertake to pay to the SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET the above amount upon receipt of its first written demand, without the SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET having to substantiate its demand, provided that in its demand the SECRETARY, COUNTY GOVERNMENT OF UASIN GISHU, P.O. BOX 40-30100, ELDORET will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the conditions, specifying the occurred condition(s).

[signature affixed]

SIGNATURE OF THE INSURANCE COMPANY

Tender Security Validity expires on 12th July 2021”

The Board notes that the issue in contention is the fact that the Applicant's tender security is in respect of Tender Number CGU/**PMSM**/T/001/2020-2021 for Provision of Medical Cover and not Tender No. CGU/**PSM**/T/001/2020-2021 **for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2)** (the subject tender). In essence, the tender number and name in the Applicant's tender security is different from the tender number and name of the subject tender.

The Applicant stated in its Request for Review that it provided an acceptable bid bond and termed the addition of letter "M" between letter "P" and letter "S" when citing the tender number as Tender Number CGU/**PMSM**/T/001/2020-2021 and citing the tender name as "**Provision of Medical Cover**", to be a minor deviation which should not have led to rejection of its tender. In the Applicant's view, this minor deviation ought to have been cured by section 79 (2) (a) of the Act which states as follows: -

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

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

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

It is worth noting that the criterion of providing tender security was a mandatory requirement, at the Preliminary Evaluation Stage.

Board is reminded that Courts have previously stated the importance of mandatory requirements in procurement processes in that eligibility and mandatory requirements (including technical specifications) determine the responsiveness of a tender. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited [2018] eKLR** the Court held that: -

"a bid only qualifies as a responsive bid if it meets all mandatory requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements."

[Emphasis by the Board]

The criterion under consideration was evaluated at the Preliminary Evaluation Stage. According to Regulation 74 (1) (h) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), one of the components of preliminary evaluation is described as follows: -

"74 (1) Pursuant to section 80 of the Act and upon opening of tenders the evaluation committee shall first conduct a preliminary evaluation to determine whether —

(h) all required documents and information have been submitted"

It therefore follows that an Evaluation Committee evaluates the documents and information submitted by bidders at the Preliminary Evaluation Stage.

In that regard, the Board studied the Tender Security Form found in Section VI. Standard Forms of the Tender Document and observes that the introductory clause required bidders to correctly identify the tender (which in this case includes tender number and tender name) as follows: -

“Whereas [name of Bidder] (hereinafter called <the tenderer> has submitted its bid dated [date of submission of bid] for the provision of insurance services ***(hereinafter called <the tender>***”

While evaluating the Applicant on the criterion of tender security, the Evaluation Committee had an obligation of checking whether the required information, in this case, the correct tender number and tender name has been expressly stated in the Applicant’s tender security.

It is only upon providing the required information, then the Evaluation Committee would proceed to adjudge the Applicant’s tender responsive to the mandatory requirement under Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with the Tender Security Form found in Section VI. Standard Forms of the Tender Document.

To address the question whether a mandatory requirement can be classified as a minor deviation, the Board considered decisions of the court and proceeds to make the following findings: -.

In Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR (hereinafter

referred to as “the KEMSA Case”), the Court while considering the meaning of minor deviations or informalities held at paragraphs 44 and 45 as follows:

“A minor informality or irregularity, is defined as: -

“one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other tenderers. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”

The decision as to whether or not a particular nonconformity constitutes a minor deviation or informality under procurement law has sometimes been characterized as a discretionary one. However, the major focus must be on the prejudice to other tenderers rather than on the degree of nonconformity in determining if a bid is nonresponsive.

Also in **PPARB Application No. 1 of 2017 - Nomads Construction Company Limited v. Kenya National Highways Authority & Another**

- (hereinafter referred to as "the KENHA Case") the Board held at page 24 of the decision as follows: -

"On further perusal of the Applicant's tender document, the Board noted that the Applicant failed to indicate by ticking either "yes" or "no" to confirm its position as to whether it had any conflict of interest in as far as the tender was concerned. This was also a mandatory requirement which the Applicant failed to comply with.

In view of the several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since the requirements cannot be treated as minor deviations and cannot also be waived. The Applicant had no option other than to comply with them and the failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at the Preliminary Evaluation Stage as the Procuring Entity did"

The Board has compared the finding of the Court in the KEMSA Case and the Board's finding in the KENHA Case and observes that mandatory requirements cannot be treated as minor deviations especially in instances where such an action would give a particular bidder an unfair advantage over other bidders who complied with the mandatory requirements specified in the Tender Document.

