

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 160/2021 OF 24<sup>TH</sup> DECEMBER 2021**

**BETWEEN**

**JUBILEE HEALTH INSURANCE LIMITED ..... APPLICANT**

**VERSUS**

**THE ACCOUNTING OFFICER,  
KENYA CIVIL AVIATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA CIVIL AVIATION AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
AND**

**AAR INSURANCE KENYA LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Civil Aviation Authority in relation to Tender No: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants.

**BOARD MEMBERS**

- |                          |               |
|--------------------------|---------------|
| 1. Ms. Faith Waigwa      | - Chairperson |
| 2. Mr. Steven Oundo, OGW | - Member      |
| 3. Mrs. Irene Kashindi   | - Member      |
| 4. Mr. Nicholas Mruttu   | - Member      |
| 5. Mr. Alfred Keriolale  | - Member      |

**IN ATTENDANCE**

Mr. Philemon Kiprop - Holding brief for Acting Board Secretary

**BACKGROUND TO THE DECISION**

**The Tendering Process**

Kenya Civil Aviation Authority (hereinafter referred to as the 'Procuring Entity') through its Director General, the 1<sup>st</sup> Respondent herein, invited sealed tenders for

Tender Number: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants (hereinafter referred to as the 'subject tender') from interested and eligible firms by way of national open tendering method advertised through the Star Newspaper, MyGov newspaper (my.gov.go.ke), the Procuring Entity's website www.kcaa.or.ke and the Public Procurement Information Portal (PPIP) <https://tenders.go.ke> on 16<sup>th</sup> November 2021.

### **Tender Submission Deadline and Opening of Tenders**

The tender submission deadline was set for 2<sup>nd</sup> December 2021 at 11.00 a.m. and by the time of tender submission deadline, the Procuring Entity had received four (4) tenders as captured in the minutes of tender opening of 2<sup>nd</sup> December 2021 (hereinafter referred to as the Tender Opening Minutes). The four (4) tenders were opened shortly after the tender submission deadline by a Tender Opening Committee in the presence of tenderers' representatives present to witness the opening and the following tenderers were recorded in the Tender Opening Minutes as having submitted their respective tenders in good time: -

1. CIC General Insurance Company Limited;
2. AAR Insurance Kenya Limited (the Interested Party herein);
3. Jubilee Health Insurance Limited (the Applicant herein); and
4. Madison General Insurance Kenya Limited.

The Tender Opening Committee noted that the Applicant herein and Madison General Insurance Kenya Limited did not indicate year two price/premium and that this should be subject to verification by the Evaluation Committee seeking clarification from the tenderers if need be. In addition to this, Madison General Insurance Kenya Limited did not provide five corresponding recommendation letters from the respective stated clients but provided only two from Kenya Medical Research Institute and Kenya Bureau of Standards only.

## **Evaluation of Tenders**

A tender evaluation committee (hereinafter referred to as the 'Evaluation Committee') evaluated tenders in the following three (3) stages as captured in an evaluation report signed by members of the Evaluation Committee on 14<sup>th</sup> December 2021 (hereinafter referred to as the 'Evaluation Report'):

- a) Preliminary tender requirements;
- b) Technical capability assessment;
- c) Financial evaluation

### **Preliminary tender requirements**

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the blank tender document of the subject tender (hereinafter referred to as the 'Tender Document'). At the end of this stage of evaluation, two (2) tenderers' tenders including the Applicant's tender were found non-responsive while two (2) tenderers' tenders including the Interested Party's tender were found responsive thus proceeded to the next stage of evaluation.

### **Technical capability assessment**

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 2(b) Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 of 76 of the Tender Document. Tenderers were required to attain a score of at least 80% at this stage of evaluation to qualify for further evaluation. At the end of this stage of evaluation, two (2) tenderers' tenders including the Interested Party's tender were found responsive having attained more than the minimum score required of 80%, thus proceeded to the next stage of evaluation.

## **Financial Evaluation**

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 2(c) Financial/Commercial Evaluation of Section III – Evaluation and Qualification Criteria at page 28 of 76 of the Tender Document. The winning tenderer was to be the lowest evaluated tenderer among those who had made to this stage. At the end of evaluation at this stage, the Evaluation Committee found the Interested Party to be the lowest tenderer at Kshs.156,550,000.00 for one year and Kshs.157,550,000.00 for year two inclusive of applicable taxes.

## **Due diligence/post qualification**

The Evaluation Committee noted that the Interested Party had been providing similar services to the Procuring Entity in the last six (6) years satisfactorily hence there was no need for due diligence.

However, the Evaluation Committee noted that there was need to clarify the following from the Interested Party:

- i. Under the terms of reference/scope of services for the Procuring Entity's Board Directors Medical Scheme, the tenderers were required to provide Standard private (self-contained) room for the members who have been admitted.

It was noted that the Interested Party's tender indicated that bed limit is Kshs.15,000.00 only. It was noted that the amount might not be adequate to cover for private bed in some hospital.

The Interested Party was requested to confirm if they will cover for private (self-contained) room in the event the amount charged by some hospitals is above Kshs.15,000.00.

- ii. It was noted that the Interested Party did not attach a breakdown of the price schedule for Lot 1 – Board Members Medical Scheme and Lot 2 – for staff and dependants.

The Interested Party responded and confirmed as follows:

- i. On the issue of the bed limit, the Interested Party confirmed that they will cover for Standard Private (Self Contained) room as provided in their response to the tender and in the event the amount charged by some hospitals is above Kshs.15,000 the amount over and above this limit shall be covered fully but in any case not more than Kshs. 20,000.
- ii. On the issue of detailed price schedule for Lot 1 and lot 2, the Interested Party confirmed that the price for each lot and year is as indicated in table 6.

### **Recommendation**

The Evaluation Committee recommended the award of the subject tender to the Interested Party at Kshs.156,550,000 for year one and Kshs.157,550,000 inclusive of all applicable taxes.

### **Professional Opinion**

Vide a memo dated 14<sup>th</sup> December 2021, a professional opinion was sent to the 1<sup>st</sup> Respondent from the Manager Procurement (hereinafter referred to as the 'Professional Opinion'). The Procuring Entity's Manager Procurement, William Kitum, reviewed the manner in which the subject tender's procurement process was undertaken including opening and evaluation of tenders and opined that the same satisfied the constitutional requirements of Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution'), the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and the Public Procurement

and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). He concurred with the recommendations of the Evaluation Committee and further recommended for the approval of award of the subject tender to the Interested Party at Kshs.156,550,000 for year one and Kshs.157,550,000 for year two inclusive of applicable taxes by the 1<sup>st</sup> Respondent.

On 16<sup>th</sup> December 2021, the 1<sup>st</sup> Respondent approved the award of the subject tender to the Interested Party as recommended by the Evaluation Committee and the Manager Procurement.

### **Notification to Tenderers**

William Kitum signed for the Respondent letters dated 16<sup>th</sup> December 2021 notifying both the successful and the unsuccessful tenderers of the outcome of evaluation of the subject tender.

### **REQUEST FOR REVIEW NO.160 OF 2021**

The Applicant lodged a Request for Review dated 24<sup>th</sup> December 2021 and filed on even date together with a Statement in Support of the Request for Review signed by Dr. Patrick Gatonga, the Chief Executive Officer of the Applicant, on 24<sup>th</sup> December 2021 through the firm of Wambugu & Muriuki Advocates, seeking the following orders:

- a) The 1<sup>st</sup> Respondent's decision awarding Tender Number KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff, and Dependants to the Interested Party be annulled and set aside;**
- b) The 1<sup>st</sup> Respondent's letter dated 16<sup>th</sup> December 2021 notifying the Applicant that it had not been successful in Tender Number**

**KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants be annulled and set aside;**

- c) A declaration that the 2<sup>nd</sup> Respondent failed to evaluate the Applicant's bid at the preliminary evaluation stage and financial evaluation stage following the criteria and procedures under the Tender Document and the provisions of the Act at Sections 79, 80 (2), 82 and 86 and the provisions of Regulations 74 and 77 of the Regulations;**
- d) The 2<sup>nd</sup> Respondent be directed to re-admit the Applicant at the preliminary evaluation stage and to carry out a re-evaluation of the tender noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80(2) and to carry out the re-evaluation in compliance with Section 79,82,86 of the Act and Regulation 74 and 77 of the Regulations;**
- e) The Board in the exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;**
- f) The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and**
- g) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.**

Vide a Notification of Appeal and a letter dated 24<sup>th</sup> December 2021, the Acting Board Secretary notified the Respondents of the existence of the Request for Review and suspension of procurement procedures for the subject tender while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020 detailing administrative and contingency

measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 24<sup>th</sup> December 2021.

