

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 142/2021 OF 23RD NOVEMBER 2021

BETWEEN

LIAISON HEALTHCARE LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER,
PARLIAMENTARY JOINT SERVICES,
PARLIAMENTARY SERVICES COMMISSION 1ST RESPONDENT
MINET KENYA INSURANCE BROKERS LIMITED ... 2ND RESPONDENT
AAR INSURANCE BROKERS LTD 1ST INTERESTED PARTY**

Review against the decision of the Accounting Officer of Parliamentary Joint Services, Parliamentary Services Commission in relation to Tender Number: PJS/007/2021-2022 for Provision of Medical Insurance Cover for Members of Parliament.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Isabella Juma | -Member |
| 3. Ms. Rahab Robi | -Member |

- | | |
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| 4. Arch. Steven Oundo, OGW | -Member |
| 5. Mr. Ambrose Ogeto | -Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The Parliamentary Joint Services (hereinafter referred to as the 'Procuring Entity') through the Director General, Parliamentary Joint Services, Parliamentary Service Commission, the 1st Respondent herein, invited sealed tenders for Tender No. PJS/007/2021-2022 for Provision of Medical Insurance Cover for Members of Parliament (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through an open tender in The Standard newspaper, the Star newspaper, the Parliamentary Service Commission's website (www.parliament.go.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 17th September 2021.

Pre-tender Meeting

A pre-tender meeting was held on 24th September 2021 at 11.00 am wherein thirteen (13) representatives of prospective tenderers' attended as captured in the minutes of the pre-tender meeting of 24th September 2021 (hereinafter referred to as the 'Pre-tender Meeting').

Addendum

The 1st Respondent issued several addenda with the last addendum issued on 24th October 2021 through the Nation and the Standard newspapers extending the tender submission deadline to 27th October 2021 at 11:00hrs.

Tender Submission Deadline and Opening of Tenders

The Procuring Entity received a total of nine (9) tenders by the extended tender submission deadline of 27th October 2021 at 11:00 am as captured in the minutes of the tender opening committee of 27th October 2021 (hereinafter referred to as the 'Tender Opening Minutes'). The nine (9) tenders were opened shortly thereafter in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their tenders and assigned the following numbers;

1. M/s CIC General Insurance Limited
2. M/s APA Insurance Limited
3. M/s Zamara Risk and Insurance Brokers Limited
4. M/s Minet Kenya Insurance Brokers Limited
5. M/s AAR Insurance Kenya Limited
6. M/s Kenbright Healthcare Administrators Limited
7. M/s Liaison Healthcare Limited
8. M/s Britam General Insurance Company (Kenya) Limited
9. M/s First Assurance Company Limited

In addition to reading out loud the name of the tenderer submitting a tender, tender amount (total amount quoted as per the form of tender), tender

security amount and source of the tender security for each tender were read out loudly and the tenderers' representatives signed the attendance register for firms representatives on 27th October 2021 (hereinafter referred to as the 'Tenderers' Representatives Attendance Register').

Evaluation of Tenders

Going by an Evaluation Report executed by all members of the Procuring Entity's Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') on 4th November 2021 (hereinafter referred to as the 'Evaluation Report'), the Evaluation Committee evaluated tenders with respect to the subject tender in the following three (3) stages: -

1. Preliminary/ Mandatory Evaluation;
2. Technical Evaluation; and
3. Financial Evaluation.

Preliminary/ Mandatory Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause A) Stage One Mandatory Requirements (to be evaluated on a 'Yes or No' basis) of Section III - Evaluation and Qualification Criteria at page 25 and 26 of the Blank Tender Document issued to tenderers by the 1st Respondent (hereinafter referred to as the 'Tender Document'). At the end of this stage of evaluation, all nine (9) tenders were found responsive thus proceeded for technical evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage Two: Technical Evaluation (Total Points 100) of Section III - Evaluation and Qualification Criteria at page 26 and 27 of the Tender Document. Tenders which attained a minimum pass mark of 80% proceeded for financial evaluation. Two (2) tenders submitted by Zamara Risk and Insurance Brokers Limited and Britam General Insurance Company (Kenya) Limited were found non-responsive having failed to meet the required minimum pass mark of 80%, while seven (7) tenders including the Applicant's, the 2nd Respondent's and the 1st Interested Party's tenders were found responsive having attained the required minimum pass mark of 80% thus proceeded for financial evaluation.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Stage Three: Financial Evaluation of Section III - Evaluation and Qualification Criteria at page 27 of the Tender Document. M/s Minet Kenya Insurance Brokers Ltd, the 2nd Respondent herein, was determined as having submitted the lowest evaluated tender at a tender sum of Kshs. 344,921,960.00 (Kenya Shillings Three Hundred and Forty-Four Million, Nine Hundred and Twenty-One Thousand, Nine Hundred and Sixty-One inclusive of all taxes) whilst M/s Liaison Healthcare Limited, the Applicant herein, was determined to have submitted the fourth lowest evaluated tender at a sum of Kshs.358,379,524.00 and which Applicant's tender sum was higher than the second and third lowest evaluated tenders submitted by M/s AAR Insurance

Kenya Limited at Kshs.345,621,960.00 and M/s First Assurance Company Limited at Kshs.348,015,966.00 respectively.

Recommendation

The Evaluation Committee recommended award of the subject tender to the 2nd Respondent at its tender sum of Kshs.344,921,960.00 (Kenya Shillings Three Hundred and Forty-Four Million, Nine Hundred and Twenty-One Thousand, Nine Hundred and Sixty-One inclusive of all taxes).

Professional Opinion

In a Professional Opinion dated 8th November 2021, the Procuring Entity's Chief Procurement Officer, Mr Keith Kisinguh, reviewed the procurement process in the subject tender, including the evaluation of tenders and was of the opinion that the process was carried out in accordance with the law, concurred with the Evaluation Committee's recommendation of award of the subject tender to the 2nd Respondent at its tender sum of Kshs.344,921,960.00 (Kenya Shillings Three Hundred and Forty-Four Million, Nine Hundred and Twenty-One Thousand, Nine Hundred and Sixty-One inclusive of all taxes) and which sum was within the Procuring Entity's budget. The Accounting Officer approved the Professional Opinion on 8th November 2021.

Notification to Tenderers

Vide Notification of Intention To Enter Into A Contract letters dated 11th November 2021 (hereinafter referred to as the 'Notification Letters', the 1st

Respondent notified tenderers of the outcome of their respective tenders in the subject tender.

THE REQUEST FOR REVIEW

On 23rd November 2021, the Applicant filed a Request for Review dated 23rd November 2021 together with a Statement in Support of the Request for Review and a Verifying Affidavit both sworn by James Godwin Odhiambo Dunde, the Applicant's Business Development Manager, on 23rd November 2021 and on 3rd December 2021 a Statement in Reply to the 1st Respondent's letter, 2nd Respondent's Replying Affidavit and Further Affidavit dated 3rd December 2021 was filed through the firm of Caroline Oduor & Associates seeking the following orders verbatim:

- 1. At the Preliminary and before hearing of the Request for Review herein, the 1st Respondent be directed to furnish the Applicant with the summary of proceedings of the tender opening meeting; tender preliminary, technical and financial evaluation; comparison of the tenders and the evaluation criteria used in accordance with the provisions of section 67(4) as read together with section 68(2)(d)(iii) of the Act.**
- 2. The subject procurement proceedings undertaken by the 1st Respondent be annulled to the extent of non-compliance with the mandatory tender requirements, the provisions of section 79(1) and 80(2) of the Act.**

- 3. The 1st Respondents decision contained in its notification letter dated 17th November 2021 and addressed to the Applicant together with all other related notifications be cancelled and set aside.**
- 4. The 1st Respondent be directed to conduct financial evaluation with respect to the tenderers lawfully eligible to participate in the financial evaluation stage and to make an award in accordance with the tender document and the law.**
- 5. The 1st Respondent to pay the costs of the Review herein.**
- 6. Any other orders as are necessary for the ends of justice.**

Vide letters dated 23rd November 2021, the Acting Board Secretary notified the 1st Respondent of the existence of the Request for Review while inviting the 1st Respondent to submit his response thereof and furnish the Board with several confidential documents touching on the subject tender pursuant to Section 67 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

On 26th November 2021, Keith Kisinguh, filed a response on behalf of the 1st Respondent dated 25th November 2021 and submitted to the Board several confidential documentation touching on the subject tender.

Vide letters dated 29th November 2021, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for Review while inviting them to furnish the Board with any information and arguments

touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

On 29th November 2021, the 2nd Respondent filed a Notice of Appointment of Advocates, a Replying Affidavit sworn on 29th November 2021 by Edwin Macharia, the 2nd Respondent's General Manager, Head of Healthcare Services and a Further Affidavit sworn on 29th November 2021 by Muhammad Ali, the 2nd Respondent's Procurement Manager through the firm of Chepkuto Advocates.

On 3rd December 2021, the 1st Interested Party filed a Memorandum of Response dated 2nd November 2021 through Mbichire & Co. Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

On 3rd December 2021, the Applicant filed Written submissions dated 3rd December 2021 together with a List of Authorities while the 2nd Respondent filed Written Submissions dated 6th December 2021 on even date.

APPLICANT'S CASE

The Applicant avers that pursuant to the 1st Respondent's tender advertisement in the subject tender, it submitted a complete tender for Kshs.358,379,524.00. Subsequently, the Applicant, vide a notification of intention to enter into a contract dated 11th November 2021 and a letter dated 17th November 2021, was notified by the 1st Respondent that the 2nd Respondent was the successful tenderer and that the Applicant was not the lowest evaluated tenderer respectively.

According to the Applicant, during the tender opening meeting conducted at the 1st Respondent's premises on 25th October 2021, it was represented by its Business Development Manager who noted the first page of the 2nd Respondent's tender was paginated (1) and a number of the document leaves immediately following page (1) were not serialized by any form of pagination.

It is the Applicant's averment that the Invitation to Tender and Section III-Evaluation and Qualification Criteria of the Tender Document with respect to tender opening required tenderers to paginate and chronologically serialise all pages of their tender documents in a format of 1, 2, 3, 4, 5n, where n is the last page number, including all attachments. Further, that Section 79(1) of the Act provides a responsive tender to be one that conforms to all eligibility and other mandatory requirements in the tender documents and that Section 80(2) of the Act requires evaluation and comparison to be done using the procedures and criteria set out in the tender

document and that minor deviations apply to non-mandatory tender eligibility requirements and not those that are expressly stated to be mandatory requirements. In the circumstances, it is the Applicant's allegation that the 2nd Respondent failed to meet the tender condition with respect to mandatory requirement on chronological serialization by way of pagination and thus ought to have been found non-responsive and should not have been allowed to proceed beyond the preliminary evaluation stage.

The Applicant alleges that the 1st Respondent abdicated his duty to ensure all tenders met the mandatory requirements and criteria of evaluation set out in the Tender Document. Further, that the 1st Respondent had a legal obligation to conduct the subject tender process in full compliance with the law and in a manner that is fair & equitable as provided for in Article 227(1) of the Constitution and within the parameters of the Tender Document requirements.

For the foregoing reasons, the Applicant is apprehensive about the general conduct of the 1st Respondent in carrying out the tender evaluation and compliance thereof within the law and tender requirements both mandatory and non-mandatory *stricto sensu*.

It is the Applicant's averment that the tender project is large in scope and value, thus of key interest to it and that it is apprehensive it may lose a business opportunity occasioned by the aforementioned breach of law.

1st RESPONDENT'S RESPONSE

As a Preliminary issue, the 1st Respondent seeks the Board to establish whether the Applicant while filing the Request for Review complied with Regulation 203(2)(d) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') requiring payment of fees set out in the Fifteenth Schedule of Regulations 2020 and Regulation 203(3) & 204 of Regulations 2020 requiring payment of a refundable deposit. Further, that in the event the Board establishes non-compliance of Regulation 203(2)(d) & (3) and Regulation 204 of Regulations 2020 on the part of the Applicant, the Request for Review be dismissed.

In response to the substantive allegations raised by the Applicant in the Request for Review, the 1st Respondent contends that the evaluation of tenders with respect to the subject tender was carried out, by an Evaluation Committee appointed pursuant to Section 46 of the Act, in three (3) stages namely; Determination of Responsiveness (Mandatory Requirements), Detailed Technical Examination and Financial Evaluation.

According to the 1st Respondent, all tenderers in the subject tender were found responsive to the requirement for 'presentation of a well bound and properly paginated tender document including the attachments' which was a requirement at Stage One (Mandatory Requirements) of Evaluation and Qualification criteria. The 1st Respondent buttresses this contention by stating that, the Evaluation Committee noted all tenderers of the subject tender submitted tenders that were well bound and paginated as required

and there was no material or major deviation from the criterion requiring presentation of a well bound and paginated tender document. Further, that the 2nd Respondent's tender is properly paginated and there is no indication that the same was tampered with where some documents were inserted or removed from the document in order to give unfair advantage to the 2nd Respondent. It is the 1st Respondent's contention that the integrity of the 2nd Respondent's tender is intact and there is no allegation the same has been tampered with.

It is the 1st Respondent's contention that the 2nd Respondent was the lowest evaluated tenderer at Kshs.344,921,960.00, the 2nd Respondent's tender was properly evaluated as being responsive and the 1st Respondent awarded the subject tender to the most cost effective tenderer qualified to provide the services sought by the Procuring Entity. Further, that the Applicant was evaluated up to the financial evaluation stage but the Applicant's tender was not the lowest at Kshs.358,379,524.00 and in fact, there are two other tenderers who made it to the financial evaluation stage, just like the Applicant and the 2nd Respondent, whose tenders have lower prices than that of the Applicant being Kshs.345,621,960.00 and Kshs.348,015,966.00. It is for this reason that the 1st Respondent contends, the Applicant is on a fishing expedition in an attempt to derail the procurement process.

The 1st Respondent further contends that the Applicant is its current service provider under a contract for provision of medical insurance cover which is set to lapse on 31st December 2021 and by seeking annulment of the subject

tender's procurement process, the Applicant is hell bent on delaying entering of any other contract by the Procuring Entity and which delay will prejudice Members of Parliament who stand to suffer enormous risk and loss by getting ill without medical insurance cover and even death. It is the 1st Respondent's contention that this Request for Review is a fraudulent exercise to frustrate a procurement process and force an extension of the current contract under which the Applicant is the current service provider.

The 1st Respondent contends that it is aware of the provisions of Article 227 of the Constitution and that the tender process of the subject tender meets all the constitutional conditions and in particular those of fairness, equitability, transparency, competitiveness and cost-effectiveness.

The 1st Respondent concludes by praying for the dismissal of the Request for Review under Section 172 of the Act for being frivolous, vexatious and made solely for purposes of delaying the procurement proceedings, costs for the Request for Review under Section 173(d) of the Act, expeditious disposal of the Request for Review by the Board delivering its decision at the earliest date to avert the Applicant's intention to delay the completion of the process and thereby expose the Members of Parliament to working without a medical cover and debarment of the Applicant pursuant to Section 41(h) of the Act.

2nd RESPONDENT'S RESPONSE

The 2nd Respondent contends that, believing it has the capacity, ability, qualifications and intent to offer the services with respect to the subject

tender and pursuant to the 1st Respondent's tender advertisement, it procured the Tender Document as per instructions in the advertisement. Further, that it subsequently submitted its tender by the tender submission deadline of 27th October 2021.

It is the 2nd Respondent's contention that its representatives, Mr. Muhammad Ali and Gideon Bii, attended the tender opening meeting of the subject tender held on 27th October 2021 and not 25th October 2021 as alleged by the Applicant. At the said opening of tenders, the name of tenderers who submitted their tenders and their respective tender sums were read out to all tenderers who had sat on the opposite end from the tender opening committee and separated by a table. Subsequently, the 2nd Respondent, vide a notification of intention to enter into a contract dated 11th November 2021, was notified by the 1st Respondent that it was the successful tenderer at Kshs.344,921,960.00. The 2nd Respondent contends that it strongly believes the Procuring Entity carried out the entire procurement process within the parameters set out under the Constitution, the Act, Regulations 2020 as well as the criteria set out in the Tender Document

It is the 2nd Respondent's contention that the Applicant's allegations are desperate and miserable fishing expedition attempts because of the spurious allegations made without legs to stand on and the entire Request for Review should be struck out with costs for the following reasons; (i) the Applicant purports to have knowledge and sight of the 2nd Respondent's tender document alleging the same was paginated (1) and a number of the leaves

following page (1) were not serialised by any form of pagination which allegation is premised on confidential information illegally obtained and cannot be relied upon pursuant to section 67 (1) (d) of the Act, (ii) by purporting to have knowledge of, or being privy to, the contents of the 2nd Respondent's tender while failing to disclose the true source of such information, the Applicant admits to have contravened the principles of fair competition under the Constitution and the Act, (iii) pagination of a tender is not an issue to be read out at tender opening under Section 78 (6) of the Act and thus pagination of the 2nd Respondent's tender was not an issue of concern at tender opening but a preserve of the Evaluation Committee under Section 80(2) of the Act. With this, the 2nd Respondent calls for debarment of the Applicant from participating from procurement proceedings in accordance with Section 176(3) of the Act.

The 2nd Respondent reiterated that it complied with all the tender requirements, in particular, the requirement of proper pagination and further contends that it conformed to all the eligibility and other mandatory requirements pursuant to Section 79(1) of the Act and that it was determined to be the successful tenderer pursuant to Section 86 of the Act after complying with all the preliminary and technical requirements under the Tender Document.

The 2nd Respondent's contends that pursuant to Article 227 (1) of the Constitution, the 1st Respondent evaluated the tenders in accordance with the principle of prudent spending and cost-effective use of resources and

confirmed that its tender met all the requirements under the Tender Document and determined to be the tenderer with the lowest evaluated tender price compared to other tenderers. The 2nd Respondent affirms that it has the required professional skills and personnel, technical and financial resources to provide satisfactory services under the subject tender and it has previously provided the Procuring Entity with similar services to the Procuring Entity's satisfaction as it received no complaints from the Procuring Entity. As such, the 2nd Respondent contends the Request for Review lacks any foundation in fact or law, is an abuse of the process of review before the Board and prays for the dismissal of the same with cost.

1ST INTERESTED PARTY'S CASE

The 1st Interested Party contends that it responded to the 1st Respondent's tender advertisement by submitting its tender at Kshs.345,621,960.00 and believes it is the second lowest tenderer after the 2nd Respondent thus does not object to the award of the subject tender to the 2nd Respondent. The 1st Interested Party avers that the Applicant's allegations reveal the Applicant had access to another entity's tender document yet the Applicant is not the evaluation entity. Further, that the Applicant's tender sum of Kshs.358,379,524.00 is extremely uneconomical in line with Section 86 (1)(a) and (c) of the Act that provide for a successful tenderer to be one with the lowest price or the tender with the lowest evaluated total costs of ownership respectively.

APPLICANT'S REJOINDER

In a rejoinder to the 1st Respondent's and 2nd Respondent's responses, the Applicant contends that it paid the fees payable pursuant to the provisions of the Fifteenth Schedule. Further, that payment of the requisite deposit amount equivalent to 15% of the tender is subject of conservatory orders issued by Justice Weldon Korir on 27th July 2020 in High Court **Petition No. E26 of 2020: Road and Civil Engineering Contractors Association and Another vs Attorney General and 3 others** staying the implementation and operation of Regulation 204(1) among other provisions of Regulations 2020 and that the Board duly acknowledged the operation of the said High Court conservatory orders in **Request for Review Application No.123/2021 between Rhombus Construction Company Limited vs. Accounting Officer, Kenya Airports Authority & Another.**

The Applicant reiterated that its representative at Tender Opening Stage observed that when the 2nd Respondent's tender was opened and the total number of pages of the tender read out, there were a few page leaves that were not serialized between pages (1) and (2). According to the Applicant, it is settled law that cost effectiveness cannot be the sole reason for a Procuring Entity to consider a tender because a Procuring Entity is under obligation to consider all other aspects provided for in a tender document and when a tender does not comply with the conditions stipulated therein, it would be unlawful for the Procuring Entity to award the tender simply on the basis that the tender is the lowest.

The Applicant further contends that it filed the Request for Review on 23rd November 2021 which is 8 days before expiry of the 14 days within which it ought to have filed the same and therefore acted in good faith and it is not deliberately delaying the procurement process. In any event, the Request for Review is by law required to be determined latest within 21 days which time lapses on 14th December 2021 which is 17 days before the Applicant's contract with the 1st Respondent lapses.

The Applicant admits that the opening of tenders took place on 27th October 2021 and not 25th October 2021 as earlier alleged and regrets the typographical error. However, the Applicant denies that an observation made by its representative at tender opening attended by all tenderers cannot be considered confidential information because the 2nd Respondent admits that the total number of pages of tenders are read out at tender opening which requires tenders to be opened in the presence of other tenderers. Further, that the 1st Respondent admitted that tenders were opened in an open space in the presence of nine tenderers' representatives thus the observation of open tenders is a matter of fact. The Applicant concludes by praying for the Request for Review to be allowed in its entirety.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions, list of authorities including confidential documents submitted to it by the 1st Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the Applicant needed to have complied with the provisions of Regulation 203(2)(d) of Regulations 2020 read with the Fifteenth Schedule of Regulations 2020 requiring payment of non-refundable fees and Regulation 203(3) of Regulations 2020 read with Regulation 204(1) of Regulations 2020 requiring payment of a refundable deposit valued at 15% of the Applicant's tender sum before filing the instant Request for Review.**

Depending on the determination of the first issue;

- 2. Whether the Applicant complied with the provisions of Regulation 203(2)(d), 203(3), 204(1) and the Fifteenth Schedule of Regulations 2020.**

Depending on the determination of the second issue;

- 3. Whether the 2nd Respondent's tender was fairly evaluated against the criterion set out in Clause q of Clause A) Stage One Mandatory Requirements (to be evaluated on a 'yes or No' basis) of Section III – Evaluation and Qualification Criteria at page 26 of the Tender Document.**

4. Whether the Board can debar the Applicant from participating in procurement proceedings pursuant to section 41(1)(h) of the Act read with Section 176(3) of the Act.

The Board will now proceed to determine the issues as framed.

Whether the Applicant needed to have complied with the provisions of Regulation 203(2)(d) of Regulations 2020 read with the Fifteenth Schedule of Regulations 2020 requiring payment of non-refundable fees and Regulation 203(3) of Regulations 2020 read with Regulation 204(1) of Regulations 2020 requiring payment of a refundable deposit valued at 15% of the Applicant's tender sum before filing the instant Request for Review.

On the first issue framed for determination, the 1st Respondent wants the Request for Review to be dismissed if the Board establishes that the Applicant failed to pay the requisite non-refundable fees stipulated in Regulation 203(2)(d) read with the Fifteenth Schedule of Regulations 2020 and the refundable deposit valued at 15% of the Applicant's tender sum stipulated in Regulation 204(1) read with Regulation 203(3) of Regulations 2020. In response, the Applicant contends that it paid the fees payable pursuant to the provisions of the Fifteenth Schedule and the Board's records bears the same. However, on the non-refundable deposit, the Applicant contends that the same is subject of conservatory orders issued by Justice Weldon Korir on 27th July 2020 in High Court **Petition No. E26 of 2020: Road and Civil Engineering Contractors Association and Another vs**

Attorney General and 3 others staying the implementation and operation of Regulation 204(1) among other provisions of Regulations 2020 and the operation of the conservatory orders have been acknowledged by the Board in **Request for Review Application No.123/2021 between Rhombus Construction Company Limited vs. Accounting Officer, Kenya Airports Authority & Another.**

Section 167 (2) of the Act requires a Request for Review to be accompanied by a refundable deposit as prescribed in Regulations 2020 but the same is required not to be less than 10 % of the cost of the contract and reads as follows;

(1)

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3)

(4)—

(a);

(b); and

(c)

On the other hand, the non-refundable deposit referred to in Section 167(2) of the Act is prescribed in Regulation 204 (1) of Regulations 2020 as follows:-

(1) Pursuant to section 167(2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account.

Regulation 203(2)(d) and (3) of Regulations 2020 requires payment of a requisite non-refundable fees and refundable deposit before filing of a Request for Review and reads as follows:

(1)

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

(a)

(b)

(c)—

(i)

(ii); or

(iii)

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

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

(4)

On the other hand, the Fifteenth Schedule of Regulations 2020 provides for non- refundable fees payable for a Request for Review referred to in

Regulation 203(2)(d) of Regulations 2020 and fees chargeable on filing a preliminary objection referred to under Regulation 209(5) of Regulations 2020 reviews and reads as follows:

FIFTEENTH SCHEDULE
(rr.203(2)(d) and 209(5))
FEES FOR REVIEWS

- 1. Administrative fee*** ***KES 5,000***
- 2. Upon filing a request for review, the fees payable shall be as follows-***

<i>Amount of Tender</i>	<i>Fees</i>
1. Tenders of Ascertainable Value	
(a) Does not exceed KES 2,000,000	10% subject to a minimum of KES 20,000/-
(b) Exceeds KES 2,000,000/- but not over KES 50,000,000/-	The fees for tender sum of KES 2,000,000 plus an additional fee of 0.25% on the amount above KES 2,000,000
(c) Exceeds KES 50,000,000/-	The fees for tender sum of KES. 50,000,000 plus an additional fee of 0.025% on the amount above KES 50,000,000/- subject to a maximum fee of KES 250,000/-
(d) Pre-qualification, EOI and other “	KES 40, 000/-
2. Unquantified Tenders	KES 250,000/-
3. Upon request of an adjournment to a party by the Board.	Maximum amount payable fee shall be KES20, 000/-
4. Filing a preliminary objection	KES 5, 000/-
5. The Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable.	

From the foregoing, an applicant is, by law, required to file a Request for Review after paying for the requisite non-refundable fees and payment of a

refundable deposit valued at 15% of such an applicant's tender sum before filing a request for review.

However, the Board notes that by a conservatory order issued on 27th July 2020 by Justice W. Korir in **Petition No.E26 of 2020 Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association vs. Attorney General, Cabinet Secretary for National Treasury and The Public Procurement Administrative Review Board and National Assembly** stayed the implementation and or operation of any Regulation of Regulations 2020 requiring payment of the deposit of 15% of an Applicant's tender sum. The Board is not aware of, neither has it been brought to its attention by parties herein, of, any lifting /vacating/ setting aside of this conservatory order. The effect of this conservatory order is that there is currently no requirement for an Applicant to pay a refundable deposit valued at 15% of its tender sum before filing a request for review. The Board has previously espoused this position in **PPARB Application No.123 of 2021 Rhombus Construction Company Ltd vs. The Accounting Officer, Kenya Ports Authority and Kenya Ports Authority** when it held as follows at page 35 of its decision:

"Accordingly, we find the failure by the Applicant to comply with section 167(2) of the Act and Regulation 204(1) of Regulations 2020 in light of the Conservatory orders of Justice Weldon Korir staying the implementation or operation of Regulation 204(1) of

Regulations 2020 is justifiable, thus the instant Request for Review does not warrant summary dismissal for want of jurisdiction. "

Further, the Board takes judicial notice that by a conservatory order issued on 24th November 2020 by Justice W. Korir in **Petition No.E332 of 2020 Jackson Wanjiru Ikua vs. Attorney General, Cabinet Secretary, National Treasury and Planning and The Public Procurement Regulatory Authority and The National Assembly** stayed the application and enforcement of Regulation 203(2)(d) of Regulations 2020 and suspended Regulation 224 of Regulations 2020 only to the extent of assessment of filing fees in the repealed Public Procurement and Disposal Regulations, 2006 (hereinafter referred to the 'Repealed Regulations 2006') pending the hearing and determination of the petition. The Board is not aware of, neither has it been brought to its attention by parties herein, of, any lifting /vacating/ setting aside of this conservatory order. The effect of this conservatory order is that fees payable on any Request for Review is assessed and payable under the Repealed Regulations 2006 as amended (if any) and not under Regulation 203(2)(d) read with the Fifteenth Schedule of Regulations 2020.

The Board notes that the Applicant did not pay any refundable deposit valued at 15% of its tender sum, justifiably so, because it was aware of the conservatory orders staying the implementation and operation of any Regulation of Regulations 2020 requiring such deposit. However, the Board notes that from its records of an official receipt dated 23rd November 2021

and a copy of a National Bank customer transaction receipt dated 23rd November 2021 evidences that it received Kshs.205,000.00 from the Applicant through its advocates being the amount assessed as fees payable for this Request for Review under the Repealed Regulations 2006 as amended(if any).

In the circumstances, the Board finds the Applicant was not required to comply with the provisions of Regulation 203(2)(d) of Regulations 2020 read with the Fifteenth Schedule of Regulations 2020 requiring payment of non-refundable fees and Regulation 204(1) of Regulations 2020 read with Regulation 203(3) of Regulations 2020 requiring payment of a refundable deposit valued at 15% of the Applicant's tender sum before filing the instant Request for Review following issuance of conservatory orders by Justice W. Korir staying the application and enforcement of Regulations 203(2)(d) of Regulations 2020 and suspending Regulation 224 of Regulations 2020 only to the extent of assessment of filing fees in the Repealed Regulations 2006 as amended (if any) pending the determination of **Petition No.E332 of 2020 Jackson Wanjiru Ikua vs. Attorney General, Cabinet Secretary, National Treasury and Planning and The Public Procurement Regulatory Authority and The National Assembly** and staying the implementation and or operation of any Regulation of Regulations 2020 requiring the deposit of 15% of an applicant's tender sum.

Whether the Applicant complied with the provisions of Regulation 203(2)(d), 203(3), 204(1) and the Fifteenth Schedule of Regulations 2020.

The findings of the Board on the first issue has dispensed with this second issue. Therefore, the Board shall proceed to determine the third issue as framed.

Whether the 2nd Respondent's tender was fairly evaluated against the criterion set out in Clause q of Clause A) Stage One Mandatory Requirements (to be evaluated on a 'yes or No' basis) of Section III – Evaluation and Qualification Criteria at page 26 of the Tender Document.

On the third issue framed for determination the Applicant alleges that the 2nd Respondent's tender ought not to have been evaluated past the preliminary evaluation stage and awarded the subject tender because the same was not properly paginated as required by a mandatory requirement of the Tender Document. To support this assertion, the Applicant states that its representative observed during tender opening meeting, when the 2nd Respondent's tender was opened in the presence of other tenderers' representatives and the total number of pages read out, there were few page leaves that were not serialised between pages (1) and (2). It is our understanding that the Applicant alleges breach of duty on the part of the 1st Respondent imposed by Section 79(1) and 80(2) of the Act.

In response, the 1st Respondent contends that all nine tenders submitted in the subject tender passed Stage One (Mandatory Requirements) of Evaluation and Qualification Criteria and that the Evaluation Committee found all nine tenders were responsive to the requirement for 'presentation of a well bound and properly paginated tender document including the attachments'. Further, that the 2nd Respondent's tender is intact as no documents have been inserted or removed from it and that no allegations have been made to suggest that the 2nd Respondent's tender has been tampered with. The 1st Respondent contends that the procurement process of the subject tender has been undertaken in line with the provisions of Article 227 of the Constitution and the provision of the Act particularly on fairness, equitability, transparency competitiveness and cost effectiveness which can be attested from award of the subject tender to the 2nd Respondent who was the lowest evaluated tenderer. The 1st Respondent concludes by stating that the Applicant was evaluated up to the financial stage but was not successful because it was not the lowest having noted that the Applicant's tender price was higher than that of the 2nd Respondent and two other tenderers making the Applicant the fourth lowest evaluated tenderer at the financial stage. It is for this reason that the 1st Respondent believes the Applicant is on a fishing expedition and the orders sought to annul the procurement process is hell bent on delaying the entering of any other contract by the Procuring Entity in the guise to force an extension of a current contract for medical insurance cover for Members of Parliament between the Procuring Entity and the Applicant when the same expires on

31st December 2021 at the risk of having state officers working without a medical cover.

The 2nd Respondent on its part contends that the Applicant having admitted having knowledge of confidential information contained in the 2nd Respondent's tender, without disclosing how it received such information which is tantamount to relying on illegally obtained confidential information which the Board should not entertain and instead should strike out such information clearly undermines the principle of fair competition. The 2nd Respondent confirms that it presented a well bound and properly paginated tender document including attachments as required by the Tender Document and that it has the required skills and personnel, technical and financial resources to provide satisfactory services under the subject tender having previously satisfactorily provided the 1st Respondent with similar services in the past.

In a rejoinder to the 1st and 2nd Respondents' respective responses, the Applicant reiterates that the alleged confidential information is not confidential because the observation made by its representative at the tender opening meeting with respect to pagination of the 2nd Respondent's tender was made when the 2nd Respondent's tender was opened in the presence of tenderers' representatives and the total number of pages of the 2nd Respondent's tender read out. Further, that cost effectiveness is not the only consideration for award of the subject tender and that it is not seeking to delay the subject tender's procurement process because it approached

the Board within 14 days and in any case, the Board is required by law to determine the Request for Review latest by 14th December 2021 which is 17 days before the lapse of the current contract for provision of medical cover it holds with the Procuring Entity.

The Board observes that for one to know whether a tender, other than such person's tender, is paginated, one must have knowledge of the contents of a tender which content is confidential information. We say so because, Section 67(1)(d) of the Act deems contents of tenders to be confidential as it provides as follows:-

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

(a)

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

(c); or

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

There is no doubt that in alleging the 2nd Respondent's tender was not properly paginated presupposes the Applicant had knowledge of the contents of the 2nd Respondent's tender which contents are confidential in nature. The question the Board needs to address is whether the Applicant obtained the alleged confidential information illegally.

It is common ground among parties herein that during tender opening on 27th October 2021, tenders were opened in the presence of tenderers' representatives and pages of such tenders read out and recorded. The Tender Opening Minutes at page 3 thereof captures the number of pages of the 2nd Respondent's tender as "932" pages.

Even though the 2nd Respondent alleges that it was impossible for one to see the contents of a tender opened during tender opening, we are alive to the fact that there is a remote possibility that for a procuring entity to establish the number of pages a tender has, flipping of pages of such tender will occur before the number of pages of a tender are read out and recorded. It is during this flipping of pages that one may by fluke observe a page of a tender is not paginated. To this end, and because this issue is hinged on the 2nd Respondent's word against that of the Applicant, we find it fair to give the Applicant the benefit of doubt that it observed the 2nd Respondent's tender was not properly paginated as alleged by the Applicant. In the circumstances, we cannot find that the Applicant obtained such information illegally, though the same amounts to confidential information.

Section 80 of the Act is prescriptive on how evaluation of tenders should be conducted as it reads as follows:

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this 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) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

(5)

(6)

(7)

The above provisions of law require the Evaluation Committee to evaluate tenders in an objective manner based on the criteria for evaluation set out in the Tender Document.

The criteria for evaluation of the subject tender was set out under Section III – Evaluation and Qualification Criteria at page 25 to 29 of the Tender Document. We say so because Clause 1. General Provisions of Section III – Evaluation and Qualification Criteria at page 25 of the Tender Document provides, *inter alia*, as follows:-

“.....

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.....

.....”

In specific, criterion q of Clause A) Stage One Mandatory Requirements (to be evaluated on a ‘Yes or No’ basis) of Section III – Evaluation and Qualification Criteria at page 26 of the Tender Document reads as follows:-

"Presentation of a well bound and properly paginated tender document including the attachments."

The Evaluation Committee was required to evaluate tenders at the Stage One Mandatory Requirement to establish, *inter alia*, that tenders were well bound and properly paginated. Our understanding of pagination is allocating a number to a page.

On the other hand Section 74 (1) (i) of the Act requires serialisation of a tender and reads as follows: -

- 74 (1) *The accounting officer shall ensure the preparation of an invitation to tender that sets out the following***
- (a)***
 - (b)***
 - (c)***
 - (d)***
 - (e)***
 - (f)***
 - (g)***
 - (h)***
 - (i) requirement of serialization of pages by the bidder for each bid submitted"***

The Oxford English Dictionary, 7th Edition defines the word "series" as:-

"a number of things that come one after another"

The Cambridge English Dictionary, 7th Edition further defines the term "sequence" as:-

"a series of related things or events, or the order in which they follow each other"

From the two definitions above, the Board notes that in order for a series to be created when paginating a document, an author of a document chooses a particular series that he/she shall use when paginating a document. For example, if one chooses the numerical series where figures are used to paginate a document starting with "1", then the sequence taken in paginating the document will be "1", "2", "3", "4", "5" and so on, up to the last page. Therefore, the author of such document ought not to introduce a different method of serialization (such as roman numbers (i, ii, iii etc.)), in between the pages, since this will interfere with the sequence already created by using numerical numbers.

The Board has carefully studied the original tender submitted by the 2nd Respondent which forms part of confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act and notes that the 2nd Respondent submitted a tape bound (in blue tape) tender containing 932 pages. The pages of the 2nd Respondent's tender are paginated in numerical numbers starting from the face page (first page of the tender) which appears to have been numbered '1' and the last page of the tender is numbered '932'.

However, the second, third and fourth pages of the tender are not numbered but the fifth page of the tender is numbered '5' and the sequence continues as '6', '7', '8' up to the last page of the tender being '932'.

The Board notes that the second, third and fourth pages of the 2nd Respondent's tender contains the Table of Contents wherein the 2nd Respondent refers to certain documents and where such documents are to be found within the tender document.

Thereafter, the 2nd Respondent provided a letter dated 27th October 2021 addressed to the 1st Respondent as its fifth page of the tender. This fifth page is numbered '5' and from here the 2nd Respondent numbered the next pages of its tender in a numerical series up to the last page of its tender being "932" (i.e. the page where the 2nd Respondent's Contact Information appears).

Having considered the manner in which the 2nd Respondent paginated its tender, the Board deems it necessary to address its mind on the importance of a "Table of Contents" and whether the same ought to be allocated a page number.

The Oxford English Dictionary, 7th Edition, provides two definitions to the word "table of contents" as follows: -

- "1. a list of divisions (chapters or articles) and the pages on which they start or appear.***

2. *A list of titles of the parts of a book or document, organized in the order in which the parts appear."*

The Cambridge English Dictionary further describes a "table of contents" as follows: -

"A table of contents, usually headed simply "Contents" and abbreviated informally as TOC, is a list of the parts of a book or document organized in the order in which the parts appear. The contents usually include; the titles or descriptions of the first-level headers, such as chapter titles in longer works, and often includes second-level or section titles within the chapters as well, and occasionally even third-level titles. The depth of detail in tables of contents depends on the length of the work, with longer works having less. Formal reports also have a table of contents. Within an English-language book, the table of contents usually appears after the title page, copyright notices, and, in technical journals, the abstract; and before any lists of tables or figures, the foreword, and the preface. Printed tables of contents indicate the page numbers where each details in that table of contents can be found, while digital ones offer links to go to each part. The format and location of the page numbers is a matter of style for the publisher. If the page numbers appear after the heading text, they might be preceded by characters called leaders, usually

dots or periods, that run from the chapter or section titles on the opposite side of the page, or the page numbers might remain closer to the titles. In some cases, the page number appears before the text.”

Having considered the above description of a Table of Contents, it is important to note that a Table of Contents provides details of the items in a book or any other document and the pages where such items can be found. For example, the 2nd Respondent’s Table of Contents specified the pages where one can find certain documents such as “Certificate of Registration and/or Incorporation” (Page 11), “VAT/PIN Certificate from Kenya Revenue Authority (KRA) as at the date of tender opening” (Page 20) and so on.

It is also worth noting that, the items contained in a Table of Contents usually do not include an item called “Table of Contents” so that the author of a document then proceeds to allocate a page number to the part known as “table of contents”. This explains why in the practice of publishing articles and books, table of contents, if paginated, adopt a different series and sequence from the rest of the pages of an article or a book. Usually the roman series of i, ii, iii, whereas the rest of the pages of an article would adopt numerical series of 1, 2, 3. It is therefore not necessary to allocate a page number to the Table of Contents, because one is likely to cite a wrong page number, i.e. citing a page number which actually belongs to another item as previously held by this Board in **PPARB Application No.74 & 77 of 2020 FCM Travel Solutions t/a Charleston Travel Limited &**

Another vs. The Accounting Officer Kenya Ports Authority & Another and Magical Holidays Limited & Another. Further, having established that the series of pagination for Table of Contents is likely to differ with the series for pagination in the rest of a document, omission of paginating the table of contents in a tender would help in ensuring that pagination of the tender is not done by use of different series e.g both roman and numerical series.

In the Board's view, the mischief that the legislature intended to cure by section 74 (1)(i) of the Act is to avoid instances where documents are inserted into a tenderer's tender or removed from such tenderer's tender, either by the tenderer or by the tenderer in collusion with a procuring entity or by any other person after deadline of submission of tenders. Such a tenderer and a procuring entity would collude in order to give the tenderer an unfair advantage to the detriment of other tenderers who participated in the procurement process.

In PPARB Application No.129 of 2019 **Island Homes Developers vs. Kenya Ports Authority & 2 others Review Application No. 129 of 2019** which was upheld by Justice Ogola at the High Court sitting in Mombasa in **Island Homes Developers Limited VS Public Procurement Administration Review Board, Kenya Ports Authority & 2 others [2020] eKLR** the Board elucidated the purpose and significance of serialization and pagination of tenders as follows:

'Pagination of a bid document avoids the bid document from being tampered with in any way by any person or entity. It protects the sanctity of a bid document by ensuring that bidders are evaluated on the basis of the documents they submitted by the tender closing date and that no document is inserted or removed in favour of a noncompliant bidder to the detriment of other bidders who choose to comply with the requirements of a procuring entity.'

Article 227 (1) of the Constitution requires all State organs and other public entities to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. The 1st Respondent contends that no documents have been inserted into or removed from the 2nd Respondent's tender which fact we do confirm having carefully studied the 2nd Respondent's tender.

We also note the 2nd Respondent never introduced a different method of serialization of its tender but was consistent in the manner in which it numbered its tender from the fifth page to the end (i.e. 005, 006, 007 and so on, up to 932), therefore creating a proper sequence. The Board further notes that there is no allegation that the 2nd Respondent's tender was ever tampered with, either by removal of some pages from the 2nd Respondent's tender, or insertion of new pages into the 2nd Respondent's tender, by the Procuring Entity or by the Procuring Entity in collusion with the 2nd

Respondent or by any other person, in order to give the 2nd Respondent an unfair advantage over other tenderers. In fact, the Board notes that between the first page (numbered '1') and the fifth page (numbered '5') of the 2nd Respondent's tender there are three pages containing the table of contents which three pages if they were numbered would automatically have taken the following pagination '2', '3', and '4' of the tender document and are the second, third and fourth pages of the 2nd Respondent's tender confirming that there could have been no insertion or removal of any page of the 2nd Respondent's tender or wrong serialisation of the 2nd Respondent's tender.

Assuming for a moment there was insertion of pages into the 2nd Respondent's tender, then it is likely that the sequence of pages, in the 2nd Respondent's tender would have been interfered with at whatever page such insertion is done. This is also true for any pages that may have been removed as one would easily notice that there is a number or some numbers missing from the 2nd Respondent's tender. Having studied the 2nd Respondent's tender in its entirety, there is no indication that pages were either removed from the 2nd Respondent's tender or inserted into the 2nd Respondent's tender. We also confirm that it is not true that pages between pages numbered '1' and '2' of the 2nd Respondent's tender were not paginated as alleged by the Applicant.

Lastly we note that the Tender Document required tenders to be paginated. Clause 12 of Section I – Instructions to Tenders at page 9 of the Tender Document provides for what comprises a tender as follows: -

12.1 The Tender shall comprise the following: -

"a) Form of Tender prepared in accordance with ITT 13"

ITT 13 of Section I – Instructions to Tenders at page 10 of the Tender Document provides;

"Form of Tender and Schedule of Requirements 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."

It is clear that a Table of Contents does not form part of the mandatory documents of a tender in the subject tender thus buttressing our argument that if objectively looked at, such Table of Contents needs not be paginated.

Accordingly, the Board finds that the Procuring Entity fairly evaluated the 2nd Respondent's tender since the 2nd Respondent correctly numbered its original tender in the correct sequence and it was not necessary for it to allocate a page number to the Table of Contents.

Whether the Board can debar the Applicant from participating in procurement proceedings pursuant to section 41(1)(h) of the Act read with Section 176(3) of the Act.

On the fourth and last issue framed for determination, the 1st Respondent calls for debarment of the Applicant from participating in subsequent tenders with public entities for a period not less than three years by the Board pursuant to Section 41(1)(h) of the Act for fraudulent acts committed by the Applicant. Further, the 2nd Respondent equally calls for debarment of the Applicant from participating from procurement proceedings in accordance with Section 176(3) of the Act for obtaining confidential information illegally. On its part, the Applicant denies the allegations of fraud and more so that no particulars of fraud have been demonstrated by the 1st Respondent and that its representative's observation cannot amount to confidential information because it was an observation made at the tender opening meeting attended by tenderers' representatives where tender documents were opened in an open space in the presence of other tenderers.

Section 41(1)(h) of the Act provides for debarment of a person from participating in procurement proceedings on the ground that such a person is guilty of corrupt or fraudulent practices and reads as follows:

- (1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person –***
- (a).....***
 - (b).....***
 - (c).....***
 - (d).....***
 - (e).....***
 - (f).....***
 - (g).....***
 - (h) is guilty of corrupt or fraudulent practices; or***
 - (i)***

The Board referred to in Section 41(1) of the Act is the Public Procurement Regulatory Board which is different from this Board (Public Procurement Administrative Review Board (Review Board)). We say so because Section 2 of the Act has assigned the meaning of the Board and Review Board referred to in the Act as follows:

"Board" means the Public Procurement Regulatory Board established under Section 8 of the Act; and

"Review Board" means the Public Procurement Administrative Review Board established under Section 27 of the Act.

It is clear that a reference to the Board and the Review Board in the Act means the Public Procurement Regulatory Board and the Public Procurement Administrative Review Board (this Board) respectively.

It therefore follows that it is the Public Procurement Regulatory Board that debars a person from participating in procurement proceedings and not this Board (Public Procurement Administrative Review Board). This finding is buttressed by the fact that the powers conferred upon the Board under Section 173 of the Act do not extend to powers of debarment of a person from participating in procurement proceedings as it reads as follows:

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.

In the circumstances, the Board finds that it is not clothed with powers to debar and cannot debar a person from participating in procurement proceedings under section 41(1)(h) read with section 176(3) of the Act as such power is the preserve of the Public Procurement Regulatory Board.

In totality of the issues under consideration, the Board finds the Request for Review herein fails in its entirety and proceeds to make the following specific orders.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 23rd November 2021: -

- 1. The Request for Review dated 23rd November 2021 in respect of Tender No. PJS/007/2021-2022 for Provision of Medical**

Insurance Cover for Members of Parliament is hereby dismissed.

2. Each Party shall bear its own costs to the Request for Review.

Dated at Nairobi this 14th day of December 2021.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