The Board further notes that the Applicant attached to its written submissions, a decision of the High Court where a similar position was taken

regarding the manner in which mandatory requirements ought to be treated. In **Miscellaneous Application No. 407 of 2018, Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR**, the Court held that: -

"[78] In essence, a conforming/compliant/responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender.

[79] For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

.....

[81] A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived...

[82] The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it.

The Board would like to point out that in several occasions, it has dealt with instances where a procuring entity re-advertises a tender that was floated in a previous financial year. In those instances, the procuring entity is likely to retain the tender name but may indicate a different tender number and different financial year. This in the Board's view demonstrates that if any letter or number of a tender is cited differently, it is very likely that one could be referring to a different procurement process.

In the instant case, the Applicant ought to have exercised caution and to confirm whether or not the tender name and number for the subject procurement process is correctly referenced in its tender security especially in this instance where tender security was a mandatory requirement that cannot be waived or considered to be a minor deviation. Pursuant to section 61 (3) of the Act, a tender security, cushions a procuring entity in instances where a bidder; (a) withdraws its tender after the deadline for submitting tenders but before the expiry of the period during which tenders shall remain valid, (b) refuses to enter into a written contract pursuant to section 136 or (c) fails to furnish any required performance security.

It is also worth noting that the Evaluation Committee had an obligation of evaluating the Applicant's bid using the procedures and criteria specified in

the Tender Document as required by section 80 (2) of the Act which states that: -

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

The Applicant insisted that the reference to Tender No. CGU/PMSM/T/001/2020-2021 in its tender security was a typographical error, yet as established by the Board, the Applicant cited a wrong tender number and also cited a wrong tender name. Failure to correctly cite the tender number and name of the subject tender in accordance with the format and information required in Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers of the Tender Document read together with the Tender Security Form found in Section VI. Standard Forms of the Tender Document left the Evaluation Committee with no option but to find the Applicant's bid non-responsive to the mandatory requirement specified in Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers of the Tender Document, because the Applicant's tender security relates to a different tender from the subject tender.

Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause 2.20.5 (i) of the Appendix to Instructions to Tenderers and the Tender Security Form found in Section VI. Standard Forms of the Tender Document read together with section 79 (1) of the Act.

On the second limb of the second issue for determination, the Applicant was notified of a second reason why its bid was unsuccessful as follows: -

"...your contract with flying doctors was not signed"

The Board studied the Tender Document and notes that Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers required bidders to provide the following as part of the mandatory requirements at the Mandatory Requirements/Preliminary Evaluation Stage: -

"Proof of contractual agreements with emergency air and road Ambulance services"

In response to this criterion, the Applicant attached an Intermediary Agreement to its original bid which described parties to the said agreement as follows: -

"PARTIES TO AGREEMENT

This Agreement is made between the AMREF Flying Doctors (hereafter referred to as "AFD" which expression shall, where the context so requires, include AMREF Flying Doctors" successors in title and permitted assigns) of Wilson Airport, P.O Box 18617-00500, Nairobi and

.....

..

(Hereafter referred to as the "Agent" which expression shall, where the context so requires include the Agent's successors in title and permitted assigns of P.O Box....."

The Board observes that the Intermediary Agreement attached to the Applicant's original bid identified only one party as AMREF Flying Doctors including its successors and assigns. However, no description was given of the "agent" because the space for describing this "agent" was left blank.

Further, the execution clause of the said agreement shows it was signed on 11th February 2021 by a Principal Officer of Trident Insurance Co. Ltd whose name was not given and Carol Njogu, the Assistant Sales Manager of AMREF Flying Doctors.

The Black's Law Dictionary, 9th Edition (2009) defines the term "**contract**" as:

"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable in law"

In an article known as "**Policy and Procedure for Contract Review, Execution, and Administration Substantive Checklist for Divisional Review of Contracts**" published by Cambridge University, validity of contracts is described at page 1 to 2 thereof as follows: -

"No contract is valid unless it contains three essential elements: (1) the names of the "parties," (2) the "subject matter," and (3) "consideration."

The "parties" are the persons who enter into a legal arrangement. They may be living persons or "legal persons,"

such as a corporation. All parties to the contract must be clearly identified.