Through a letter dated 29<sup>th</sup> December 2021, the Respondents requested to file their response within five (5) working days from 28<sup>th</sup> December 2021 being the date they received the notification of appeal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Memorandum of Response to Request for Review dated 31<sup>st</sup> December 2021 on even date through Kuchio Tindi Advocate.

Vide a letter dated 3<sup>rd</sup> January 2022, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, the tenderers were requested to submit any information and arguments about the subject tender within three (3) days from 3<sup>rd</sup> January 2022.

The Interested Party filed its Notice of Preliminary Objection dated 6<sup>th</sup> January 2022 and its Memorandum of Response dated 6<sup>th</sup> January 2022 on even date through their Advocate Mwaniki Gachuba Advocates.

On 7<sup>th</sup> January 2022, the Applicant filed a Further Statement in Response to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Memorandum of Response signed by Dr. Patrick Gatonga and on 10<sup>th</sup> January 2022 the Applicant filed a Further Statement in Response to the Interested Party's Notice of Preliminary Objection and Memorandum of Response signed by Dr. Patrick Gatonga on 10<sup>th</sup> January 2022.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on 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.

On 10<sup>th</sup> January 2022, the Applicant filed its written submission dated 10<sup>th</sup> January 2022 together with its list of authorities dated 10<sup>th</sup> January 2022.

### **APPLICANT'S CASE**

The Applicant avers that it is a tenderer in the subject tender having submitted its tender (which tender met all eligibility and mandatory requirements in the Tender Document) by the tender submission deadline of 2<sup>nd</sup> December 2021 pursuant to invitation by the Procuring Entity by way of an advertisement on 16<sup>th</sup> November 2021.

The Applicant alleges that it received a letter dated 17<sup>th</sup> December 2021 (hereinafter referred to as the 'letter of notification of regret') from the 1<sup>st</sup> Respondent on 17<sup>th</sup> December 2021 informing it that its tender was not successful because it:

*" (a) Did not provide a duly filled and signed Form of Tender. The form of tender provided indicate that the price is for one year instead of two years as required and specified in the Bid Data Sheet section 2.2 and Terms of Reference.*

*(b) Did not submit a duly filled schedule of price form. The schedule of price submitted is for one year instead of two years as required and indicated in the Bid Data Sheet section 2.2 and Terms of Reference.*

*(c) There is nowhere in the entire bid document of the bidder indicating the second year price and even if this were specified elsewhere the filled Form of tender and price schedule could have been incomplete and not meeting the requirements of the tender issued by KCAA as it could have affected the tender sum and the bidder could not be considered for further evaluation in accordance with section 82 of the Public Procurement and Asset Disposal Act, 2015 and Regulation 74(2) of the Public Procurement and Asset Disposal Regulations, 2020 which states as follows:-....."*

It is the aforementioned reasons for finding the Applicant's tender unsuccessful that the Applicant is challenging, in this review, for being unlawful, unfair and prejudicial and in breach of Article 227(1) of the Constitution, Section 3, 79, 80(2), 82 and 86 of the Act, Regulations 74 and 77 of Regulations 2020 for the following reasons.

First, according to the Applicant, the decision by the 2<sup>nd</sup> Respondent was based on the 2<sup>nd</sup> Respondent's erroneous conclusion that the Applicant did not fill and/or sign the Form of Tender and Schedule of Price Form, which it did fill and sign, and which decision was largely influenced by the 2<sup>nd</sup> Respondent's erroneous interpretation of Section 82 of the Act and Regulation 74(2) of Regulations 2020. According to the Applicant, Section 82 of the Act and Regulations 74(2) of Regulations 2020 should be read against ITT 2.2 of Section III – Tender Data Sheet at page 22 of 76 of the Tender Document, Items 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document, Form of Tender of Section IV – Tendering Forms at page 30 to 32 of 76 of the Tender Document and Schedule of Prices Form of Section IV – Tendering Forms at page 43 of 76 of the Tender Document and when this is done, it is clear that the 2<sup>nd</sup> Respondent applied extraneous criteria in evaluating the Applicant's tender contrary to Section 80(2) of the Act for the following reasons:

- (a) ITT 2.2 of Section III – Tender Data Sheet at page 22 of 76 of the Tender Document indicates the insurance duration for each item will be for two years subject to satisfactory performance in the first year but does not provide any guidance on how the Form of Tender is to be filled.
- (b) Items 7 and 15 of Clause 2(a) of Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document require a duly filled and signed Form of Tender and a duly filled Schedule of Price Form respectively but do not provide any guidance on what 'duly filled' means.
- (c) Clause 12 and 13 of Section I - Instructions To Tenderers at page 9 and 10 of the Tender Document indicate a Form of Tender and priced activity

Schedule will form part of the documents comprising a tender and requires the Form of Tender and Schedule of Requirements to be completed without alterations to the text and all blank spaces therein to be filled with the information requested while prohibiting any substitutes of a form of tender and priced schedule and that the Applicant adhered to this because no substitutions were made for the format and all blank spaces were filled.

Secondly, requiring the Applicant to indicate in the Form of Tender the price is for two years while alleging this was required under ITT 2.2 of Section II – Tender Data Sheet at page 22 of 76 of the Tender Document and Terms of Reference, contrary to the clear wording of the Tender Document was introducing extraneous criteria because of the following:

- (a) The Schedule of Tendered Items and Prices in the Form of Tender contained only one table and the instructions to tenderers at the beginning of the Form of Tender did not provide any particular instructions on the filling of the schedule on prices.
- (b) The table of the Schedule of Tendered Items and Prices in the Form of Tender provided for filling of prices per annum with column 5 thereof requiring a tenderer to provide insurance premium per annum (which is the tender price) and column 7 thereof requiring the total tender price for insurance service per annum.
- (c) Noting the Form of Tender provided for prices per annum and ITT 2.2 of Section II – Tender Data Sheet at page 22 of 76 of the Tender Document provided for duration of insurance as two years, it follows the price for the whole duration of insurance of two years would be per annum price multiplied by the duration of two years.
- (d) Where the per annum price would remain the same for whole duration of insurance, there was no requirement for a tenderer to reproduce the table of the Schedule of Tendered Items and Prices in the Form of Tender noting

the Form of Tender did not provide a schedule of tendered items and price for year 2.

Thirdly, the Applicant alleges it duly filled and signed the Scheduled of Prices Form of Section IV – Tendering Forms at page 43 of 76 of the Tender Document and avers as follows:-

- (a) The Schedule of Price Form of Section IV – Tendering Forms at page 43 of 76 of the Tender Document is similar to the Schedule of Tendered Items and Prices in the Form of Tender of Section IV – Tendering Forms at page 30 to 32 of 76 of the Tender Document save for the former has eight columns due to introduction of a column on major contingencies requiring insurance while the latter has seven and the former does not list the price as per annum while the former does.
- (b) The Applicant's tender price in the Schedule of Price Form indicated Kshs.148,537,127.00 and which amount is clearly listed in the Applicant's Form of Tender as the insurance premium per annum (tender price) and total tender price for insurance service per annum and which price is absolute and final.

Fourth, the reason by the Procuring Entity to declare the Applicant's tender unsuccessful due to an alleged failure to indicate the second-year price (despite the form of tender requiring per annum tender pricing) and linking the reason for disqualification to Section 82 and Regulation 74 is unlawful because:

- (a) There was no error in the Applicant's tender price since its price for both years is the same hence issues of correction, adjustment or amendment of the tender sum in Section 82 of the Act and Regulation 74(2) of Regulations 2020 as referred to by the 1<sup>st</sup> Respondent in the letter of notification of regret on errors in the Applicant's submitted tender is irrelevant.
- (b) There is an inconsistency between Regulation 74 (2) of Regulations 2020 and Section 82 of the Act in which case Section 82 prevails.

- (c) Regulation 77 of Regulations 2020 guides on how financial evaluation is conducted and does not consider correction, adjustment and amendment of errors as one of the components at financial evaluation stage but instead takes into consideration the tender price in the form of tender and which price is absolute and final and not subject of correction, adjustment or amendment in any way by any person or entity when determining the evaluated price of a tender.
- (d) The Applicant's tender price could only be considered by the Procuring Entity during Financial Evaluation as provided in Clause 32 of Section I – Instructions to Tenderers at page 17 of 76 of the Tender Document, Regulation 77 of Regulations 2020 and Section 82 of the Act and not at the Preliminary Evaluation stage.

Fifth, according to the Applicant, the evaluation of its tender using extraneous criteria introduced by the 2<sup>nd</sup> Respondent on the Form of Tender and Schedule of Prices Form is in breach of Section 80(2) of the Act which requires evaluation to be conducted using the procedures and criteria set out in the Tender Document. It is the Applicant's averment that tenderers should compete on an equal footing, and to do so, they must be clearly informed of the rules of the game in advance to enable them to comply. Additional rules introduced halfway through the game, as done by the Respondents in the subject tender, results to unfair treatment of some tenderers and stifles competition contrary to Article 227(1) of the Constitution.

Six, the Applicant alleges the unfair evaluation of its tender led to violation of the principle of cost-effectiveness espoused in Article 227(1) of the Constitution since the award of the subject tender to the Interested Party will cost the Kenyan taxpayer over 17 million shillings more than what it would have costed had its tender been found to be the lowest evaluated tender.

The Applicant prays for annulment and setting aside of the award of the subject tender to the Interested Party and annulment and setting aside of the letter of notification of regret issued to it by the 1<sup>st</sup> Respondent. Further, the Applicant prays for its tender to be re-admitted for re-evaluation at the preliminary evaluation stage and for a declaration that the 2<sup>nd</sup> Respondent failed to evaluate the Applicant's tender at the preliminary and financial evaluation stage in accordance with the criteria and procedures set under the Tender Document contrary to Section 79, 80(2) and 86 of the Act and Regulations 74 and 77 of Regulations 2020. Finally the Applicant prays for the Respondents to be compelled to pay its\ costs arising from/ and incidental to this review.

## **RESPONDENT'S RESPONSE**

In response, the Respondents confirm the subject tender was floated on 16<sup>th</sup> November 2021, closed and opened on 2<sup>nd</sup> December 2021 and the duration of insurance being tendered for was a period of 2years set to commence on 1<sup>st</sup> January 2022.

The Respondents deny every allegation set out by the Applicant in the Request for Review and contend that they fully complied with Section 79 of the Act and Regulation 74 of Regulations 2020 but contend that Regulation 77 of Regulations 2020 is not applicable because the Applicant's tender did not pass the preliminary evaluation criteria.

The Respondents contend that the Applicant was unsuccessful for the reasons cited in the letter of notification of regret issued to the Applicant by the 1<sup>st</sup> Respondent and reproduced hereinbefore. According to the Respondents, the Applicant did not meet the tender requirements under Items 7 and 15 of Clause 2(a) of Preliminary Examination for Determination for Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document that required tenderers to duly fill and sign the Form of Tender and to duly fill Schedule of Price Form. This

is because, according to the Respondents, while evaluating the contents of the Applicant's tender against the requirements set forth under the Tender Document, the Respondents determined that the Applicant quoted for year 1 and omitted year 2. According to the Respondents, duly filled Form of Tender connotes the correct filling of the Form of Tender which must *ipso facto* make sense within the context of the tender in issue and must be correct in the sense of right answers in context and correct in terms of exhaustive complete filling of the Form of Tender and Schedule of Price Forms.

The Respondents contend that the Applicant having omitted to complete the Form of Tender and Schedule of Price for year 2, failed the test for possible consideration of its tender sum of Kshs.148,537,127.00 being absolute and final and that proceeding to consider the Applicant's tender will be unfair to other tenderers who participated in the subject tender. It is the Respondents contention that allowing the Applicant to amend their tender for consideration by the Respondents will be grossly in breach of Section 82 of the Act and if the Request for Review is allowed, the foreseeable issue will be upon completion of year 1 if the Applicant's tender outcome is successful, this will mean that the Respondents will have to hold negotiations for year 2 as the Applicant did not submit their quotation as instructed in the Tender Document.

The Respondent contends that the Applicant is estopped from raising issues with provisions of the Tender Document late in the day after subjecting itself to the provisions of the Tender Document.

The Respondents prayer for dismissal of the Request for Review for want of merit and for being frivolous and to be awarded costs of this Request for Review.

### **INTERESTED PARTY'S RESPONSE**

The Interested Party objects to the Request for Review on grounds that the Request for Review is time-barred by virtue of Section 75(2) of the Act and Clause 7 and 8 of

Section I – Instructions to Tenderers at page 8 of the Tender Document which provide for modification of tender documents, clarification of tender documents and clarification of tendering documents respectively read with Section 167(1) of the Act and Regulation 203(2)(c)(i) of Regulations 2020 and for being frivolous and vexatious within the meaning of Section 172 of the Act.

The Interested Party contends the Request for Review is an omnibus application that contravenes Regulation 203(2) (a) of the Regulations 2020 as it alleges breach of Section 79, 80(2), 82 and 86 of the Act and Regulation 74 and 77 of Regulations 2020 while the Applicant's tender was declared unresponsive at the preliminary examination.

The Interested Party contends that the Tender Document clearly indicated the subject tender was for 2 years and the Form of Tender and the Schedule of Prices Form required tenderers to state the insurance period and the insurance premium per specified period which the Interested Party did and if the same was not clear, the Applicant should have sought clarification from the Respondents under Section 75(2) of the Act and Clause 7 and 8 of Section I – Instructions to Tenderers at page 8 of the Tender Document.

The Interested Party contends that Section 80 of the Act is inapplicable as the Applicant's tender was non-responsive under Section 79 of the Act. Clause 40.1 of the Tender Document stipulated that the award is to be made to the lowest evaluated tender and not the lowest priced tender and that the Interested Party's tender was the lowest evaluated tender as it complied with all eligibility, technical qualification and financial requirements in the Tender Document.

The Interested Party prays for dismissal with costs to it of the Request for Review for want of merit and for being frivolous.



## **APPLICANT'S REJOINDER TO THE RESPONDENTS' RESPONSE**

The Applicant in a rejoinder to the Respondents' response, avers as follows:

- (a) The final price that forms the basis of the award in a tender can only be determined by the tender price indicated in the Form of Tender.
- (b) The Form of Tender can only be filled in line with Clause 13 of Section I – Instructions to Tenderers at page 10 of the Tender Document.
- (c) The Procuring Entity ought to only evaluate tenders in line with the criteria in the Tender Document and line with Section 80(2) of the Act and Section III – Evaluation and Qualification Criteria at page 23 of the Tender Document.
- (d) The Form of Tender provided for 7 items in the Schedule of Tendered Items and Prices in the form with the last column providing for total tender price per annum which is the final tender sum.
- (e) The indication in the Tender Data Sheet that the insurance duration is two years is not the same as stating that tenderers should quote for Year 1 and 2.
- (f) The Form of Tender was to be filled without alteration and the price to be provided would be per annum price, there was no room or requirement to quote for year 1 or 2.

The Applicant questions the format the tenderers who quoted for Year 1 and Year 2 used since the Forms provided did not allow for that or for alteration and on what basis the Respondents evaluated such tenders for 2 years in view of the 'per annum' requirements and whether such tenders should have passed the preliminary evaluation. In view of the Evaluation Criteria at page 23 of the Tender Document and Section 80(2) of the Act there was no basis of evaluating tenders that provided two prices.

That in reference to the Terms of Reference under the "Scheme Specifications" on Page 60 and line with the Form of Tender per annum quotations requirements, the Procuring Entity expressly stated that:

*"Period of cover: 2 years from the commencement of the Contract. The cover will initially be awarded for one year and the 2<sup>nd</sup> year will be renewable subject to satisfactory performance and provisions of the Procurement Regulations in force."*

That the Respondents should re-evaluate the Applicant's bid with the set-out criterion.

By way of illustration, the Applicant invited the Board to compare the contents of Price Schedule and Form of Tender in the Tender Document in the subject tender with the Tender Document used by the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') to procure for medical insurance for its own staff for the year 2020 – 2021 and how it provided for slots for prices for Year 1, and Year 2 while indicating the tender sum should be the total premium for the two years.

The Applicant prays for its Request for Review to be allowed and for its tender to be subjected to proper preliminary evaluation in accordance with criteria and procedures under the Tender Document and Section 80 (2) of the Act.

### **APPLICANT'S REJOINDER TO THE INTERESTED PARTY'S RESPONSE**

The Applicant in a rejoinder to the Interested Party's response avers that its Request for Review is filed within the statutory timelines and that it raises weighty and justiciable issues which cannot be termed as frivolous.

The Applicant avers that the crux of its case is that its tender was compliant since it provided a duly filled and signed Form of Tender and Schedule of Price Form in line with the procedures and criteria provided in the Tender Document but the 2<sup>nd</sup> Respondent did not evaluate its tender in accordance with the procedures and criteria

set out in the Tender Document but instead applied extraneous /extrinsic criteria during evaluation contrary to Section 80 (2) of the Act.

With regard to Section 75(2) of the Act, the Applicant is not challenging the content and/or the form of the Tender Document as published/issued by the 2<sup>nd</sup> Respondent to potential tenderers. The Applicant has not made any contention to the effect that the Tender Document (as is) is ambiguous or should have been modified. The Applicant has instead clearly stated that the provisions of the tender Document regarding what the Respondents wanted are clear. It is the manner of evaluation that the Applicant has raised issues with. The provisions of Section 75(2) of the Act are therefore irrelevant for purposes of establishing timelines since the breach complained of does not relate to this section of the Act.

It is the Applicant's averment that the Interested Party's Notification of Preliminary Objection is baseless, devoid of any merit and should be dismissed with costs to the Applicant as it is based on a total misapprehension of the Applicant's Request for Review.

Further, the Applicant states that the Request for Review is not an omnibus application because it is accompanied by a statement as the applicant considers necessary in line with Regulation 203(2)(a) of Regulations 2020 and revolves around one issue, the evaluation of the Applicant's tender in breach of Section 80(2) of the Act and is therefore not cumbersome as to render just determination of the Request for Review onerous.

The Applicant prays for the Request for Review to be allowed and for its tender to be subject ed to preliminary evaluation and subsequent stages of evaluation in accordance with the criteria and procedures in the Tender Document and Section 80(2) of the Act.

## **BOARD'S DECISION**

The Board has considered each of the parties' pleadings, written submissions and list of authorities together with the confidential documents submitted to it by the 2<sup>nd</sup> Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the Request for Review was filed within 14 days of notification of award or date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act and Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.**
- 2. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with Section 80(2) of the Act read with Items 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document.**
- 3. What orders should the Board grant in the circumstances.**

The Board will now proceed to address the issues framed for determination.

**Whether the Request for Review was filed within 14 days of notification of award or date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act to invoke the jurisdiction of the Board.**

The Interested Party has objected to the Request for Review praying for its dismissal on grounds that it is time barred by virtue of Section 75(2) of the Act and Clause 7 and 8 of Section I – Instructions to Tenderers at page 8 and 9 of 76 of the Tender Document which provides for modification to tender documents, clarification to tender

document and clarification of tendering document respectively and time barred by virtue of Section 167(1) of the Act and Regulation 203(2)(c)(i) of Regulations 2020 which provides for a period of within 14 days for filing of a Request for Review from the date of occurrence of breach before making of an award.

The Applicant on the other hand opposes the objection to the Request for Review on grounds that the crux of its case is that its tender was compliant since it provided a duly filled and signed Form of Tender and Schedule of Price Form in line with the procedures and criteria provided in the Tender Document but the 2<sup>nd</sup> Respondent did not evaluate its tender in accordance with the procedures and criteria set out in the Tender Document but instead applied extraneous /extrinsic criteria during evaluation contrary to Section 80 (2) of the Act and this information it obtained from the letter of notification of regret issued to it by the 1<sup>st</sup> Respondent.

Further, the Applicant avers that it is not challenging the content and/or the form of the Tender Document as published/issued by the 2<sup>nd</sup> Respondent to potential tenderers, has not made any contention to the effect that the Tender Document (as is) is ambiguous or should have been modified but has instead clearly stated that the provisions of the Tender Document regarding what the Respondents wanted are clear. It is the manner of evaluation that the Applicant has raised issues with and the provisions of Section 75(2) of the Act are therefore irrelevant for purposes of establishing timelines since the breach complained of does not relate to this section of the Act.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR**, Nyarangi, JA 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 v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

***".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows at paragraph 68 of its Ruling:

***"(68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere***

***procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....”***

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides for:

***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 for the functions and powers of the Board 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.

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 (1) of the Act which

provides for what can and cannot be subject to proceedings before the Board and Section 173 which provides for the Powers of the Board as follows:

## ***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

### ***167. Request for a review***

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

***(2) .....***

***(3) .....***

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

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act.*** [Emphasis by the Board]

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

### ***173. Powers of Review Board***

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



- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act allows an aggrieved tenderer, such like the Applicant to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

**PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS**

**203. Request for a review**

***(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***

***(2) The request referred to in paragraph (1) shall—***

***(a) .....;***

***(b) .....;***

***(c) be made within fourteen days of —***

***(i) the occurrence of the breach complained of, where the request is***

***made before the making of an award;***

***(ii) the notification under section 87 of the Act; or***

***(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***

***(d) .....***

***(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***

***(4) .....***

Regulation 203 prescribes an administrative review sought by an aggrieved tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within

14 days of (i) occurrence of breach complained of takes place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of takes place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

***(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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(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.***

***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.***

It is therefore clear from a reading of Section 167(1) & 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 allows an aggrieved tenderer to invoke the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of has taken place before an award is made, (ii) notification of intention to enter into a contract has been issued or (iii) occurrence of breach complained of

takes place after making of an award to the successful tenderer. Simply put, an aggrieved tenderer, such like the Applicant, can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

Turning to the circumstances of this case, it is common ground that the letter of notification of regret (notification of intention to enter into a contract) dated 16<sup>th</sup> December 2021 was received by the Applicant on 17<sup>th</sup> December 2021. The letter of notification of Regret was prepared on the 2<sup>nd</sup> Respondent's letterhead and signed by William Kitum for the 1<sup>st</sup> Respondent reads as follows:

**"KCAA/CONF/1010/3 VOL 49 (465)**

**16<sup>th</sup> DECEMBER 2021**

***Jubilee Health Insurance Limited***

***P.O. Box 6694-00100***

***Nairobi***

***Tel: 07009949000***

***Email: talk2us@jubileekenya.com, eric.avulala@jubileekenya.com***

***NOTIFICATION OF INTENTION TO AWARD CONTRACT FOR PROVISION OF  
INSURANCE SERVICES FOR INPATIENT AND OUTPATIENT MEDICAL COVER  
FOR KCAA BOARD MEMBERS, STAFF & DEPENDANTS. TENDER  
NO.KCAA/025/2021-2022***

.....

***Reasons why your Tender was unsuccessful is because:***

- ⇒ ***Did not provide a duly filled and signed Form of Tender. The form of tender provided indicate that the price is for one year instead of two years as required and specified in the Bid Data Sheet section 2.2 and Terms of Reference.***
- ⇒ ***Did not submit a duly filled schedule of price form. The schedule of price submitted is for one year instead of two years as required and indicated in the Bid Data Sheet section 2.2 and Terms of Reference.***
- ⇒ ***There is nowhere in the entire bid document of the bidder indicating the second year price and even if this were specified elsewhere the filled Form of tender and price schedule could have been incomplete and not meeting the requirements of the tender issued by KCAA as it could have affected the tender sum and the bidder could not be considered for further evaluation in accordance with section 82 of the Public Procurement and Asset Disposal Act, 2015 and Regulation 74(2) of the Public Procurement and Asset Disposal Regulations, 2020 which states as follows:-***
- ***Sec.82. The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.***
  - ***Regulation 74(2) – Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal or total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.***

.....

***William Kitum***

***For: Director General”***

The Applicant is dissatisfied with reasons given for finding its tender unsuccessful and is specifically challenging the manner in which its tender was evaluated. This information was not within the Applicant's knowledge prior to it receiving the letter of notification of regret on 17<sup>th</sup> December 2021 but the Applicant learnt that its tender was not evaluated in accordance with criteria set out in the Tender Document and Section 80(2) of the Act when it learnt of the reasons why its tender was disqualified on 17<sup>th</sup> December 2021. This means that Regulation 203(2)(c)(i) of Regulations 2020 is not applicable in these circumstances.

We understand the Applicant's main complain to be that the 2<sup>nd</sup> Respondent's Evaluation Committee failed to evaluate its tender in line with criteria set out in the tender Document and Section 80(2) of the Act having been notified of the reasons why its tender was unsuccessful. It is these reasons given to the Applicant why its tender was unsuccessful that the Applicant is challenging in this review. These reasons were made known to the Applicant vide a letter of notification of regret dated 16<sup>th</sup> December 2021 and received by the Applicant on 17<sup>th</sup> December 2021. The Applicant is not challenging the provisions of the Tender Document as drafted neither is it seeking for amendment of any provision of the Tender Document. In fact, the Applicant is content with the provisions of the Tender Document and is only challenging the manner in which the 2<sup>nd</sup> Respondent's Evaluation Committee applied the provisions of the Tender Document when evaluating its tender. In the circumstances, Regulation 203(2)(c)(ii) of Regulations 2020 is available to the Applicant for purposes of filing this Request for Review within 14 days of the letter of notification of regret (notification of award under Section 87 of the Act), which 14 days started running on 18<sup>th</sup> December 2021 a day after the letter of notification of regret was received by the Applicant and not 16<sup>th</sup> December 2021 being the date of the letter of notification of regret. Our interpretation is hinged on the fact that it would be absurd to have time starting to run based on the date of a letter of notification of regret when such letter of notification of regret has not been received by its intended recipient.

In computing time the board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

**57. Computation of time**

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (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;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing time within which the Applicant needed to file its request for review under Regulation 203(2)(c)(ii) of Regulations 2020 and because the breach complained of became known to the Applicant on 17<sup>th</sup> December 2021 upon issuance of a letter of notification of regret, the 17<sup>th</sup> December 2021 is excluded under Section 57(a) of IGPA being the date when the Applicant learnt of the breach. The 14 days from the 17<sup>th</sup> December 2021 within which the Applicant needed to file its request for review started running on 18<sup>th</sup> December 2021 and lapsed on 31<sup>st</sup> December 2021.

We note the Applicant had up to the 31<sup>st</sup> December 2021 within which to file its request for review being 14 days from the 17<sup>th</sup> December 2021 when the Applicant learnt of the breach complained of. The Applicant filed this Request for Review on 24<sup>th</sup> December 2021 on the 7<sup>th</sup> day after learning of the breach complained of.

In the circumstances, we find the Request for Review was filed within 14 days of the Applicant learning of the alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board and we find this Board has jurisdiction to determine the issues raised in the Request for Review.

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with Section 80(2) of the Act read with Items 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document.**

We have hereinbefore enumerated the reasons given to the Applicant by the 1<sup>st</sup> Respondent for finding the Applicant's tender unsuccessful and noted the Applicant is aggrieved by the aforementioned reasons.

According to the Applicant, it submitted a duly filled and signed Form of Tender and a duly filled Schedule of Price Form containing the tender price per annum and which amount should be construed to be the same amount per annum for each of the two years of the duration of the insurance services tendered for.

However, the Respondent contends that the Applicant only quoted the price of Year 1 while omitting Year 2 yet the duration of insurance tendered for is for two years. According to the Respondent, since duly filled means correct filling with right answers,



the Form of Tender and Schedule of Price Form of the Applicant were not duly filled because the Applicant only quoted premium/tender price for Year 1 and omitted Year 2 yet the Tender Document required a tenderer to quote both Year 1 and Year 2 premiums.

The Board is cognizant of Article 227 of the Constitution which provides for the kind of system the 2<sup>nd</sup> Respondent is required to apply when contracting for goods or services as follows:

***Article 227. Procurement of public goods and services***

- (1) 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.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
  - (a) .....***
  - (b) .....***
  - (c) ..... and***
  - (d) .....***

The Act of Parliament envisaged in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation of tenders should be conducted and provides as follows:

**Section 80. Evaluation of tenders**

**(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**

**(3) .....**

**(4) .....**

**(5) .....**

**(6) .....**

**(7) .....**

The import of Section 80 (1) and (2) of the Act read with Article 227 (1) of the Constitution requires an evaluation committee to evaluate tenders in a system that is fair using the criteria and procedure laid out in a tender document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers because such criteria was provided for in a tender document issued to tenderers by a procuring entity.

We have carefully studied the Tender Document and note the criteria for evaluation of the subject tender is contained in Section III: Evaluation and Qualification Criteria running through pages 24 to 29 of 76 of the Tender Document.

Clause 1. General Provision of Section III – Evaluation and Qualification Criteria at page 24 of 76 of the Tender Document provides as follows in part:

**.....**

***This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The Tenderer shall***

***provide all the information requested in the forms included in Section IV, Tendering Forms.***

***.....***

***Evaluation and contract award Criteria***

***The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender***

***.....***

The Tender Document of the subject tender communicated to tenderers that evaluation of tenders will be conducted using the criteria and methodologies set out under Section III – Evaluation and Qualification Criteria at pages 24 to 29 of 76 of the Tender Document and no other factors, methods or criteria will be used.

Item 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 24 of 76 of the Tender Document are mandatory criteria for evaluation requiring submission of a duly filled and signed Form of Tender and a duly filled Schedule of Price Form by a tenderer.

We also note there are other provisions of the Tender Document that speak to Form of Tender and Schedule of Requirements as follows:-

Clause 12 of Section I - Instructions To Tenderers at page 9 of 76 of the Tender Document provides as follows;

***12.1 The Tender shall comprise the following:***

***a) Form of Tender;***

***b) Schedules: priced Activity Schedule completed in accordance with ITT 13 and ITT 15;***

***c) .....***

***d) .....***

***e) .....***

***f) .....***

***g).....***

***h) .....***

***i) .....***

***j) .....***

Clause 13 of Section I - Instructions To Tenderers at page 10 of 76 of the Tender Document provides as follows;

**13.1 The Form of Tender and priced Schedule of Requirements shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 21.3. All blank spaces shall be filled in with the information requested. The Tenderer shall chronologically serialize pages of all tender documents submitted.**

Section IV -Tendering Forms at page 30 of 76 of the Tender Document provides for the Form of Tender tenderers were to fill referred in Clause 13.1 of Section I - Instructions To Tenderers at page 10 of 76 of the Tender Document which form reads as follows:

## ***SECTION IV- TENDERING FORMS***

### ***1. Form of Tender***

#### ***INSTRUCTIONS TO TENDERERS***

***i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the***

***Tenderer's complete name and business address.***

- ii) All italicized text is to help Tenderer in preparing this form.***
- iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDERER and TENDERER' SELIGIBILITY - CONFIDENTIAL BUSINESS QUESTIONNAIRE all attached to this Form of Tender.***
- iv) The Form of Tender shall include the following Forms duly completed and signed by the Tenderer.***
  - a) Tenderer's Eligibility-Confidential Business Questionnaire***
  - b) Certificate of Independent Tender Determination***
  - c) Self-Declaration of the Tenderer***

***Date of this Tender submission:\_\_\_\_[insert date (as day, month and year) of Tender submission] ITT No.: \_\_\_\_\_[insert number of ITT process]***

***To:\_\_\_\_\_ [insert complete name of Procuring Entity]***

- a) No reservations: We have examined and have no reservations to the tendering document, including Addenda issued in accordance with ITT 9;***
- b) Eligibility: We meet the eligibility requirements and have no conflict of interest in accordance with ITT 4;***
- c) Tender-Securing Declaration: We have not been suspended***

***nor declared ineligible by the Procuring Entity based on execution of a Tender-Securing Declaration or Proposal-Securing Declaration in Kenya in accordance with ITT 21;***

***d) Conformity: We offer to provide the Insurance Services in conformity with the tendering document of the following: [insert the list of items tendered for and a brief description of the Insurance Services];***

***SCHEDULE OF TENDERED ITEMS ND PRICES***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>	<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
<b><i>No of item to be insured</i></b>	<b><i>Brief description of item to be insured</i></b>	<b><i>Value of item to be insured</i></b>	<b><i>Insurance period</i></b>	<b><i>Insurance Premium per annum (Tender Price)</i></b>	<b><i>Price discount (if any)</i></b>	<b><i>Total Tender Price for Insurance Service per annum</i></b>
<b><i>No 1</i></b>						
<b><i>No 2</i></b>						
<b><i>No 3</i></b>						

- e) Discounts: The discounts offered and the methodology for their application are:***
- i) The discounts offered are: [Specify in detail each discount offered.]***
- ii) The exact method of calculations to determine the net price after application of discounts is shown below: [Specify in detail the method that shall be used to apply the discounts];***
- f) Tender Validity Period: Our Tender shall be valid for the period specified in TDS 19.1(as amended if applicable) from the date fixed for the Tender submission deadline (specified in TDS 23.1(as amended if applicable), and it shall remain binding upon us and may be accepted at any time before the expiration of that period;***
- g) Performance Security: If our Tender is accepted, we commit to obtain a Performance Security in accordance with the tendering document;***
- h) One Tender Per Tenderer: We are not submitting any other Tender (s) as an individual Tenderer, and we are not participating in any other Tender (s) as a Joint Venture member or as a subcontractor, and meet the requirements of ITT 4.3, other than***

***alternative Tenders submitted in accordance with ITT 14;***

- i) Suspension and Debarment: We, along with any of our subcontractors, suppliers, consultants, manufacturers, or insurance Providers for any part of the contract, are not subject to, and not controlled by any entity or individual that is subject to, a temporary suspension or a debarment imposed by the PPRA. Further, we are not in eligible under Kenya's official regulations or pursuant to a decision of the United Nations Security Council;***
- j) State-owned enterprise or institution: [select the appropriate option and delete the other] [We are not a state- owned enterprise or institution]/ [We are a state-owned enterprise or institution but meet the requirements of ITT 4.6];***
- k) Commissions, gratuities and fees: We have paid, or will pay the following commissions, gratuities, or fees with respect to the Tendering process or execution of the Contract: [insert complete name of each Recipient, including Insurance Brokers, its full address, the reason for which each commission or gratuity was paid and the amount and currency***



***of each such commission or gratuity,]***

<b><i>Name Recipient</i></b>	<b><i>of Address</i></b>	<b><i>Reason</i></b>	<b><i>Amount</i></b>

***(If none has been paid or is to be paid, indicate "none.")  
[Delete if not appropriate, or amend to suit] We confirm  
that we understand the provisions relating to Standstill  
Period as described in this tendering document and the  
Procurement Regulations.***

***(m) Binding Contract: We understand that this Tender,  
together with your written acceptance thereof included  
in your Form of Acceptance, shall constitute a binding  
contract between us, until a formal contract is prepared  
and executed;***

***(n) Not Bound to Accept: We understand that you are not  
bound to accept the lowest evaluated cost Tender, the  
Best Evaluated Tender or any other Tender that you may***

*receive;*

***(o) Fraud and Corruption: We here by certify that we have taken steps to ensure that no person acting for us or on our behalf engages in any type of Fraud and Corruption.***

***(p) Collusive practices: We here by certify and confirm that the tender is genuine, non-collusive and made with the intention of accepting the contract if awarded. To this effect we have signed the "Certificate of Independent tender Determination" attached below; and***

***(q) Code of Ethical Conduct: We under take to adhere by the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from (specify website) during the procurement process and the execution of any resulting contract.***

***(r) We, the Tenderer, have completed fully and signed the following Forms as part of our Tender:***

***(i) Tenderer's Eligibility; Confidential Business Questionnaire – to establish we are not in any conflict to interest.***

***(ii) Certificate of Independent Tender Determination –***

***to declare that we completed the tender without colluding with other tenderers.***

***(iii) Self-Declaration of the Tenderer—to declare that we will, if awarded a contract, not engage in any form of fraud and corruption.***

***(iv) Declaration and commitment to the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal.***

***Further, we confirm that we have read and understood the full content and scope of fraud and corruption as informed in "Appendix 1-Fraud and Corruption" attached to the Form of Tender.***

***Name of the Tenderer: \*[insert complete name of person signing the Tender]***

***Name of the person duly authorized to sign the Tender on behalf of the Tenderer: \*\*:..... [insert complete name of person duly authorized to sign the Tender]***

***Title of the person signing the Tender:..... [insert complete title of the person signing the Tender ] Signature of the person named above :..... [insert signature of person whose name and capacity are shown above]***

***Date signed:..... [insert date of signing] day of [insert month], [insert year].***

The template of the Form of Tender provided in Section IV – Tendering Forms at page 30 of 76 of the Tender Document required the following:

- a) to be prepared on the tenderer's letterhead showing tenderer's name and business address;
- b) to have attached to it completed and signed certificate of independent tender determination, self-declaration of the tenderer and tenderer's eligibility – confidential business questionnaire forms;
- c) to indicate the date of tender submission;
- d) to indicate the tender number;
- e) to indicate the Procuring Entity's name;
- f) to fill in the Schedule of tendered items and prices table in the Form of Tender with insurance premium per annum (being the tender price) and list of items tendered for and a brief description of the insurance services among other items;
- g) to indicate the name of the tenderer;
- h) to indicate the name of the person duly authorized to sign the tender on behalf of the tenderer;
- i) to indicate the title of the person signing the tender;
- j) to have the signature of the person duly authorized to sign the tender on behalf of the tenderer affixed therein; and
- k) to indicate the date the Form of Tender is signed.

Even though the insurance service duration tendered for in the subject tender was for 2 years commencing 1<sup>st</sup> January 2022 with the 2<sup>nd</sup> year

subject to satisfactory performance in the 1<sup>st</sup> year, we confirm, nowhere in the Form of Tender was a tenderer required to fill in insurance premium per annum (tender price) for Year 1 and Year 2 as alluded to by the Respondents. The Form of Tender had only one table of Schedule of Tendered Items and Prices which table at column 5 and 7 thereof provided for insurance premium per annum (tender price) and total tender price for insurance service per annum as rightly stated by the Applicant.

The Respondents have argued that they used the standard tender documents provided by the Authority in accordance with Section 70 of the Act. We however note a procuring entity is required to use a tender document that contains sufficient information to allow fair competition among those who may wish to submit tenders in accordance with Section 70(3) of the Act. One way of ensuring a tender document has sufficient information is by way of customizing the standard tender document to suit the need of a procuring entity which is permissible under paragraph 9 of the standard tender document for insurance services provided by the Authority.

In our considered view, nothing stopped the Respondents from providing a table of Schedule of Tendered Items and Prices that caters for Year 1 and Year 2.

Section IV -Tendering Forms at page 43 of 76 of the Tender Document provides for the Schedule of Prices Form which required tenderers to fill in and which reads as follows:

## ***SCHEDULE OF PRICES FORM***

***[The Procuring Entity shall fill in these Forms to indicate the List of Insurance Services required by the Procuring Entity [Columns 1-4 and the Tenderer shall complete columns 5-7 as his/her Tender].***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>		<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
<b><i>No of item to be insured</i></b>	<b><i>Description of item to be insured</i></b>	<b><i>Value of item to be insured</i></b>	<b><i>Major contingencies requiring insurance</i></b>	<b><i>Insurance period</i></b>	<b><i>Insurance Premium per specified period (Tender Price)</i></b>	<b><i>Price discount (if any)</i></b>	<b><i>Total Tender Price for Insurance Service (Col. 5 -6)</i></b>
<b><i>No 1</i></b>							
<b><i>No 2</i></b>							

<b>No</b> <b>3</b>							
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***Name of Tenderer ..... [insert complete name of Tenderer]***

***Signature of Tenderer ..... [signature of person signing the Tender]***

***Date ..... [insert date]***

The template of the table of Schedule of Prices Form provided in Section IV – Tendering Forms at page 43 of 76 of the Tender Document required the following:

- a) to indicate the list of insurance services required by the procuring entity at columns 1 to 4 thereof;
- b) to indicate the insurance premium per specified period (tender price), price discount (if any) and the total tender price for insurance service at columns 5 to 7 respectively;
- c) to indicate the name of the tenderer;
- d) to have the signature of the person signing the tender affixed therein;
- e) to date the Schedule of Prices Form.

Even though the insurance duration tendered for in the subject tender was for 2 years commencing 1<sup>st</sup> January 2022 with the 2<sup>nd</sup> year subject to satisfactory performance in the 1<sup>st</sup> year, we confirm nowhere in the Schedule

of Prices Form was a tenderer required to fill in insurance premium per annum (tender price) for Year 1 and Year 2 as alluded to by the Respondents. The Schedule of Prices Form had only one table and which table at column 5 and 7 thereof provided for insurance premium per specified period (tender price) and total tender price for insurance service as rightly stated by the Applicant.

In our considered view, nothing stopped the Respondents from providing a Schedule of Prices Form that caters for Year 1 and Year 2.

It is clear from the provisions of the Tender Document cited hereinbefore it was a mandatory requirement for a tenderer to submit a duly filled and signed Form of Tender and a duly filled Schedule of Prices Form. These Form of Tender and Schedule of Prices Form would take the form provided at page 30 to 32 of 76 of the Tender Document and 43 of 76 of the Tender Document respectively as reproduced hereinbefore.

We observe the Form of Tender and Schedule of Prices Form made no reference requiring tenderers to provide total tender price for insurance service for two years. However, the Form of Tender in its Schedule of Tendered Items and Prices provides a table requiring insurance premium to be quoted per annum as the tender price.

We have carefully studied the Applicant's original tender submitted to the Board as part of confidential documents by the 2<sup>nd</sup> Respondent and note at



page 25 thereof, the Applicant submitted the Schedule of Prices Form which took the form of the Schedule of Prices Form in Section IV – Tendering Forms at page 43 of 76 of the Tender Document as follows:

***SCHEDULE OF PRICES FORM***

***[The Procuring Entity shall fill in these Forms to indicate the List of Insurance Services required by the Procuring Entity [Columns 1-4 and the Tenderer shall complete columns 5-7 as his/her Tender].***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>		<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
<b><i>No of item to be insured</i></b>	<b><i>Description of item to be insured</i></b>	<b><i>Value of item to be insured</i></b>	<b><i>Major contingencies requiring insurance</i></b>	<b><i>Insurance period</i></b>	<b><i>Insurance Premium per specified period (Tender Price)</i></b>	<b><i>Price discount (if any)</i></b>	<b><i>Total Tender Price for Insurance Service (Col. 5-6)</i></b>
<b><i>No 1</i></b>	<b><i>Board Memb</i></b>	<b><i>As per</i></b>	<b><i>As per terms</i></b>	<b><i>Year 1</i></b>	<b><i>396,130</i></b>	<b><i>N/A</i></b>	<b><i>396,130</i></b>

	<b><i>ers Medic al Sche me</i></b>	<b><i>term s of refer ence</i></b>	<b><i>of referen ce</i></b>				
<b><i>No 2</i></b>	<b><i>Staff and depen dents Out Patie nt and In Patie nt Medic al Sche me</i></b>	<b><i>As per term s of refer ence</i></b>	<b><i>As per terms of referen ce</i></b>	<b><i>Year 1</i></b>	<b><i>148,1 40,99 7</i></b>	<b><i>N/A</i></b>	<b><i>148,140 , 997</i></b>
<b><i>No 3</i></b>							<b><i>148,537 ,127.00</i></b>

On the other hand, at page 10, 11 and 12 of the Applicant's original tender, the Applicant submitted an original Form of Tender which took the form of the Form of Tender in Section IV – Tendering Forms at page 30 to 32 of 76 of the Tender Document. The Applicant's Form of Tender is indicated to be for the subject tender as KCAA/025/2021-2022 has been inserted therein as the number of the ITT process. Further, the Applicant filled Column 7 Schedule of Tendered Items and Prices in the Applicant's Form of Tender as follows:

***SCHEDULE OF TENDERED ITEMS ND PRICES***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>	<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
<b><i>No of item to be insured</i></b>	<b><i>Brief description of item to be insured</i></b>	<b><i>Value of item to be insured</i></b>	<b><i>Insurance period</i></b>	<b><i>Insurance Premium per annum (Tender Price)</i></b>	<b><i>Price discount (if any)</i></b>	<b><i>Total Tender Price for Insurance Service per annum</i></b>
<b><i>No 1</i></b>	<b><i>Board Members</i></b>	<b><i>As per TOR</i></b>	<b><i>Year 1</i></b>	<b><i>396,130</i></b>	<b><i>N/A</i></b>	<b><i>396,130</i></b>
<b><i>No 2</i></b>	<b><i>Staff &amp; Dependants</i></b>	<b><i>As per TOR</i></b>	<b><i>Year 1</i></b>	<b><i>148,140,997</i></b>	<b><i>N/A</i></b>	<b><i>148,140,997</i></b>
<b><i>No 3</i></b>						<b><i>148,537,127</i></b>

It is clear that the Applicant provided a total tender price for insurance service of Kshs.148,537,127 (as the currency of tender under Clause 16.1 of Section I – Instructions to Tenderers is Kenya Shillings) at the 5<sup>th</sup> row of column eight but numbered 7 of its Schedule of Prices Form. This amount of Kshs.148,537,127 is what has been transferred to the 5<sup>th</sup> row of the seventh column of the Schedule of Tendered Items and Prices of the Form of Tender as total tender price for insurance service per annum.

The Cambridge English Dictionary defines the words per annum as, words;

***'used in business when referring to an amount that is produced, sold, or spent each year'***

With this definition, we construe the Form of Tender as submitted by the Applicant with respect to the subject tender whose duration of insurance services being tendered for is 2 years to mean the total tender price for each of the two years of the duration of the insurance services tendered for is Kshs.148,537,127/= . This construction of the Applicant's Form of Tender negates the Respondents allegation that if the Applicant is found to be the lowest evaluated tenderer, the Respondents will have to negotiate on the tender price for the 2<sup>nd</sup> year. We say so because, Section 82 of the Act states that the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person. What this means is that the Applicant is bound by its tender price (tender sum) of

Kshs.148,537,127/= per annum which we have construed to be for each of the two years of the duration of the insurance services tendered for. Simply put, if the Applicant is found to be the lowest evaluated tenderer culminating to a contract being entered between the 2<sup>nd</sup> Respondent and the Applicant, the Applicant will be entitled to a premium pay of Kshs.148,537,127/= inclusive of all applicable taxes by the 2<sup>nd</sup> Respondent for the first year of the two years of the duration of the insurance services tendered for and another premium pay of Kshs.148,537,127/= inclusive of all applicable taxes for the second year of the two years of the duration of insurance services tendered for subject to satisfactory performance in the first year. This position is buttressed by the fact that the intention of the 2<sup>nd</sup> Respondent is to enter into a contract for a period of two years subject to satisfactory provision of services in the first year for a contract price that will be made in one lumpsum on contract signature per year based on the evaluated price of a successful tenderer as provided in GC Clause 6.2-6.3 of Section VII – Special Conditions of Contract at page 72 of 76 of the Tender Document.

We note the Applicant filled all the blank spaces of both the Form of Tender and Schedule of Prices Form with information required or requested for in the Form of Tender and Schedule of Prices Form. We also note that both the Applicant's Form of Tender and Schedule of Prices Form were signed by Dr. Patrick Gatonga, the Chief Executive Officer of the Applicant and lastly, we note that both the Applicant's Form of Tender and Schedule of Prices Form were not altered but were similar to those provided in the Tender Document

save for the same being filled with information as requested in the said forms by the Applicant.

In the circumstances, we find the Applicant provided a Form of Tender and a Schedule of Prices Form that are duly filled and signed as required under Item 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document read with Form of Tender of Section IV – Tendering Forms at page 30 to 32 of 76 of the Tender Document and Schedule of Prices Form of Section IV – Tendering Forms at page 43 of 76 of the Tender Document.

In comparison to what the Applicant provided, we have carefully studied the Interested Party's original tender submitted to the Board as part of confidential documents by the 2<sup>nd</sup> Respondent and note at page 45 thereof, the Interested Party submitted the Schedule of Prices Form which took a form different to the form of the Schedule of Prices Form in Section IV – Tendering Forms at page 43 of 76 of the Tender Document as follows:

***SCHEDULE OF PRICES FORM***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>	<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
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<b><i>No of item to be insu red</i></b>	<b><i>Descriptio n of item to be insured</i></b>	<b><i>Value of item to be insur ed</i></b>	<b><i>Insur ance perio d</i></b>	<b><i>Insuranc e Premium per annum (Tender Price)</i></b>	<b><i>Pric e disc ount (if any)</i></b>	<b><i>Total Tender Price for Insuranc e Service (Col.5-6)</i></b>
<b><i>No 1  YEA R 1</i></b>	<b><i>KCAA/025 /2021- 2022 Provision of Insurance Services for Inpatient &amp; Outpatien t Medical Cover for KCAA Board Members,</i></b>	<b><i>As per the tende r docu ment</i></b>	<b><i>Year 1</i></b>	<b><i>156,550, 000/=</i></b>	<b><i>N/A</i></b>	<b><i>156,550, 000/=</i></b>

	<b><i>Staff &amp; Dependents</i></b>					
<b><i>No 2</i></b> <b><i>YEA R 2</i></b>	<b><i>KCAA/025 /2021-2022 Provision of Insurance Services for Inpatient &amp; Outpatient Medical Cover for KCAA Board Members, Staff &amp; Dependents</i></b>	<b><i>As per the tender document</i></b>	<b><i>Year 2</i></b>	<b><i>157,550,000/=</i></b>	<b><i>N/A</i></b>	<b><i>157,550,000/=</i></b>
<b><i>No 3</i></b>						



On the other hand, at page 22, 23 and 24 of the Interested Party's original tender, the Interested Party submitted an original Form of Tender which took a different form from the Form of Tender in Section IV – Tendering Forms at page 30 of 76 of the Tender Document. The Interested Party's Form of Tender is for the subject tender since KCAA/025/2021-2022 is inserted therein as the number of the ITT process. Further, the Interested Party filled Column 7 of Schedule of Tendered Items and Prices in the Applicant's Form of Tender as follows:

***SCHEDULE OF PRICES***

<b><i>1</i></b>	<b><i>2</i></b>	<b><i>3</i></b>	<b><i>4</i></b>	<b><i>5</i></b>	<b><i>6</i></b>	<b><i>7</i></b>
<b><i>No of item to be insured</i></b>	<b><i>Description of item to be insured</i></b>	<b><i>Value of item to be insured</i></b>	<b><i>Insurance period</i></b>	<b><i>Insurance Premium per annum (Tender Price)</i></b>	<b><i>Price discount (if any)</i></b>	<b><i>Total Tender Price for Insurance Service (Col.5-6)</i></b>
<b><i>No 1  YEA R 1</i></b>	<b><i>KCAA/025 /2021-2022  Provision of</i></b>	<b><i>As per the tender</i></b>	<b><i>Year 1</i></b>	<b><i>156,550,000/=</i></b>	<b><i>N/A</i></b>	<b><i>156,550,000/=</i></b>

	<b><i>Insurance Services for Inpatient &amp; Outpatient Medical Cover for KCAA Board Members, Staff &amp; Dependents</i></b>	<b><i>document</i></b>				
<b><i>No 2 YEA R 2</i></b>	<b><i>KCAA/025 /2021-2022 Provision of Insurance Services for Inpatient &amp; Outpatient</i></b>	<b><i>As per the tender document</i></b>	<b><i>Year 2</i></b>	<b><i>157,550,000/=</i></b>	<b><i>N/A</i></b>	<b><i>157,550,000/=</i></b>

	<b><i>t Medical Cover for KCAA Board Members, Staff &amp; Dependen ts</i></b>					
<b><i>No 3</i></b>						

It is clear that the Interested Party provided a tender price of Kshs.156,550,000/= for Year 1 and Kshs.157,550,000/= for Year 2 for the subject tender in which the duration of insurance tendered for is two years and the currency of tender under Clause 16.1 of Section I – Instructions to Tenderers is Kenya Shillings.

It therefore follows the Form of Tender as submitted by the Interested Party can be construed to mean the tender price for the first year of the two years is Kshs.156,550,000/= while that for the second year of the duration of the insurance services tendered for is Kshs.157,550,000/=.

We note the Interested Party filled all the blank spaces on both the Form of Tender and Schedule of Prices Form. We also note that both the Interested

Party's Form of Tender and Schedule of Prices Form were signed by Dr. Jonah Wachira, the GM-Sales and Marketing of the Interested Party and lastly, we note that both the Interested Party's Form of Tender and Schedule of Prices Form were both slightly different from what was provided in the Tender Document. For instance, the Schedule of Prices Form in the Tender Document had eight columns whilst that of the Interested Party's has seven columns totally disregarding the column known as 'Major contingencies requiring insurance'. The second difference is the introduction of Year 1 and Year 2 in the 3<sup>rd</sup> and 4<sup>th</sup> rows of column 1 in both Form of Tender and Schedule of Prices Form and lastly, both the table in the Form of Tender known as Schedule of Tendered Items and Prices and Schedule of Prices Form in the Applicant's tender are the same yet there is a slight difference between the two in the Tender Document. In essence, the Interested Party altered the Form of Tender and the Schedule of Prices Form perhaps to accommodate a quotation of tender price for Year 1 and Year 2.

It is therefore absurd that despite the Interested Party having altered the Form of Tender and the Schedule of Prices Form, was awarded the subject tender and the Applicant who duly filled and signed the Form of Tender and Schedule of Prices Form without alteration was unsuccessful at the Preliminary Evaluation Stage for not quoting a tender price for Year 2 yet it quoted a tender price of Kshs.148,537,127.00 for each year of the two years of the insurance services being tendered for as provided in the Form of Tender.

It therefore follows that the 2<sup>nd</sup> Respondent's Evaluation Committee unfairly found the Applicant's tender unsuccessful on account of not having duly filled and signed the Form of Tender and Schedule of Prices Form, which we have established the Applicant duly filled and signed without alteration.

In the circumstances, we find the 2<sup>nd</sup> Respondent's Evaluation Committee did not evaluate the Applicant's tender in accordance with the provisions of Section 80(2) of the Act read with Item 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document.

**What orders should the Board grant in the circumstances.**

We have found the Applicant provided a duly filled and signed Form of Tender and Schedule of Price Form in its original tender in accordance with Item 7 and 15 of Clause 2(a) Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 25 of 76 of the Tender Document. We have noted the 2<sup>nd</sup> Respondent's Evaluation Committee unfairly found the Applicant's tender to be unsuccessful at Preliminary Evaluation Stage only on grounds that the Applicant had not provided a duly filled and signed Form of Tender and Schedule of Price Form which reasons we have found to be erroneous. It is therefore fair and just to order the 1<sup>st</sup> Respondent to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to admit the Applicant's tender to the Technical Evaluation Stage and conduct a re-evaluation of tenders that made

it to the Technical Evaluation Stage. We say so because, no other reason was advanced for finding the Applicant's tender unsuccessful at the Preliminary Evaluation Stage other than the reasons we have found to be erroneous.

We also note Madison General Insurance Kenya Limited's tender was unsuccessful at the Preliminary Evaluation Stage for reasons similar to those of the Applicant's tender's unsuccessfulness. However, in addition to these reasons, Madison General Insurance Kenya Limited's tender was found unsuccessful for a third reason being it did not provide five corresponding recommendation letters from the respective stated clients because it only provided two recommendation letters from Kenya Medical Research Institute and Kenya Bureau of Standards only. With this and noting that Madison General Insurance Kenya Limited has not challenged the reasons for its tender being found unsuccessful, its tender cannot proceed for Technical Evaluation having failed at the Preliminary Evaluation stage.

Lastly, to enable a re-evaluation to be conducted at Technical Evaluation it is only fair and just that the award of the subject tender to the Interested Party is nullified and the notification of regret to unsuccessful tenderers to also be nullified.

Given the foregoing, the Request for Review succeeds with respect to the following specific orders.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 24<sup>th</sup> December 2021:

- 1. The letter of notification of award dated 16<sup>th</sup> December 2021 issued to the Interested Party by the 1<sup>st</sup> Respondent in Tender No: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants be and is hereby cancelled and set aside.**
- 2. The letter of notification of regret dated 16<sup>th</sup> December 2021 issued to the Applicant and all other unsuccessful tenderers by the 1<sup>st</sup> Respondent in Tender No: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants be and are hereby cancelled and set aside.**
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to admit the Applicant's tender for Technical Evaluation together with any other tenderer's tender that rightfully made it to the Technical Evaluation stage and conduct a re-evaluation at the Technical Evaluation Stage in accordance with Section 80 (2) of the Act taking into consideration the findings of the Board in this decision.**

- 4. The 1<sup>st</sup> Respondent is hereby directed to complete the procurement process in Tender No: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants to its logical conclusion including the making of an award to the lowest evaluated tenderer within 14 days from the date of this decision.**
- 5. Given that the procurement proceedings in Tender No: KCAA/025/2021-2022 for provision of insurance services for inpatient and outpatient medical cover for KCAA Board Members, Staff and Dependants are not complete, each party will bear its own costs.**

**Dated at Nairobi this 14<sup>th</sup> day of January 2022**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**