

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 65/2021 OF 5TH MAY 2021
BETWEEN

UTMOST INSURANCE BROKERS LIMITED.....APPLICANT
AND
TURKANA COUNTY GOVERNMENT1ST RESPONDENT
THE ACCOUNTING OFFICER
TURKANA COUNTY GOVERNMENT.....2ND RESPONDENT
PALADIN INSURANCE BROKERS LIMITED.....INTERESTED PARTY

Review against the decision of County Government of Turkana in respect of Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only)

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Eng. Mbiu Kimani, OGW | -Member |
| 4. Mrs. Njeri Onyango | -Member |
| 5. Dr. Paul Jilani | -Member |

IN ATTENDANCE

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

The Bidding Process

The County Government of Turkana (hereinafter referred to as "the Procuring Entity") invited sealed bids from tenderers to demonstrate their technical and financial competence in providing services to the Procuring Entity in respect of Tender No. TCG/PSADM/176/2020-2021/ Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (open to Insurance Brokers Registered in Kenya Only) (hereinafter referred to as "the subject tender"). To that end, the Procuring Entity published an advertisement in the Daily Nation Newspaper, its Website (www.turkana.go.ke), and IFMIS portal at www.treasury.go.ke and the Public Procurement Information Portal (www.tenders.go.ke) on 26th March 2021.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of Eight (8) bids by the bid submission deadline of 6th April 2021. The same were opened shortly thereafter by a Tender Opening Committee at the County Secretary's Boardroom and recorded as follows: -

S/NO.	Bidder's Name	Bid Amount in (Kshs)
1.	Acentria Insurance Brokers	1,500,000
2.	Four M Insurance Brokers Limited	1,500,000
3.	Minet Insurance Brokers Limited	1,500,000
4.	Paladin Insurance Brokers Limited	1,500,000
5.	Pelican Insurance Brokers K Limited	1,500,000
6.	Sedgwick Kenya Insurance Brokers Limited	1,500,000
7.	Utmost Insurance Brokers Limited	1,500,000
8.	Zamara Risk and Insurance Brokers Limited	1,500,000

Evaluation of Bids

The Evaluation Committee evaluated bids in the subject tender in the following three stages: -

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

Preliminary Evaluation/Completeness and Responsiveness

At this stage, the Evaluation Committee applied the criterion outlined in Clause A. of Section II Appendix to Instructions to Tenderers of the Tender Document at page 15 of the Blank Tender Document. This stage involved evaluation of mandatory documents and requirements which the bidders were required to submit. Bidders who didn't meet the requirements were eliminated and didn't proceed to the next stage.

The following four (4) bidders met all the mandatory requirements and proceeded to mandatory evaluation for the underwriter.

- Acentria Insurance Brokers
- Four M insurance Brokers Limited
- Paladin Insurance Brokers Limited
- Utmost Insurance Brokers limited

One bidder M/s Utmost Insurance Brokers limited met all the mandatory requirements on evaluation for underwriter to proceed to technical evaluation.

Technical Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause A. of Section II Appendix to Instructions to Tenderers of the Tender Document at page 18 of the Blank Tender Document. Bidders were required to obtain 80 points and above to qualify for financial evaluation. At this stage, M/s Utmost Insurance Brokers limited attained a score of 94 percent qualifying to proceed for financial evaluation stage.

Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause A. of Section II Appendix to Instructions to Tenderers of the Tender Document at page 19 of the Blank Tender Document to determine the lowest evaluated tender. At the end of this stage, Bidder No.7 (M/s Utmost Insurance Brokers limited) was found to have submitted the lowest evaluated bid at Kshs 47,653,356.00.

Recommendation

The Evaluation Committee observed the proposed underwriter was the current service provider of the GLA/GPA/WIBA policy cover to the client at a total sum of Kshs. 55,046,614.00 The committee found that the quoted bid sum of Kshs.47,653,356.00 was inconsistent and not viable to carry out services satisfactorily and thus recommended the tender to be re-advertised.

Professional Opinion

In a Professional Opinion dated 20th April 2021, the Procuring Entity's Deputy Director Supply Chain Management Services reviewed the subject procurement process and expressed his satisfaction that the same met the requirements of the Act read together with Article 227 of the Constitution. He urged the Accounting Officer to consider approval of the Evaluation

Committee's recommendation to re-advertise. The said professional opinion was approved for re-advertisement on 20th April 2021 by the Accounting Officer.

Notification to Tenderers

In letters dated 19th April 2021 addressed to the Applicant and 20th April 2021 addressed to all other tenderers, the Procuring Entity notified all tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Utmost Insurance Brokers Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 29th April 2021 and filed on even date together with Applicant's Statement sworn on 28th April 2021 and filed on 29th April 2021, through the firm of Mwaniki Gachoka & Company Advocates, seeking the following orders: -

- a) An order setting aside and/or annulling the Respondent's decision rejecting the Applicant's bid for Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only)***
- b) An order directing the Procuring Entity to proceed with the procuring process of Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only) and awarding the tender to the Applicant as the lowest evaluated bidder***

- c) An order setting aside and nullifying the Respondents re-advertisement and any other action thereto under Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only)***
- d) An order directing the Procuring Entity to issue the letter of award to the Applicant and sign the contract with the Applicant in accordance with the Tender Document***
- e) An order directing the Respondent to pay the costs of and incidental to the proceedings***
- f) Any other order or further relief or reliefs that the Board shall deem just and expedient***

The Respondents responded to the Request for Review with a statement of response dated 7th May 2021 and filed on 10th May 2021. The Interested Party responded to the Request for Review in a Response to Request for Review sworn on 13th May 2021 and filed on even date by one Mr. David Wambugu its Principal Officer.

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

BOARD'S DECISION

The Board has considered parties' pleadings including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the Act) and finds that the following issues call for determination: -

- I. Whether the Accounting Officer of the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements for termination specified in section 63 of the Act thus ousting the jurisdiction of the Board.**

Depending on the outcome of the above issue:

- II. Whether the Procuring Entity evaluated the Applicant's bid at the Financial Evaluation stage in accordance with the criteria of lowest evaluated bidders in the Appendix to Instructions to Tenderers on page 19 read together with Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document and section 80 (2) of the Act.**

On the first issue for determination, the Board observes that at paragraph 16 of the Respondents' Statement of Response, the Respondents averred that they:

"complied with all the provisions of the Constitution and the Public Procurement and Asset Disposal Act and that the system used by the Respondent in cancelling and re-

advertising the tender was one that was fair, equitable and transparent without a hint of favoritism on any part"

At paragraph 18 (i) of their Statement in Response, the Respondents stated the prayers sought by the Applicant could not be granted because:

"The tender subject of this Request has been cancelled and re-advertised and the procurement process is at a very advanced stage"

The Respondents alleged that they cancelled and re-advertised the subject tender. This prompted the Board to determine whether the alleged termination or cancellation of the subject tender satisfies the substantive and procedural requirements of termination of a tender pursuant to section 63 of the Act, for the jurisdiction of the Board to be ousted.

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

(a)

(b) A termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act" [i.e. section 63 of the Act] Emphasis by the Board

In **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions

and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by section 167 (4) (b) of the Act.

"63. (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) The subject procurement have been overtaken by—

(i) Operation of law; or

(ii) Substantial technological change;

(b) Inadequate budgetary provision;

(c) No tender was received;

(d) There is evidence that prices of the bids are above market prices;

(e) Material governance issues have been detected;

(f) All evaluated tenders are non-responsive;

(g) Force majeure;

(h) Civil commotion, hostilities or an act of war; or

(i) Upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

From the confidential documents submitted to the Board, the Evaluation Report executed on 16th April 2021 shows a recommendation was made on re-advertise the subject tender because **"the committee found the bid sum quoted of Kshs. 47,653,356 for 4027 staff was inconsistent and practically not viable to carry out the service satisfactorily"**

In the professional opinion dated 20th April 2021, the Procuring Entity's Deputy Director, Supply Chain Management Services concurred with the Evaluation Committee's recommendation and advised the 2nd Respondent to approve re-advertisement of the subject tender.

The letter of notification dated 19th April 2021 addressed to the Applicant did not mention termination of the subject tender, but informed the Applicant of the reason why its bid was unsuccessful and the said bidder was encouraged to “re-apply” once the tender is re-advertised. The issue of termination of the subject tender has emerged from the Respondents’ pleadings.

The Board has also studied the Tender Invitation Notice dated 21st April 2021 published in the Standard Newspaper and notes that the Procuring re-advertised the subject tender among other tenders specified in the said Invitation Notice.

Having considered the substantive reasons for termination of a tender outlined in section 63 of the Act, the Board notes that none of those reasons were cited in any of the Procuring Entity’s confidential documents or pleadings filed with the Board. Further, the Procuring Entity did not comply with the procedural requirements in section 63 (2), (3) and (4) of the Act because bidders were not informed of termination and the specific reasons for such a termination, neither was the Board furnished with a Report on Termination addressed to the Director General of the Public Procurement Regulatory Authority within 14 days of the date of the alleged termination.

In essence, the Respondents have failed to demonstrate that they complied with the substantive and procedural requirements of termination as provided in section 63 of the Act, but merely stated they cancelled the subject tender and re-advertised the same. This in itself renders the said termination, null and void.

Having found the Procuring Entity's termination of the subject tender is null and void, it therefore follows that any process emanating from an unlawful termination is also null and void. We say so because, the Procuring Entity's re-advertisement of the subject tender through an Invitation Notice dated 21st April 2021 emanates from the subject tender. The said re-advertisement shows the Procuring Entity is re-tendering for "**Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered in Kenya only)**", which is the same services previously advertised on 26th March 2021.

Accordingly, the Board finds that the Procuring Entity's termination of the subject tender and re-advertisement of the same service through a Tender Invitation Notice dated 21st April 2021 is null and void. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the second issue framed hereinbefore.

In addressing the second issue for determination, the Board observes that from the pleadings submitted to it, the Applicant avers at paragraph four of its Request for Review, that it submitted its bid on 6th April 2021. The Applicant further states that it passed the Preliminary evaluation stage as it had provided all the required documents to be responsive. It further avers at paragraph six of the Request for Review that it was subjected to technical evaluation where it surpassed the minimum score of 80% as provided in page 19 of the Tender Document. At the Technical Evaluation stage, the Applicant together with its underwriter qualified and were subsequently subjected to a Financial Evaluation. The Applicant believes that it was the lowest evaluated bidder together with its underwriter.

However, the Applicant depones that it received a letter dated 19th April 2021 wherein it was advised that its bid was rejected on grounds that the bid sum quoted of Kshs 47,653,356.00 for 4027 staff was inconsistent and practically not viable to carry out the services (of the subject tender) satisfactorily. The Applicant believes that the reasons given by the Respondent are unfair and unlawful.

The Respondents in their Statement of Response state that they complied with section 80 (2) of the Act which had been provided in the Tender Document that the evaluation process would be conducted in strict compliance with the criteria set therein for evaluation. They further state that the allegations by the Applicant that the evaluation was not conducted in the manner set out in the tender document are wild guesses since the Applicant ought not to be privy to such information. At paragraph five of its Response to the Request for Review the Respondents aver that the Applicant attributes its passing at the Preliminary and Technical stages solely to its self yet only two questions out of 14 were directed to it and the rest to the underwriter who is not a party to these proceedings and the Applicant has not provided proof of authority to represent the underwriter in the instant proceedings. The Respondents further state that the reason given for failure to award the tender were valid as they were based on the recommendations of a duly constituted tender evaluation committee and further on a professional opinion as required by law.

The Interested Party in their Response to the Request for review aver that the Applicant has not demonstrated any breach for the Board to intervene and neither has it established to the required standard any contravention of the principals of procurement.

Having considered parties' respective arguments, the Board notes that the issue in contention requires the Board to establish eligible tenderers in the subject tender and the manner in which evaluation would be conducted by the Evaluation Committee.

To determine eligible tenderers in the subject tender, the Board studied the Tender Document and proceeds to make the following findings:

The Cover Page of the Tender Document describes the subject tender as

"Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Covers (Open to Insurance Brokers Registered in Kenya Only)"

Clause 1.1 of Section I. Invitation for Tenders of the Tender Document further described eligible tenderers as follows:

"The Turkana County Government (TCG) invites sealed tenders from eligible Insurance Brokerage Firm for PROVISION OF GROUP LIFE INSURANCE, GROUP PERSONAL ACCIDENT AND WIBA INSURANCE POLICY COVERS (INSURANCE BROKERS ONLY) for a period of 12months."

Clause 2.1.1 of Section II. Instructions to Tenderers of the Tender Document stated that:

"This Invitation for Tenders is open to all tenderers eligible as described in the Appendix to Instructions to Tenderers."

On its part, the Appendix to Instructions to Tenderers, reference in Clause 2.1.1 above provides as follows:

"Insurance BROKERAGE FIRMS licensed by the insurance Regulatory Authority to transact business in Kenya"

From the foregoing, it is clear eligible tenderers in the subject tender are Insurance Brokerage Firms licensed by the Insurance Regulatory Authority to transact business in Kenya.

As already established by the Board, eligible tenderers were "Insurance Brokerage Firms licensed by the Insurance Regulatory Authority to transact business in Kenya."

This therefore raises the question whether the Applicant (Utmost Insurance Brokers Ltd) has the required locus standi of a tenderer to lodge the instant Request for Review.

Pursuant to section 2 of the Act, a tenderer is a person who submitted a tender in response to a procuring entity's invitation notice.

From the confidential documents submitted to the Board, an original bid submitted by M/s Utmost Insurance Brokers Ltd is among eight bids received by the Procuring Entity by the tender submission deadline of 6th April 2021. At page 9 of its original bid, the Applicant attached a Single Business Permit issued by Nairobi City County valid until 30th December 2021, authorizing the Applicant to undertake the business of insurance brokerage. At page 11 of its original bid, a Membership Certificate to the Association of Insurance Brokers of Kenya is attached therein, showing the Applicant is a member of the said Association. Pages 15 to 20 of the Applicant's original bid, contains

Registration Certificates attached thereto showing the Applicant has been registered to operate as an insurance broker in Kenya for the last 5 years. In essence, the documentation submitted in the Applicants original bid demonstrates the Applicant is registered and licensed by the Insurance Regulatory Authority to transact insurance brokerage business in Kenya.

This is sufficient evidence that the Applicant is an eligible tenderer in the subject procurement process.

The Board studied the Tender Document in its entirety and notes that “underwriters” are not identified as “eligible tenderers”. That notwithstanding, bidders were required to provide an authorization letter from a proposed underwriter. However, underwriters were not submitting bids in Joint Venture with Insurance Brokerage Firms. Mandatory Requirement A (16) of the Appendix to Instructions to Tenderers of the Tender Document provided that:

"Attach authorization letter from the proposed underwriter"

This explains why the Applicant attached a duly completed Underwriters Authorization Form dated 6th April 2021 on the letterhead of Geminia Insurance Co. Ltd addressed to the Procuring Entity stating as follows:

"Whereas we Geminia Insurance Company Ltd who are established and reputable providers of insurance services having offices at Le'Marc 5th Floor, Church Road off Waiyaki Way, P.O Box 61316-00200, Nairobi do hereby authorize Utmost Insurance Brokers Ltd to submit a tender and subsequently negotiate and sign the contract with you against your TCG/PSADM/177/2020-2021 for Provision of

Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover...”

It is evident, Geminia Insurance Company Ltd was nominated as the Applicant’s proposed underwriter, thus extended its (Geminia’s) authority to the Applicant to submit a tender and subsequently negotiate a contract with the Procuring Entity in respect of the subject tender.

Having noted the Applicant is an eligible tenderer within the meaning provided in the Tender Document, it therefore follows, the Applicant did not require an authority of Geminia Insurance Company Ltd to file the instant Request for Review.

The mere fact that Geminia Insurance Company Ltd is proposed as an Underwriter for a different insurance broker in the unlawful retender, that is, the Interested Party herein, does not stop the Board from determining the Request for Review, because the Applicant rightfully invoked the jurisdiction of the Board.

At this point, the Board will address the question whether the evaluated the Applicant’s bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document read together with section 80 (2) of the Act.

It is worth pointing out that at the Preliminary Evaluation Stage, Clause A of the Appendix to Instructions to Tenderers provided requirements for Brokerage Firms and Underwriters. At the Technical Evaluation Stage, evaluation would be conducted on the brokerage firms and underwriters

based on the requirements for brokerage firms and underwriters as can be seen from the Appendix to Instructions to Tenderers at pages 18 to 19 of the Tender Document. At the Financial Evaluation Stage, the lowest evaluated bidder would be recommended for award of the subject tender pursuant to the criteria of lowest evaluated bidder in the Appendix to Instructions to Tenderers on page 19 of the Tender Document.

Lastly, the Award Criteria was provided in Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document as follows:

"2.25.1 Subject to paragraph 2.29 TCG will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.

2.25.2 To qualify for contract award, the tenderer shall have the following: -

(a) Necessary qualifications, capability experience, services, equipment and facilities to provide what is being procured.

(b) Legal capacity to enter into a contract for procurement

(c) Shall not be insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing.

(d) Shall not be debarred from participating in public procurement."

According to the Evaluation Report executed on 16th April 2021, the Applicant and its proposed underwriter (M/s Geminia Insurance Company Ltd) were evaluated against requirements for brokerage firms and underwriters respectively. Both were found responsive at the end of Preliminary Evaluation. During Technical Evaluation, the Applicant and M/s Geminia Insurance Company Ltd achieved a combined technical score of 94% out of the minimum technical score of 80% required to proceed to Financial Evaluation. At the Financial Evaluation stage, the Applicant was the lowest evaluated bidder at its tender sum of Kshs. 47,653,356/-.

However, the Evaluation Committee observed as follows in its Recommendation for Award:

"The Committee observed that the proposed underwriter is the current service provider of GLA/GPA/WIBA Policy Cover to the client at a total sum of Kshs. 55,046,614 for 3500 County Executive staff. The committee finds the said bid sum quoted sum of Kshs. 47,653,356 for 4027 staff as inconsistent and practically not viable to carry the services satisfactorily and therefore recommends the tender to be re-advertised."

In the professional opinion dated 20th April 2021, the Procuring Entity's Deputy Director, Supply Chain Management Services concurred with the Evaluation Committee's recommendation, thus advised the 2nd Respondent to approve the said recommendation.

Subsequently, the Applicant was informed in its letter of notification of unsuccessful bid dated 19th April 2021 that:

***"...your bid was unsuccessful due to the following reasons:
the proposed underwriter is the current service provider of
GLA/GPA/WIBA Policy Cover to the client at a total sum of
Kshs. 55,046,614 for 3900 County Executive staff. The
committee finds the said bid sum quoted sum Kshs.
47,653,356 for 4027 staff as inconsistent and practically not
viable to carry the services satisfactorily and therefore
recommends the tender to be re-advertised. You are
encouraged to reapply"***

Having studied the evaluation criteria outlined in the Tender Document, the Board did not find any provision which was based on evaluating whether ***"the bid sum quoted by bidders was inconsistent and practically not viable to execute services in the subject tender satisfactorily"***

Section 80 (2) of the Act provides that:

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

Section 80 (2) of the Act requires an evaluation committee to evaluate bids based on the procedures and criteria specified in the Tender Document. In the instant case, the evaluation criteria was provided in the Appendix to Instructions to Tenderers which would culminate to award based on the Award Criteria of lowest evaluated bidder as stated in Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document.

This therefore means, the criterion of evaluating ***"the bid sum quoted by bidders and finding it is inconsistent and practically not viable to execute services in the subject tender satisfactorily"*** was an

extraneous criteria introduced after Financial Evaluation, yet the same was never communicated to bidders in the Tender Document.

Article 227 (1) of the Constitution requires State organs and other public entities to undertake procurement of goods and services in a system that is fair, equitable, transparent, competitive and cost-effective. The principle of fairness applies during evaluation of bids to the effect that a procuring entity cannot introduce extraneous criteria not provided in the Tender Document to the detriment of bidders who relied on the criteria in the Tender Document when submitting their bids.

It was therefore unfair for the Evaluation Committee to introduce new criterion and fail to recommend award of the subject tender to the Applicant based on the criterion of lowest evaluated bidder. Further, the Head of Procurement's failure to advise the 2nd Respondent to award the subject tender to the lowest evaluated bidder at the Financial Evaluation Stage, lacks any justifiable basis.

Accordingly, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the criteria of lowest evaluated bidder in the Appendix to Instructions to Tenderers on page 19 read together with Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document and section 80 (2) of the Act.

In determining the appropriate reliefs in the circumstances, the Board observes that section 173 (b) of the Act gives the Board a discretionary power **“give directions to the Accounting officer of a Procuring Entity with respect with anything to be done or re-done in the procurement or disposal proceedings”**

In the instance case, the Board found that the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act rendering the termination null and void. Further, the re-advertisement of 21st April 2021 emanating from an unlawful termination is also null and void. The Board has also found that the Procuring Entity failed to evaluate the Applicant’s bid at the Financial Evaluation stage in accordance with the criteria of lowest evaluated bidder in the Appendix to Instructions to Tenderers on page 19 read together with Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document and section 80 (2) of the Act.

In the circumstances, the Accounting Officer of the Procuring Entity ought to award the subject tender to the lowest evaluated bidder in accordance with the Accounting Officer of the Procuring Entity to award the lowest evaluated bidder in accordance with the award criteria set out in **Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.**

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

FINAL ORDERS

In exercise of the powers conferred upon in by section 173 of the Act, the Board makes the following final orders: -

- 1. The Accounting Officer of the Procuring Entity's Termination of Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only) previously advertised on 26th March 2021 and the Tender Invitation Notice dated 21st April 2021 re-advertising the subject tender, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of unsuccessful bid in Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only) dated 19th April 2021 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity's Letters of unsuccessful bid in Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only) dated 20th April 2021 addressed to all other bidders, be and are hereby cancelled and set aside.**
- 4. The Accounting Officer of the Procuring Entity is hereby directed to conclude the procurement process in Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered In Kenya Only) advertised on 26th March 2021, to its logical conclusion**

including the making of an award to the lowest evaluated tenderer in accordance with Clause 2.25 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act, within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.

5. Given that the procurement process in Tender No. TCG/PSADM/177/2020-2021 for Provision of Group Life Insurance, Group Personal Accident and Work Injury Benefits Policy Cover (Open to Insurance Brokers Registered in Kenya Only) advertised on 26th March 2021 has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 19th day of May, 2021.

CHAIRPERSON

SECRETARY

PPARB

PPARB