Example: This agreement is made on October 8, 2005, between Baylor University, One Bear Place #97371, Waco, TX 76798 and XYZ Computer Company, P. O. Box 1234, Waco, TX 76745

It is worth noting that for a written contract to exist, there must be two or more parties creating obligations that are enforceable or otherwise recognizable in law. It is mandatory for the parties to a contract to be properly identified because parties to a contract are the ones that perform the obligations in the contract and are the ones responsible for all warranties in the contract. In the instance case, there is only one party identified in the Intermediary Agreement yet the agreement is signed by the Applicant (who was never identified as a party to the intermediary agreement) and AMREF Flying Doctors. The fact that the Applicant's name was omitted on the first page of the Intermediary Agreement has been admitted by the Applicant at paragraph 17 of its Written Submissions while terming the omission as an inadvertent omission.

Having established that a contract can only exist between two or more parties, it is the Board's considered finding that the Intermediary Agreement which identifies only one party is not a valid contract (agreement) in law. Furthermore, the same cannot be validated simply because an officer of the Applicant (whose name was not given) signed the same on the execution clause.

Even though the Applicant was notified that its bid was unsuccessful because ***"the contract with flying doctors was not signed"***, the Board has established the issue in contention was not on signing of the intermediary agreement but on identifying parties to the agreement. As already established, the Intermediary Agreement which identifies only one party is not a valid contract (agreement) in law. Furthermore, the same cannot be validated simply because an officer of the Applicant (whose name was not given) signed the same on the execution clause.

Upon studying the Evaluation Report dated 26th February 2021, the Board notes that the Evaluation Committee only identified the issue of tender security as the reason why the Applicant's bid did not proceed to Technical Evaluation. The Board studied the Professional Opinion dated 1st March 2021 and notes that the issue of "contract with flying doctors" was not cited by the Head of Procurement function as forming part of the reasons why the Applicant's tender was found non-responsive. In essence, the stage at which the criterion under Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers of the Tender Document was identified as one of the reasons why the Applicant's tender was found non-responsive is not indicated in the Procuring Entity's Response or confidential file submitted to the Board.

Pursuant to section 80 (4) of the Act, an Evaluation Report prepared by an Evaluation Committee contains a summary of evaluation and comparison of tenders, including a recommendation of award of a tender in instances where the lowest evaluated tenderer has been determined. This therefore means, the reasons why each bidder has been found responsive or non-responsive after evaluation should be stated in the Evaluation Report.

In the instant case, it is not clear at what stage the Applicant was disqualified on the criterion of Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers of the Tender Document. Further, the issue in contention under this criterion is on the parties to the intermediary agreement and not execution of the said agreement.

In the circumstances, the Board finds it necessary to direct the Accounting Officer to ensure the Evaluation Committee re-evaluates the Applicant's tender and all other tenders at the Preliminary Evaluation Stage on the criterion of Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers of the Tender Document.

Section 87 (3) of the Act provides that: -

"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"

Further, Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") outlines the elements of notification under section 87 (3) of the Act as: -

"(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 considered the import of section 87 (3) of the Act and Regulation 82 of Regulations 2020, the Board observes that unsuccessful bidders ought to be given the specific reasons why their bids were found unsuccessful so that they may challenge those reasons, if they wish to do so.

Upon concluding re-evaluation and determining award of the tender, bidders must be informed of the specific reasons regarding the outcome of their tenders in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

Accordingly, 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 issues the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity’s Letters of Regret in Tender No. CGU/PSM/T/001/2020-2021 for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2) dated 1st March 2021 addressed to the Applicant**

and all other unsuccessful bidders herein, be and is hereby cancelled and set aside.

- 2. The Accounting Officer of the Procuring Entity's Letter of Award of Tender No. CGU/PSM/T/001/2020-2021 for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2) dated 1st March 2021 addressed to the Interested Party herein, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender together with all other tenders at the Preliminary Evaluation Stage and conduct a re-evaluation at the Preliminary Evaluation Stage with respect to the criterion under Clause 2.20.5 (x) of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 and 80 (2) of the Act.**
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to ensure the procurement proceedings in Tender No. CGU/PSM/T/001/2020-2021 for Provision of Staff Medical Insurance Cover (Negotiation No. 838900-2) proceeds to its logical conclusion including issuance of a letter of notification of intention to enter into a contract in accordance with section 87 of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 within fourteen (14) days**

from the date of this decision, taking into consideration the Board's findings in this Review.

- 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 6th day of April 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB