

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 19/2021**  
**(APPLICATION NO. 10/2021 AND APPLICATION NO. 19/2021)**  
**(CONSOLIDATED)**  
**BETWEEN**

**DERMALOG IDENTIFICATION SYSTEMS GmbH**  
**COMPULYNX LIMITED, LIAISON HEALTHCARE**  
**LIMITED, LCT AFRICA LTD (JOINT VENTURE**  
**PARTNERS) .....1<sup>ST</sup> APPLICANT**  
**INTRASOFT INTERNATIONAL S.A**  
**INTRASOFT INTERNATIONAL EAST**  
**AFRICA LIMITED (CONSORTIUM).....2<sup>ND</sup> APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**  
**NATIONAL HOSPITAL INSURANCE FUND.....1<sup>ST</sup> RESPONDENT**  
**NATIONAL HOSPITAL INSURANCE FUND.....2<sup>ND</sup> RESPONDENT**  
**MEDBOOK KENYA LTD/TECH MAHINDRA.....3<sup>RD</sup> RESPONDENT**  
**TECHNOLOGY ASSOCIATES E.A.....4<sup>TH</sup> RESPONDENT**

Review against the decision of the Accounting Officer of National Hospital Insurance Fund with respect to Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System.

**BOARD MEMBERS**

- |                     |              |
|---------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani  | -Member      |

3. Mrs. Irene Kashindi -Member
4. Ms. Isabella Juma, CPA -Member
5. Mr. Nicholas Mruttu -Member

### **IN ATTENDANCE**

1. Mr. Philip Okumu -Acting Board Secretary
2. Mr. Stanley Miheso -Secretariat

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

National Hospital Insurance Fund (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System (hereinafter referred to as "the subject tender") through an Invitation to Tender Notice published on *MyGov* Newspaper, the Procuring Entity's Website ([www.nhif.or.ke](http://www.nhif.or.ke)) and the Public Procurement Information Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) on 13<sup>th</sup> October 2020.

#### **Bid Submission Deadline and Opening of Bids**

The initial bid submission deadline of 25<sup>th</sup> November 2020 was extended to 9<sup>th</sup> December 2020 through an Addendum issued by the Procuring Entity on 19<sup>th</sup> November 2020. The Procuring Entity received a total of ten (10) bids by the bid submission deadline of 9<sup>th</sup> December 2020. The same were opened in the presence of bidders' representatives by a Tender Opening Committee and recorded as follows: -

<b>Bidder No.</b>	<b>Bidder Name</b>
1	Technology Associates E.A Ltd
2	Tech Mahindra/Medbook
3	Eclectics International Ltd
4	Intrasoft International E.A
5	SYBL Kenya Limited
6	Yash Technologies
7	LCT Africa Ltd
8	E-klaim Africa Ltd
9	KPMG Kenya
10	Computech Limited

The subject tender was divided into 3 lots (lot 1, lot 2 & lot 3). Bidders' participation in the specific lots was as follows: -

<b>Bidders</b>		
<b>Lot 1</b>	<b>Lot 2</b>	<b>Lot 3</b>
Technology Associates E.A. Limited	Technology Associates E.A. Limited	Technology Associates E.A. Limited
Tech Mahindra/Medbook	Tech Mahindra/Medbook	Computech Limited
Intrasoft International Ltd	Eclectics International Ltd	
LCT Africa Ltd	SYBYL Kenya Limited	
Eclectics International Ltd	Yash Technologies	
E-klaim Africa Ltd	KPMG Kenya	

### **Evaluation of Bids**

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following stages: -

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

## 1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated bids against the Mandatory Evaluation Criteria outlined in the Appendix to Instructions to Tenderers at page 200 of the Tender Document. The results of bidders who were found responsive and thus qualified to proceed to Technical Evaluation in the three lots were recorded as follows: -

<b>Lot 1</b>	<b>Lot 2</b>	<b>Lot 3</b>
Four bidders proceeded to Technical Evaluation. These were: -	1 bidder proceeded to Technical Evaluation.	1 bidder proceeded to Technical Evaluation.
-Technology Associates E.A. Limited - Medbook Kenya Ltd/Tech Mahindra - Intrasoft International Ltd - LCT Africa Ltd	Technology Associates E.A. Limited	Technology Associates E.A. Limited

## 2. Technical Evaluation

At this stage, bidders were evaluated against the technical specifications set out at pages 202 to 294 of the Tender Document. Bidders would then be invited to demonstrate their proposed solution to the Evaluation Committee. The following bidders achieved the minimum technical score of 80% specified in the Tender Document and thus eligible to proceed to Financial Evaluation: -

<b>Lot 1</b>	<b>Scores (%)</b>
Technology Associates E.A. Limited	88.5

Medbook Kenya Ltd/Tech Mahindra	90.2
Intrasoft International Ltd	90
LCT Africa Ltd	89.25

<b>Lot 2</b>	<b>Scores (%)</b>
Technology Associates E.A. Limited	86.2

<b>Lot 3</b>	<b>Scores (%)</b>
Technology Associates E.A. Limited	85

### 3. Financial Evaluation

At this stage, the Evaluation Committee recorded the tender prices submitted by bidders so as to determine the lowest evaluated tenderer in the three lots as follows: -

	<b>Bidder (s)</b>	<b>Prices</b>	<b>Lowest Evaluated Price</b>
Lot 1	Technology Associates E.A. Limited	Ksh. 188,826,047.20	Medbook Kenya Ltd/Tech Mahindra Ksh. 135,000,000.00
	Medbook Kenya Ltd/Tech Mahindra	Ksh. 135,000,000.00	
	Intrasoft International Ltd	USD 5,683,000 (Ksh. 632,915,710.00) Exchange Rate as at 9 <sup>th</sup> /12/2020 was 1 USD = Ksh. 111.37	
	LCT Africa Ltd	Ksh. 697,280,000.00	

Lot 2	Technology Associates E.A. Limited (Only bidder)	Ksh. 283,596,781.88	Ksh. 283,596,781.88
Lot 3	Technology Associates E.A. Limited (Only bidder)	Ksh. 106,200,030.92	Ksh. 106,200,030.92

## Recommendation

The Evaluation Committee recommended award of the subject tender as follows: -

	Lowest Evaluated Bidder	Lowest Evaluated Price
Lot 1	Medbook Kenya Ltd/Tech Mahindra	Ksh. 135,000,000.00
Lot 2	Technology Associates E.A. Limited	Ksh. 283,596,781.88
Lot 3	Technology Associates E.A. Limited	Ksh. 106,200,030.92

## Professional Opinion

In a professional opinion dated 25<sup>th</sup> January 2021, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. She took the view that the procurement process satisfied the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). Consequently, she advised the Procuring Entity's Chief Executive Officer to approve award of the subject tender in the 3 respective lots as recommended by the Evaluation Committee. The Chief Executive Officer approved the said professional opinion on 25<sup>th</sup> January 2021.

## Notification to Tenderers

In letters dated 26<sup>th</sup> January 2021, the Procuring Entity notified all tenderers of the outcome of their bids.

## **REQUEST FOR REVIEW NO. 10/2021**

M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners) lodged a Request for Review dated 1<sup>st</sup> February 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 1<sup>st</sup> February 2021 and filed on even date, a Verifying Affidavit sworn on 1<sup>st</sup> February 2021 and filed on even date and a Reply to the 1<sup>st</sup> Respondent's Memorandum of Response and Replying Affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, sworn on 12<sup>th</sup> February 2021 and filed on even date, through the firm of Caroline Oduor & Associates, seeking the following orders: -

- 1. An order directing the 1<sup>st</sup> Respondent to furnish the Applicant with the summary of proceedings of the opening of tender's 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, at the preliminary and before hearing of the Request herein;***
- 2. An order annulling the subject procurement proceedings undertaken by the 1<sup>st</sup> Respondent to the extent of non-compliance with the mandatory tender requirements, the provisions of sections 79 (1) and 80 (2) of the Act and the outcome thereof relating to preliminary, technical and financial evaluation be varied accordingly;***

- 3. An order canceling and setting aside the 1<sup>st</sup> Respondent's decision contained in its notification letter of regret dated 26<sup>th</sup> January 2021 and addressed to the Applicant together with all other related notifications to the 2<sup>nd</sup>, 3<sup>d</sup> and 4<sup>th</sup> Respondents;***
- 4. An order directing the 1<sup>st</sup> Respondent to conduct financial evaluation with respect to the tenderers lawfully eligible to participate in the financial evaluation stage and to make an award on the basis of an indicative market price in accordance with the tender document and the law;***
- 5. An order compelling the 1<sup>st</sup> Respondent to pay the costs of the Review herein; and***
- 6. Any other orders that the Board deems necessary for the ends of justice.***

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged a Memorandum of Response dated 5<sup>th</sup> February 2021 and filed on 8<sup>th</sup> February 2021 together with a Replying Affidavit sworn by the Procuring Entity's Head of Supply Chain Management on 5<sup>th</sup> February 2021 and filed on 8<sup>th</sup> February 2021 through the firm of Robson Harris & Co. Advocates, M/s Medbook Kenya Ltd/Tech Mahindra lodged a Replying Affidavit sworn by its Director on 10<sup>th</sup> February 2021 and filed on 11<sup>th</sup> February 2021 through the firm of Mbugwa, Atudo & Macharia Advocates while M/s Intrasoft International SA & M/s Intrasoft International East Africa Limited (Consortium) lodged a Memorandum of Response dated 8<sup>th</sup> February 2021 and filed on 9<sup>th</sup> February 2021, a Statement in Support of the Memorandum of Response, dated 8<sup>th</sup>

February 2021 and filed on 9<sup>th</sup> February 2021 and a Verifying Affidavit sworn by the 2<sup>nd</sup> Applicant's representative on 8<sup>th</sup> February 2021 and filed on 9<sup>th</sup> February 2021 through the firm of O & M Law LLP Advocates. M/s Technology Associates E.A addressed a letter dated 15<sup>th</sup> February 2021 to the Board Secretary in response to Review No. 10/2021, expressing their confidence and satisfaction with the processes followed by the 1<sup>st</sup> Respondent in awarding Lot 1 and thus, had no objection to the said award.

M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners) lodged Written Submissions dated and filed on 15<sup>th</sup> February 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged Written Submissions dated and filed on 15<sup>th</sup> February 2021 together with Supplementary Submissions dated and filed on 16<sup>th</sup> February 2021 in respect to the Request for Review No. 10/2021. M/s Medbook Kenya Ltd/Tech Mahindra, M/s Intrasoft International SA & M/s Intrasoft International East Africa Limited (Consortium) and M/s Technology Associates E.A did not file written submissions in Review No. 10/2021.

### **REQUEST FOR REVIEW NO. 19/2021**

M/s Intrasoft International SA, Intrasoft East Africa Limited (Consortium) lodged another Request for Review No. 19/2021 dated 8<sup>th</sup> February 2021 and filed on 9<sup>th</sup> February 2021 together with a Statement in Support of the Request for Review sworn on 8<sup>th</sup> February 2021 and filed on 9<sup>th</sup> February 2021, a Verifying Affidavit sworn on 8<sup>th</sup> February 2021 and filed on 9<sup>th</sup> February 2021 and a Further Affidavit sworn on 19<sup>th</sup> February 2021 and filed

on even date through the firm of O & M Law LLP Advocates, seeking the following orders: -

- i. An order directing the Procuring Entity to furnish the Applicant with a summary of the proceedings of the opening of the tender's preliminary, technical and financial evaluation; a comparison of the tenders, the scores awarded and the evaluation criteria used thereof, before the Request for Review herein can be heard substantively;***
- ii. An order declaring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Tender Document issued in respect of Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing & Commissioning of an ERP and Claims Management System and the procurement process commenced thereof incurably flawed;***
- iii. An order cancelling and setting aside the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Tender Document issued in respect of Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing & Commissioning of an ERP and Claims Management System and the tender proceedings commenced thereof;***
- iv. An order cancelling and setting aside the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision contained in its letter dated 26<sup>th</sup> January 2021 addressed to the Applicant, and all other related notifications communicated to the tenderers of the subject tender;***

- v. ***An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to retender, within thirty (30) days from the date of the Board's decision, for Supply, Delivery, Installation, Testing & Commissioning of an ERP and Claims Management System in compliance with the Constitution of Kenya, the Public Procurement and Asset Disposal Act, 2015, the Regulations thereof, and all other enabling provisions of the law;***
- vi. ***An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay the costs of the Review herein; and***
- vii. ***Any other reliefs that the Board may deem fit and just to grant in the circumstances.***

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged a Memorandum of Response dated 16<sup>th</sup> February 2021 and filed on even date together with a Replying Affidavit sworn on 16<sup>th</sup> February 2021 and filed on even date through Robson Harris & Company Advocates while M/s Technology Associates E.A addressed a letter dated 15<sup>th</sup> February 2021 to the Board Secretary in response to Review No. 19/2021 expressing their confidence and satisfaction with the processes followed by the 1<sup>st</sup> Respondent in awarding Lot 1 and thus, had no objection to the said award M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners) and M/s Medbook Kenya Ltd/Tech Mahindra, did not file responses in Review No. 19/2021.

M/s Intrasoft International SA, Intrasoft East Africa Limited (Consortium) lodged Written Submissions dated 19<sup>th</sup> February 2021 and filed on 22<sup>nd</sup> February 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged Written Submissions dated 25<sup>th</sup> February 2021 and filed on even date in respect of Request for Review No. 19/2021. M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners), M/s Medbook Kenya Ltd/Tech Mahindra and /s Technology Associates E.A did not file written submissions in Review No. 19/2021, yet they were served by the pleadings of the parties.

**CONSOLIDATION OF REQUEST FOR REVIEW APPLICATION NO. 10/2021 AND NO.19/2021 INTO ONE REQUEST FOR REVIEW NO. 19/2021**

Request for Review No. 10/2021 filed by M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners) and Request for Review No. 19/2021 filed by M/s Intrasoft International SA, Intrasoft East Africa Limited (Consortium) relate to the same tender advertised by the same procuring entity.

Noting the applicants in Request for Review No. 10/2021 and Request for Review No. 19/2021 participated in the same procurement process advertised by the same procuring entity lodged two separate request for review applications, the Board addressed its mind on the question whether the circumstances in both Request for Review Applications justify

consolidation of the two Request for Review applications to proceed as one Request for Review application.

In addressing this question, the Board considered Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides as follows: -

***"Where two or more requests for review are instituted arising from the same tender or procurement proceeding the Review Board may consolidate the requests and hear them as if they were one request for review"***

In the case of **Kerugoya HC ELC 258 of 2013, Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others (2014) eKLR**, the Court cited with approval a rendition of the Indian Supreme Court **Case No. 551, Prem Lala Nahata & Another vs Chandi Prasad Sikaria, (2007) 2** at paragraph 18 where it was held as follows: -

***"it cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or cause pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the***

***suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason, it is desirable to make an order consolidating the suits.”***

Similarly, in **Petition No. 14 of 2013, Law Society of Kenya v. Center for Human Rights and Democracy and 12 Others (2014) eKLR**, the Supreme Court of Kenya observed as follows: -

***“the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties.”***

Having considered the meaning and purpose of consolidation of cases as explained in the foregoing cases, this Board observed that in procurement proceedings, an accounting officer of a procuring entity has the primary responsibility under section 44 (1) of the Act of ensuring a procuring entity complies with the Act. In doing so, the accounting officer must ensure it complies with any directions given to it by this Board pursuant to section 173 (b) of the Act with respect to anything to be done or redone in the procurement or disposal proceedings.

The second aspect that the Board took into consideration is the fact that pursuant to section 168 of the Act, the Board Secretary in a letter dated 1<sup>st</sup> February 2021, directed the 1<sup>st</sup> Respondent to suspend the subject procurement proceedings because Request for Review No. 10/2021 was filed before this Board on 1<sup>st</sup> February 2021. Similarly, on 9<sup>th</sup> February 2021, the

Board Secretary in a letter dated 9<sup>th</sup> February 2021 directed the 1<sup>st</sup> Respondent to suspend the subject procurement proceedings because Request for Review No. 19/2021 was filed before this Board on 9<sup>th</sup> February 2021. The result of this is that upon completing a review as required under section 171 (1) of the Act, any suspension issued by the Board Secretary pursuant to section 168 of the Act is lifted and the procurement proceedings continue running a day after the Board's decision. Thus, time for implementation of orders issued by the Board in Request for Review No. 10/2021 would start running a day after the lapse of 21 days from 1<sup>st</sup> February 2021 whereas time for implementation of orders issued by the Board in Request for Review No. 19/2021 would also start running a day after the lapse of 21 days from 9<sup>th</sup> February 2021.

If the Board were to issue separate orders in Review No. 10/2021 and Review No. 19/2021, there would be confusion as to which orders are to be implemented by the 1<sup>st</sup> Respondent. Furthermore, implementation of orders issued in respect of Review No. 10/2021 would be difficult because of suspension of procurement proceedings under section 168 of the Act given that another Request for Review No. 19/2021 was filed in respect of the same procurement proceedings in Review No. 10/2021.

Article 48 of the Constitution provides in part as follows: -

***"The State shall ensure access to justice for all persons..."***

Further, Article 50 (1) of the Constitution states that: -

***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"***

Finally, Article 159 (2) (a) of the Constitution provides that: -

***"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a) justice shall be done to all, irrespective of status"***

The right to access to justice and the right to a fair hearing under Articles 48 and 50 (1) of the Constitution respectively, applies to applicants, respondents and interested parties alike. In that regard, this Board is called upon to ensure justice is done to all irrespective of parties that appear before the Board as aggrieved tenderers, an accounting officer of a procuring entity, successful tenderers and any other party joined as such pursuant to section 170 (d) of the Act. This Board ought to balance each party's rights so that on one hand, tenderers are granted appropriate remedies while on the other hand, the accounting officer of a procuring entity is given clear and unambiguous directions on the manner in which a procurement process ought to be concluded, especially in instances where more than one request for review applications are filed before this Board on diverse dates touching on the same subject tender.

In order to save costs, time and effort and to ensure there is clear and unambiguous directions on the manner in which the subject procurement

process ought to proceed, the Board found it convenient to consolidate the two request for review applications Numbers 10/2021 and 19/2021 as one Request for Review pursuant to Regulation 215 of Regulations 2020.

To that end and in exercise of the powers conferred upon it by section 173 of the Act, the Board issued the following orders on 22<sup>nd</sup> February 2021: -

- 1. Request for Review No. 10 of 2021 filed on 1<sup>st</sup> February 2021 and Request for Review No. 19 of 2021 filed on 9<sup>th</sup> February 2021 are hereby consolidated into one Request for Review No. 19 of 2021 pursuant to Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020.**
- 2. Following the consolidation of the two request for review applications, the parties to the Consolidated Request for Review No. 19 of 2021 shall be as follows: -**
  - i. M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd (Joint Venture Partners) as the 1<sup>st</sup> Applicant.**
  - ii. M/s Intrasoft International S.A, Intrasoft International East Africa Limited (Consortium) as the 2<sup>nd</sup> Applicant.**
  - iii. The Accounting Officer, National Hospital Insurance Fund as the 1<sup>st</sup> Respondent.**
  - iv. National Hospital Insurance Fund as the 2<sup>nd</sup> Respondent.**
  - v. Medbook Kenya Ltd/Tech Mahindra as the 3<sup>rd</sup> Respondent.**

**vi. Technology Associates E.A as the 4<sup>th</sup> Respondent.**

**3. The Board will render a Decision in the Consolidated Request for Review on or before 2<sup>nd</sup> March 2021.**

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request 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.

**BOARD'S DECISION**

After careful consideration of the parties' pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

**I. Whether the Board has jurisdiction to entertain the following allegations raised by the 2<sup>nd</sup> Applicant in its Request for Review: -**

*a) Whether the Procuring Entity created an amorphous, ambiguous and/or two award evaluation criteria that would be used to arrive at the successful bidder in the subject tender;*

- b) Whether the Tender Document provided two methods of tendering thus making it difficult for the 2<sup>nd</sup> Applicant and other bidders to sufficiently know the benchmarks they were required to meet to satisfy the evaluation criteria;*
- c) Whether the criteria of weighting of prices at 20% and weighting of technical specifications at 80% specified in Clause 2.24 of the Appendix to Instructions to Tenderers at page 21 of the Tender Document was neither objective nor quantifiable as required by section 80 (3) of the Act;*
- d) Whether the Procuring Entity failed to provide specific requirements in the Tender Document that allow fair and open competition as required by section 60 of the Act in its description of the business units for Lot 1 and Lot 2; and*
- e) Whether the Procuring Entity breached Clause 2.18.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 78 (8) of the Act on provision of tender opening minutes to bidders.*

**II. Whether Request for Review filed by the 1<sup>st</sup> Applicant is properly filed before the Board.**

**III. Whether the Procuring Entity evaluated the 3<sup>rd</sup> Respondent's bid in accordance with the criteria on tender security specified in Clause 2 of the Mandatory Evaluation Criteria at page 200 of the Tender Document and the Standard Form for Tender**

**Security outlined in page 519 to 520 of the Tender Document read together with section 79 (1) and 80 (2) of the Act.**

- IV. Whether the Procuring Entity evaluated the 2<sup>nd</sup> Applicant's bid in accordance with the criterion on serialization of bids specified in Clause 3 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document read together with section 79 (1) and 80 (2) of the Act.**
- V. Whether the Procuring Entity undertook a due diligence exercise in accordance with Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act.**
- VI. Whether the Procuring Entity awarded the subject tender in accordance with section 86 (1) (a) of the Act and Article 227 (1) of the Constitution.**
- VII. Whether the 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 meets the threshold of section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.**
- VIII. Whether the 1<sup>st</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 was issued by a person authorized in law.**

Before addressing the above issues, the Board would like to address a preliminary issue raised by the 2<sup>nd</sup> Applicant.

In a letter Ref: ROP01/1007/11/DW dated 26<sup>th</sup> February 2021 addressed to the Board Secretary, the 2<sup>nd</sup> Applicant stated that: -

**"RE: APPLICATION NO. 19 OF 2021-INTRASOFT INTERNATIONAL S.A & INTRASOFT INTERNATIONAL EAST AFRICA LIMITED (CONSORTIUM) v. THE ACCOUNTING OFFICER, NHIF & NHIF**

***We act for the Consortium (Applicant) in the above matter***

***We served the Applicant's Further Affidavit and Submissions upon the Respondents' Advocates on 22<sup>nd</sup> February 2021. An advance copy of the Further Affidavit had been served upon the Respondents' advocates via email on 19<sup>th</sup> February 2021. Please see copies of page 1 of the Applicant's Further Affidavit and Submissions bearing the impressions of the Respondents' advocates' stamp***

***The Respondents' advocates served us with their Submissions on 25<sup>th</sup> February 2021 via email. The same are dated and filed on even date. At paragraph 3, the Respondents' advocates state that at the time of filing their submissions, they were yet to be served with the Applicant's written submissions. This statement is obviously untrue and a clear misrepresentation of facts.***

***We therefore clarify that the Respondents' advocates had sufficient notice of the Applicant's Further Affidavit at the time of filing their own submissions"***

At paragraph 3 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Written Submissions filed with respect to the 2<sup>nd</sup> Applicant's Request for Review, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state as follows: -

***"Madam Chair and Honourable members of the Board, it is worth noting that at the time of filing these submissions, we are yet to be served with the Applicant's written submissions"***

Having considered the 2<sup>nd</sup> Applicant's letter dated 26<sup>th</sup> February 2021 addressed to the Board Secretary and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' allegation at paragraph 3 of their Written Submissions, the Board observes that the 2<sup>nd</sup> Applicant attached a copy of the first page of its Further Affidavit and the first page of its Written Submissions, both of which bear the stamp of Robson Harris Advocates, LLP, the Advocates representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this Request for Review. The said stamp shows the 2<sup>nd</sup> Applicant's Further Affidavit and Written Submissions were received by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Advocates on 22<sup>nd</sup> February 2021 at 2.25pm by Nancy and a signature is affixed therein.

Clause 5 of the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 provides that: -

***"The Accounting Officer of a Procuring Entity and/or any other Respondent to the Request for Review shall file his/her submissions within 3 days of service to him/her of the written submissions of the Applicant, the tenderer notified to be successful and/or such other persons determined by PPARB"***

It is worth noting that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Written Submissions within three days after receiving the 2<sup>nd</sup> Applicant's Written Submissions on 22<sup>nd</sup> February 2021 as required by Clause 5 of the Circular referenced hereinbefore.

Having dispensed with the above preliminary issue, the Board shall now address the issues framed for determination as follows: -

On the first limb of the first issue for determination, the 2<sup>nd</sup> Applicant alleged at paragraph 37 to 41 of its Request for Review that the Procuring Entity created an amorphous, ambiguous and/or two award evaluation criteria that would be used to arrive at the successful bidder in the subject tender. According to the 2<sup>nd</sup> Applicant, Clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document provided the award criteria as follows: -

***"Subject to paragraph 2.29, the Fund 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 tenderer, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"***

The 2<sup>nd</sup> Applicant also cited Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document which states that: -

***"Bid evaluation will take into account technical factors in addition to cost factors. The weight for price is 20% while the***

***weight for technical specifications is 80%. Bidders must conform to the specific technical requirements in Section IV”***

According to the 2<sup>nd</sup> Applicant, the weighting criteria under Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document was contradictory to the express provision of Clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document which makes it clear that the successful tender would be the lowest evaluated tenderer. The 2<sup>nd</sup> Applicant further states that it sought clarification on 15<sup>th</sup> October 2020 but the Procuring Entity did not offer any response to the clarification on the aforementioned clauses.

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents depone at paragraphs 36 to 20 of their Replying Affidavit and paragraphs 36 to 39 of their Memorandum of Response that they duly responded to numerous requests for clarifications made by the 2<sup>nd</sup> Applicant, vide addenda letters dated 30<sup>th</sup> October 2020 and 11<sup>th</sup> November 2020. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the responses provided adequately addressed the 2<sup>nd</sup> Applicant’s concerns within reasonable time to enable the 2<sup>nd</sup> Applicant to submit its tender, given that the tender submission deadline was extended to 9<sup>th</sup> December 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further alleged that if the Applicant was aggrieved by any of the clarifications by the Procuring Entity’s in the aforementioned addenda, the 2<sup>nd</sup> Applicant ought to have sought administrative review within 14 days of the date of occurrence of the alleged breach at any stage of the procurement process pursuant to section 167 (1) of the Act.

In exercise of its right of reply, the 2<sup>nd</sup> Applicant depones at paragraph 8 and 9 of its Further Affidavit that section 167 (1) of the Act allows an aggrieved tenderer to seek administrative review within fourteen (14) days of either notification of award or date of occurrence of the alleged breach at any stage of the procurement process. According to the 2<sup>nd</sup> Applicant, notification of award was made on 26<sup>th</sup> January 2021 and its Request for Review was filed within 14 days from that date.

Having considered parties' rival cases, the Board notes that section 167 (1) of the Act provides that: -

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

Section 167 (1) of the Act gives a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity a right to seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

The fourteen-day statutory period under section 167 (1) of the Act ensures that candidates and tenderers exercise their right to administrative review in

good time, so that by the time the Board has completed a review, a procurement process can continue without undue delay. This explains why a candidate or a tenderer ought to approach this Board at the early stages of a procurement process when such candidate or tenderer learns of an alleged breach of duty by a procuring entity. It was therefore not the intention of the legislature for bidders to wait until they receive letters of notification of the outcome of their bids, even in cases where they already learnt of an alleged breach before evaluation has been completed and before notification of the outcome of evaluation has been done by a procuring entity.

The 2<sup>nd</sup> Applicant challenged provisions of the Tender Document to wit, the award criteria specified in Clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document vis-à-vis the evaluation criteria stated in Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document. From the confidential file submitted to the Board, the Procuring Entity issued two Addenda on 30<sup>th</sup> October 2020 and 11<sup>th</sup> November 2020 responding to several clarifications sought by bidders whereas the Addendum issued on 19<sup>th</sup> November 2020 extended the tender submission deadline to 9<sup>th</sup> December 2020.

Having noted the last addendum dealing with clarifications on provisions of the Tender Document was issued on 11<sup>th</sup> November 2020 and that by 9<sup>th</sup> December 2020, no other Addendum was issued by the Procuring Entity, the 2<sup>nd</sup> Applicant was well aware (as admitted by it) that the responses provided on 11<sup>th</sup> November 2020 did not adequately address application of Clause

2.25.1 of Section II. Instructions to Tenderers of the Tender Document vis-à-vis the evaluation criteria stated in Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document. The 2<sup>nd</sup> Applicant also knew that if it participated in the subject procurement process, it would mean that it was subjecting itself to the provisions in the Tender Document and clarifications given as at 11<sup>th</sup> November 2020.

Pursuant to section 75 (1) of the Act, a procuring entity may amend the tender documents at any time before the deadline for submission of tenders by issuing an addendum without materially altering the substance of the original tender. In essence, addenda are issued by a procuring entity any time before the deadline for submission of tenders, to assist tenderers in preparing their respective bids. It is therefore the Board's considered finding that as at 9<sup>th</sup> December 2020, the 2<sup>nd</sup> Applicant should have known that no addendum would be issued modifying the Tender Document any further, because 9<sup>th</sup> December 2020 was the deadline for submission of tenders and the last day for the 2<sup>nd</sup> Applicant to decide whether or not it would subject itself to the subject procurement process or challenge the provisions stated in the Tender Document by filing a request for review before this Board.

In determining the period within which the Applicant ought to have approached this Board challenging application of Clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document vis-à-vis the evaluation criteria stated in Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which states that: -

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

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"***

Pursuant to section 57 (a) of the Act, the 2<sup>nd</sup> Applicant ought to have approached this Board within fourteen days after 9<sup>th</sup> December 2020 and as such, the last day for filing a Request for Review challenging application of Clause 2.25.1 of Section II. Instructions to Tenderers of the Tender Document vis-à-vis the evaluation criteria stated in Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document, fell on 23<sup>rd</sup> December 2020.

The 2<sup>nd</sup> Applicant challenged the aforesaid provisions in a Request for Review filed on 9<sup>th</sup> February 2020 and we find that the Board lacks jurisdiction to entertain the 2<sup>nd</sup> Applicant's allegation that the Procuring Entity created an amorphous, ambiguous and/or two award evaluation criteria that would be used to arrive at the successful bidder in the subject tender because the said allegation was raised out of time

On the second limb of the first issue for determination, the 2<sup>nd</sup> Applicant alleged at paragraph 42 and 43 of its Request for Review that the Tender Document provided two methods of tendering and that this made it difficult for the 2<sup>nd</sup> Applicant and other bidders to sufficiently know the benchmarks

they were required to meet to satisfy the evaluation criteria. In the 2<sup>nd</sup> Applicant's view, the Tender Document was titled "Open National Tender" while the purpose of the tender was described at page 34 of the Tender Document as a "Request for Proposal". In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintain their position that they responded to numerous requests for clarifications made by the 2<sup>nd</sup> Applicant, vide letters dated 30<sup>th</sup> October 2020 and 11<sup>th</sup> November 2020 and that the responses provided adequately addressed the 2<sup>nd</sup> Applicant's concerns within reasonable time. In the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' view, the 2<sup>nd</sup> Applicant had sufficient time to consider the said addendum and submit its bid by the tender submission deadline because the same was extended to 9<sup>th</sup> December 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further allege that if the Applicant was aggrieved by any of the Procuring Entity's addenda, the 2<sup>nd</sup> Applicant ought to have sought administrative review within 14 days of the date of the occurrence of the alleged breach at any stage of the procurement process pursuant to section 167 (1) of the Act.

In addressing this issue, the Board observes that the 2<sup>nd</sup> Applicant is challenging the title of "OPEN NATIONAL TENDER" written on the face of the Tender Document and the introductory sentence on Terms of Reference for Core Application Systems at page 34 of the Tender Document which states as follows: -

***"The purpose for this Technical Requirements document is to allow National Health Insurance Fund (NHIF) request for a proposal (RFP) and select a vendor who will provide services for the supply, implementation, installation, configuration,***

***data migration, integration, testing, training, commissioning and support of an ERP integrating both Back Office Operations, Core Health-Care Insurance Systems and Infrastructure”***

This in the Board’s view, is an issue that ought to have been raised by the 2<sup>nd</sup> Applicant within 14 days after the tender submission deadline of 9<sup>th</sup> December 2020. Pursuant to section 57 (a) of the Interpretation and General Provisions Act, the 2<sup>nd</sup> Applicant ought to have approached this Board within fourteen days after 9<sup>th</sup> December 2020 and as such, the last day for filing a Request for Review challenging the method of procurement used vis-à-vis the evaluation criteria specified in the Tender Document was 23<sup>rd</sup> December 2020. Had the 2<sup>nd</sup> Applicant filed its Request for Review within 14 days after 9<sup>th</sup> December 2020, the Board would first establish whether indeed the 2<sup>nd</sup> Applicant is challenging the method of procurement used by the Procuring Entity so as to determine whether the Board’s jurisdiction is ousted by section 167 (4) (a) of the Act.

Having established the 2<sup>nd</sup> Applicant raised an allegation that the Tender Document provided two methods of tendering in a Request for Review filed on 9<sup>th</sup> February 2020, the Board finds that it lacks jurisdiction to entertain the same because the allegation has been raised outside the statutory timeline specified in section 167 (1) of the Act.

On the third limb of the first issue for determination, the 2<sup>nd</sup> Applicant alleged at paragraph 50 of its Request for Review that in the absence of a breakdown

of scores at Technical and Financial Evaluation stages, the criteria of weighting of prices at 20% and the weight for technical specifications at 80% was neither objective nor quantifiable as required by section 80 (3) of the Act. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintain their position that they responded to numerous requests for clarifications made by the 2<sup>nd</sup> Applicant, vide letters dated 30<sup>th</sup> October 2020 and 11<sup>th</sup> November 2020 and that the responses they provided, adequately addressed the 2<sup>nd</sup> Applicant's concerns within reasonable time. This, in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' view, gave the 2<sup>nd</sup> Applicant sufficient time to submit its tender, because the Procuring Entity extended the tender submission deadline to 9<sup>th</sup> December 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further allege that if the 2<sup>nd</sup> Applicant was aggrieved by any of the Procuring Entity's addendum, the 2<sup>nd</sup> Applicant ought to have sought administrative review within 14 days of the date of the occurrence of the alleged breach at any stage of the procurement process pursuant to section 167 (1) of the Act.

The criteria referred to by the 2<sup>nd</sup> Applicant can be found in Clause 2.24 of the Appendix to Instructions to Tenderers at page 21 of the Tender Document which states as follows: -

***"The bid evaluation will take into account technical factors in addition to cost factors. The weight for price is 20% while the weight for technical specifications is 80%. Bidders must conform to the specific Technical Requirements in Section IV"***

Evidently, the Applicant is challenging a criterion in the Tender Document which specified the weight for prices as 20% and the weight for technical specifications as 80%. The 2<sup>nd</sup> Applicant admitted that the last Addendum issued on 11<sup>th</sup> November 2020, did not adequately address the clarifications it had sought from the Procuring Entity. As at 9<sup>th</sup> December 2020, the 2<sup>nd</sup> Applicant knew that no addendum would be issued modifying the Tender Document any further, because 9<sup>th</sup> December 2020 was the deadline for submission of tenders and the last day for the 2<sup>nd</sup> Applicant to decide whether or not it would subject itself to the subject procurement process or challenge the provisions stated in the Tender Document by filing a request for review before this Board.

Pursuant to section 57 (a) of the Interpretation and General Provisions Act, the 2<sup>nd</sup> Applicant had 14 days after 9<sup>th</sup> December 2020 to file a Request for Review, challenging Clause 2.24 of the Appendix to Instructions to Tenderers at page 21 of the Tender Document vis-à-vis the provision of section 80 (3) of the Act and as such, the last day for filing a Request for Review raising this ground fell on 23<sup>rd</sup> December 2020.

The 2<sup>nd</sup> Applicant only raised an alleged breach of section 80 (3) of the Act by the Procuring Entity in a Request for Review filed on 9<sup>th</sup> February 2020, and we find the same was filed outside the timelines specified in section 167 (1) of the Act, thus depriving the Board of jurisdiction to address the same.

On the fourth limb of the first issue for determination, the 2<sup>nd</sup> Applicant alleged at paragraph 57 to 60 of the Request for Review that the description of the business units for Lot 1 and Lot 2 and their implementation caused an interlinking of the two lots thus confusing bidders. The Applicant lists several questions it sought clarifications from the Procuring Entity to support its view that the responses given by the Procuring Entity were ambiguous and thus the Procuring Entity failed to provide specific requirements that allow for fair and open competition as required by section 60 of the Act. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintain their position that they responded to numerous requests for clarifications made by the 2<sup>nd</sup> Applicant, vide letters dated 30<sup>th</sup> October 2020 and 11<sup>th</sup> November 2020 and that the responses provided adequately addressed the 2<sup>nd</sup> Applicant's concerns within reasonable time. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 2<sup>nd</sup> Applicant had sufficient time to prepare its tender because the Procuring Entity extended the tender submission deadline to 9<sup>th</sup> December 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further allege that if the Applicant was aggrieved by any of the Procuring Entity's addendum, the 2<sup>nd</sup> Applicant ought to have sought administrative review within 14 days of the date of the occurrence of the alleged breach at any stage of the procurement process pursuant to section 167 (1) of the Act.

The description of business units for Lot 1 can be found in the Terms of Reference for Core Application Systems at page 36 of the Tender Document. On the other hand, the description of business units for Lot 2 can be found in the Terms of Reference for the Enterprise Resource Planning (ERP) at page 209 of the Tender Document. The 2<sup>nd</sup> Applicant has admitted that in its view, the last addendum issued by the Procuring Entity on 11<sup>th</sup> November

2020 did not adequately address the clarifications sought from the Procuring Entity. This therefore leads the Board to find that as at 9<sup>th</sup> December 2020, the 2<sup>nd</sup> Applicant knew that no addendum would be issued modifying the Tender Document any further, because 9<sup>th</sup> December 2020 was the deadline for submission of tenders and the last day for the 2<sup>nd</sup> Applicant to decide whether or not it would subject itself to the subject procurement process or challenge the provisions stated in the Tender Document by filing a request for review before this Board.

Pursuant to section 57 (a) of the Interpretation and General Provisions Act, the 2<sup>nd</sup> Applicant had 14 days after 9<sup>th</sup> December 2020 to file a Request for Review, raising an allegation that the Procuring Entity failed to provide specific requirements in the Tender Document that allow fair and open competition as required by section 60 of the Act in its description of the business units for Lot 1 and Lot 2. The last day for filing a Request for Review raising this allegation fell on 23<sup>rd</sup> December 2020.

The 2<sup>nd</sup> Applicant only raised this allegation in a Request for Review filed on 9<sup>th</sup> February 2020, and we find the same was filed outside the timelines specified in section 167 (1) of the Act, thus depriving the Board of jurisdiction to address the same.

On the fifth limb of the first issue for determination, the 2<sup>nd</sup> Applicant cited Clause 2.18.4 of Section II. Instructions to Tenderers of the Tender Document to support its view that the Procuring Entity failed to furnish the 2<sup>nd</sup> Applicant with minutes of tender opening meeting held on 9<sup>th</sup> December

2020 despite the 2<sup>nd</sup> Applicant having requested for the same through email on 10<sup>th</sup> December 2020. In the 2<sup>nd</sup> Applicant's view, the Procuring Entity's failure to furnish the 2<sup>nd</sup> Applicant with tender opening minutes raised doubt on the integrity of the event of tender opening and thus the Procuring Entity failed to adhere to the principles provided in Article 227 (1) of the Constitution. Having perused the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit, the Applicant deponed at paragraph 11 of its Further Affidavit that the allegation raised on the Procuring Entity's failure to provide the tender opening minutes is not time barred because the said allegation was raised within fourteen days of notification of award as required by section 167 (1) of the Act.

At paragraph 40 of their Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents depone that the 2<sup>nd</sup> Applicant's contention that the Procuring Entity failed to provide tender opening minutes, is statute barred and an abuse of the process of this Board. In the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' view, the 2<sup>nd</sup> Applicant ought to have sought redress within 14 days from 9<sup>th</sup> December 2020 being the date of the alleged breach of the provisions of the Tender Document.

In addressing this issue, the Board observes that the 2<sup>nd</sup> Applicant attached an email extract to its Request for Review which we note contains the following details: -

**"From: SAMOUIL Samis <Samis.SAMOUIL@intrasoft-intl.com>**

**Sent: Thursday, December 10, 2020 1:47 PM**

**To: tenders@nhif.or.ke**

**Cc: MBESA Wambui; NJOROGE Carolyne**

**Subject: Tender Opening Session Mom NHIF/O15/2020-2021-LOT 1**

**ATT: HEAD OF PROCUREMENT**

**Procedure: RESPONSE TO THE REQUEST FOR PROPOSALS FOR THE SUPPLY, DELIVERY, TESTING AND COMMISSIONING OF AN ERP AND CLAIMS MANAGEMENT SYSTEM FOR LOT 1: CORE APPLICATION SYSTEM**

**Tender No: NHIF/015/202-2021**

**Dear Sirs**

**With reference to the subject procedure, we kindly request that you share with us the Minutes of Meeting recorded at the opening session for Lot 1**

**We remain at your disposal..."**

From the foregoing, the Board observes that the 2<sup>nd</sup> Applicant requested for minutes of tender opening in respect of the subject tender through an email dated 10<sup>th</sup> December 2020. The 2<sup>nd</sup> Applicant alleges that the same was not responded to and thus took the view that the Procuring Entity breached Clause 2.18.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 78 (8) of the Act which provide as follows: -

***"Clause 2.18.4: The Fund will prepare minutes of the tender opening which will be submitted to the tenderers that signed the tender opening register and will have made the request***

***Section 78 (8): The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender"***

The Board observes that the 2<sup>nd</sup> Applicant learnt of the Procuring Entity's alleged failure to provide minutes of tender opening, on 10<sup>th</sup> December 2020, because the 2<sup>nd</sup> Applicant admits that the email of 10<sup>th</sup> December 2020 was not responded to. This means, the 2<sup>nd</sup> Applicant had 14 days after 10<sup>th</sup> December 2020 (and not 9<sup>th</sup> December 2020 as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) to file a Request for Review before this Board in accordance with section 167 (1) of the Act raising an allegation that the Procuring Entity failed to provide Minutes of Tender Opening held on 9<sup>th</sup> December 2020 as required by Clause 2.18.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 78 (8) of the Act.

The 2<sup>nd</sup> Applicant only raised this allegation in a Request for Review filed on 9<sup>th</sup> February 2020, and we find the same was filed outside the timelines specified in section 167 (1) of the Act, thus depriving the Board of jurisdiction to address the same.

**In Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR,**

the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows: -

**"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."**

**The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned..."** [Emphasis by the Board]

The Board concurs with the High Court's finding in the above case and would hasten to add that the statutory timeline provided under section 167 (1) of the Act must be adhered to by an aggrieved candidate or tenderer. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

This Board has noted the rising number of bidders who abuse the options under section 167 (1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of their bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of a procurement process or disposal process.

The 2<sup>nd</sup> Applicant herein could have approached the Board within fourteen days after the tender submission deadline raising the allegations addressed by the Board in the first, second, third and fourth limbs of the first issue for determination having noted that as at 9<sup>th</sup> December 2020, the Procuring Entity was not going to issue any other addendum. Furthermore, the 2<sup>nd</sup> Applicant could have approached the Board within 14 days after 10<sup>th</sup> December 2020 when it learnt of the Procuring Entity's failure to furnish it with minutes of tender opening, having made the request on 10<sup>th</sup> December 2020. The 2<sup>nd</sup> Applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging provisions of the Tender Document, so late in the day after sleeping on its right to seek administrative review.

The Board has found that it lacks jurisdiction to entertain the grounds raised by the 2<sup>nd</sup> Applicant challenging various provisions of the Tender Document and allegations of breach on various provisions of the Act. Be that as it may,

the 2<sup>nd</sup> Applicant also challenged one of the ingredients of a letter of notification of unsuccessful bid issued pursuant to section 87 (3) of the Act and further alleged that the Procuring Entity failed to conduct a market survey and a due diligence exercise before award of the subject tender. The said grounds are not time-barred because the same could only be raised within 14 days after the 2<sup>nd</sup> Applicant received its letter of notification. Accordingly, the Board shall address them as substantive issues in the consolidated Request for Review.

On the second issue for determination the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deponed at paragraph 2 and 3 of their Replying Affidavit in response to the 1<sup>st</sup> Applicant's Request for Review that, the 1<sup>st</sup> Applicant's Statement in Support of the Request for Review is sworn by Sylvia Nyambura Kanyoro yet the Power of Attorney given to Sylvia Nyambura Kanyoro is specifically limited to executing documents on behalf of the tender. In the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' view, Sylvia Nyambura Kanyoro lacks the requisite *locus standi* to institute the 1<sup>st</sup> Applicant's Request for Review.

In response, the 1<sup>st</sup> Applicant deponed at paragraph 1 and 3 of its Reply to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response and Replying Affidavit that, Sylvia Nyambura Kanyoro is the Chief Operating Officer of one of the 1<sup>st</sup> Applicant's Joint Venture Partners, LCT Africa Ltd and the 1<sup>st</sup> Applicant's duly authorized representative and holder of power of attorney donated by the Applicant empowering Sylvia Nyambura Kanyoro to execute all such documents on behalf of the 1<sup>st</sup> Applicant. According to the 1<sup>st</sup> Applicant, its Joint Venture Partners comprise of; M/s Dermalog

Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd suing severally and jointly as Joint Venture Partners. Further to this, the 1<sup>st</sup> Applicant deponed that Sylvia Nyambura Kanyoro is duly authorized to initial and sign all documents pertaining to the 1<sup>st</sup> Applicant in the manner stated at the tail end of paragraph 1 of the said Power of Attorney.

Having considered the foregoing pleadings, the Board observes that a Joint Venture Agreement dated 13<sup>th</sup> September 2020 between M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd can be found at page 12 of the 1<sup>st</sup> Applicant's bid showing the said companies entered into a joint venture agreement to implement the subject tender. At pages 8 and 9 of the 1<sup>st</sup> Applicant's Original bid, a Power of Attorney signed by representatives of M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd is attached therein with the following details: -

***POWER OF ATTORNEY***

***DERMALOG-COMPULYNX-LIAISON-LCT-JOINT VENTURE***

***-to-***

***SYLVIA NYAMBURA KANYORO***

***This POWER OF ATTORNEY is made on this 9<sup>th</sup> day of September Two Thousand and Twenty (2020) by DERMALOG-COMPULYNX-LIAISON-LCT-JOINT VENTURE duly formed in the Republic of Kenya and whose address of service shall be Post Office Box Number 58013-00200, Nairobi aforesaid (herein after "the Joint Venture") WITNESSETH as follows:***

- 1. The Joint Venture appoints SYLVIA NYAMBURA KANYORO (herein after "the Attorney") of National ID 26069874 and Post Office Box Number 58013-00200, Nairobi, Kenya to be its attorney with authority to execute on its behalf the Form of Tender, Price Schedule and any deed or arrangement which may be required to be executed by the Joint Venture to complete and conclude all documents of the Joint Venture regarding the tender contracts, on behalf of the DERMALOG-COMPULYNX-LIAISON-LCT-JOINT VENTURE by signing and initialing all such documents.**
- 2. The Joint Venture intends that any deed or arrangement signed on its behalf by the Attorney pursuant to Clause 1 above shall bind the Joint Venture.**

**IN WITNESS WHEREOF this Power of Attorney is hereby executed in the presence of the respective companies' duly authorized officers the day and year first herein before written.**

**[signature affixed]**

**SYLVIA NYAMBURA KANYORO**

**Signed on behalf of**

**DERMALOG IDENTIFICATION SYSTEMS (GmbH)**

**In the presence of**

**[stamp and signature affixed )**

**Signed on behalf of**

**COMPULYNX LIMITED**

**In the presence of**

**[stamp and signature affixed )**

**Signed on behalf of**

**LIAISON HEALTHCARE LIMITED**

***In the presence of***

***[stamp and signature affixed*** )

***Signed on behalf of***

**LCT AFRICA LTD**

***In the presence of***

***[stamp and signature affixed*** )

The Board observes that the 1<sup>st</sup> Applicant (comprising of M/s Dermalog Identification Systems (GmbH), M/s Compulynx Limited, M/s Liaison Healthcare Limited and M/s LCT Africa Ltd as Joint Venture Partners) appointed Sylvia Nyambura Kanyoro to be its attorney with authority to execute the Form of Tender, Price Schedule and any deed or arrangement which may be required to be executed by the Joint Venture to complete and conclude all documents of the Joint Venture regarding the tender contracts. Furthermore, any deed or arrangement signed by Sylvia Nyambura Kanyoro will bind the 1<sup>st</sup> Applicant.

The Black's Law Dictionary, 7<sup>th</sup> Edition at page 1290 thereof describes the term "**power of attorney**" as: -

***"An instrument granting someone authority to act as agent or attorney-in-fact for the grantor."***

Further, **“general power of attorney”** is described therein as: -

***“A power of attorney that authorizes an agent to transact business for the principal”***

On its part, **“special power of attorney”**, is described by the Black’s Law Dictionary as: -

***“power of attorney that limits the agent's authority to only a specified matter.”***

Having compared the above definitions, the Board observes that the Power of Attorney given by the 1<sup>st</sup> Applicant to Sylvia Nyambura Kanyoro on 9<sup>th</sup> September 2020 is a “General Power of Attorney” because it does not limit Sylvia Nyambura Kanyoro’s authority to act on behalf of the 1<sup>st</sup> Applicant when it comes to the subject procurement proceedings. One of the activities undertaken by tenderers incidental to procurement proceedings is filing of Request for Review applications challenging the outcome of their bids.

The Board observes that none of the joint venture partners of the 1<sup>st</sup> Applicant denied giving authority to Sylvia Nyambura Kanyoro to act on behalf of the Joint Venture through a General Power of Attorney in filing a Request for Review. Having found the Joint Venture Partners donated authority to Sylvia Nyambura Kanyoro to act on behalf of the Joint Venture through a General Power of Attorney, it is the Board’s considered finding that Sylvia Nyambura Kanyoro is duly authorized to initial and sign all documents in relation to the subject procurement including filing of a

Request for Review and sworn statements that the Applicant deems necessary to support its Request for Review. The Applicant filed a Statement in Support of the Request for Review, a Verifying Affidavit, a Reply to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response and Replying Affidavit and a Further Affidavit, all sworn by Sylvia Nyambura Kanyoro whom we have found had the requisite authority from the Joint Venture Partners in the subject procurement process, which includes filing the instant Request for Review on behalf of the 1<sup>st</sup> Applicant.

Accordingly, the Board finds that the Request for Review filed by the 1<sup>st</sup> Applicant is properly filed before this Board.

The third issue for determination relates to the question whether the Procuring Entity evaluated the 3<sup>rd</sup> Respondent's bid in accordance with section 79 (1) and 80 (2) of the Act which provide as follows: -

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

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

The 1<sup>st</sup> Applicant cited section 78 (6) (c) of the Act at paragraph 9 of its Request for Review, in support of its view that the tender opening committee ought to prepare what has been given by bidders as tender security. According to the 1<sup>st</sup> Applicant, the Tender Opening Committee announced

that the 3<sup>rd</sup> Respondent had not enclosed its original tender security in its bid, yet proceeded to other stages of evaluation. According to the 1<sup>st</sup> Applicant, the 3<sup>rd</sup> Respondent's financial bid was opened on 25<sup>th</sup> January 2021 when the 1<sup>st</sup> Applicant attended the financial opening ceremony. At paragraph 7 of its Statement in Support of the Request for Review, the 1<sup>st</sup> Applicant depones that the Procuring Entity's Tender Opening Committee announced during the event of tender opening of the Technical Proposal held on 9<sup>th</sup> December 2020 that, the 3<sup>rd</sup> Respondent had not enclosed its original tender security. In response, the 3<sup>rd</sup> Respondent's representative attending the meeting stated that the 3<sup>rd</sup> Respondent's tender security is enclosed in its financial bid envelope for Lot 1 & 2 of the subject tender. Further, the 1<sup>st</sup> Applicant depones that the 3<sup>rd</sup> Respondent's representative was then caused to write and sign on the face of their bid that the original tender security was not part of the 3<sup>rd</sup> Respondent's Technical Proposal submitted to the Procuring Entity.

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state at paragraph 26 of their Memorandum of Response and paragraph 30 of their Replying Affidavit that the 3<sup>rd</sup> Respondent provided its original tender security in accordance with the requirement in the Tender Document. At paragraph 7 (c) of its Replying Affidavit, the 3<sup>rd</sup> Respondent depones that it submitted a tender security of Kshs, 5,000,000/- issued by Sidian Bank and valid for 150 days and thus complied with the mandatory requirement on submission of a tender security as required in the Tender Document.

In addressing this issue, the Board observes that the events of tender opening are described in section 78 of the Act and in particular, section 78

(1) thereof specifies that an accounting officer of a procuring entity appoints a tender opening committee to undertake such an exercise. Section 78 (6) of the Act states as follows: -

**"78 (6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—**

- (a) the name of the person submitting the tender;**
- (b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and**
- (c) if applicable, what has been given as tender security**

Upon conclusion of the tender opening ceremony, section 78 (10) of the Act requires the tender opening committee to: -

**"78 (10) ... prepare tender opening minutes which shall set out—**

- (a) a record of the procedure followed in opening the tenders; and**
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders"**

In essence, the events of tender opening are reduced in writing and contained in a document known as **"Tender Opening Minutes"**. The Tender Opening Minutes are a reflection of the procedure followed in opening the tenders and the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

Pursuant to section 67 (3) (e) of the Act, Tender Opening Minutes form part of the Procuring Entity's confidential documents submitted to this Board when an applicant files a request for review. In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents furnished the Board with the confidential file applicable in the subject procurement process including Tender Opening Minutes of the Meeting held on 9<sup>th</sup> December 2020 at the Procuring Entity's Auditorium. It is worth noting that the Tender Opening Minutes of 9<sup>th</sup> December 2020 recorded the events of opening of the Technical Proposals because the subject tender was a two envelope tender whereby the Technical Envelope contained requirements to be considered at the Preliminary and Technical Evaluation Stage whereas the Financial Envelope contained requirements to be considered at the Financial Evaluation Stage. Having studied the Tender Opening Minutes of 9<sup>th</sup> December 2020, the Board notes that the Procuring Entity's Tender Opening Committee recorded the following: -

***"The chairman called the meeting to order at 10.20 am and welcomed the members and representatives of the firms that had participated in the tender opening exercise..."***

***Ten (10) bidders participated as listed below.***

***The Chairman read the bidder name and bid bond details, the Chairman also read out the number of pages each bid contained.***

**Tender Opening Details**

<b>No</b>	<b>Bidder's Name</b>	<b>Name of Institution</b>	<b>Bid Bond Amount</b>	<b>Tender Quote</b>
1	Technology Associates E.A Ltd	Prime Bank	5,000,000.00	Separate Envelope
2	Tech Mahindra/Medbook	Sidian Bank	5,000,000.00	Separate Envelope
3	Eclectics International Ltd	The Monarch Insurance	5,000,000.00	Separate Envelope
4	Intrasoft International E.A	NCBA	5,000,000.00	Separate Envelope
5	SYBL Kenya Limited	ABC Bank	5,000,000.00	Separate Envelope
6	Yash Technologies	The Monarch Insurance	5,000,000.00	Separate Envelope
7	LCT Africa Ltd	ABSA Bank	5,000,000.00	Separate Envelope
8	E-klaim Africa Ltd	The Monarch Insurance	5,000,000.00	Separate Envelope
9	KPMG Kenya	Stanbic Bank	5,000,000.00	Separate Envelope
10	Computech Limited	Prime Bank	5,000,000.00	Separate Envelope

From the foregoing, the Board observes that the Tender Opening Committee recorded the bidders' respective tender security amounts and the banks that issued the same. It is evident that the Tender Opening Committee recorded the tender security provided by the 2<sup>nd</sup> Respondent as Kshs. 5,000,000.00

from Sidian Bank. According to Clause 2 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document required bidders to provide:

***"Tender Security- A bid bond from a reputable bank or an Insurance Company approved by PPRA of Five Million Shillings (Kshs. 500,000.00) MUST accompany the tender document and should be valid for 150 days"***

The Tender Security Form can be found at pages 518 to 520 of the Tender Document with the following details: -

***"Whereas .....[name of the tenderer]..... (hereinafter called "the tenderer") has submitted its tender dated..... [date of submission of tender] for the provision of ..... [name and/or description of the services] (hereinafter called "the Tender")***  
.....

***KNOW ALL PEOPLE by these presents that WE..... Of.....having registered office at Fund (hereinafter called "the Bank") are bound unto..... Fund (hereinafter called "the Fund") in the sum of .....for which payment well and truly to be made to the said Fund, the Bank binds itself, its successors, and assigns by these presents. Sealed with the Common Seal of the said Bank this \_\_\_\_\_ day of 20 \_\_\_\_\_-***  
.....

***THE CONDITIONS of this obligation are:***

- 1. If the tenderer withdraws its Tender during the period of tender validity specified by the tenderer on the Tender Form;***  
***or***

**2. If the tenderer, having been notified of the acceptance of its Tender by the Fund during the period of tender validity:**

**(a) fails or refuses to execute the Contract Form, if required; or**

**(b) fails or refuses to furnish the performance security, in accordance with the instructions to tenderers;**

**We undertake to pay to the Fund up to the above amount upon receipt of its first written demand, without the Fund having to substantiate its demand, provided that in its demand the Fund will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.**

**This guarantee will remain in force up to and including thirty (30) days after the period of tender validity, and any demand in respect thereof should reach the Bank not later than the above date.**

---

**[signature of the bank]**

It is worth noting that the 1<sup>st</sup> Applicant alleged that the 3<sup>rd</sup> Respondent's technical bid did not contain its tender security and that this was indicated by a representative of the 3<sup>rd</sup> Respondent during the Tender Opening Ceremony of 9<sup>th</sup> December 2020. This allegation prompted the Board to study the 3<sup>rd</sup> Respondent's Technical Proposal and we note that: -

- *At page 28 of Volume 1 of the 2<sup>nd</sup> Respondent's Technical Proposal, a letter dated 3<sup>rd</sup> December 2020 addressed to the 1<sup>st</sup> Respondent is attached therein in respect of tender security issued by Sidian Bank for Kshs. 5,000,000/- valid for 186 days from 3<sup>rd</sup> December 2020;*

The contents of the letter are similar to the Tender Security Form can be found at pages 518 to 520 of the Tender Document.

The Board observes that the 3<sup>rd</sup> Respondent's tender security can be found in its Technical Proposal. The 3<sup>rd</sup> Respondent's tender security of Kshs. 5,000,000/- is valid for 150 days (plus an additional 36 days) as required by Clause 2 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document duly completed in the format of Standard Forms specified in page 519 to 520 of the Tender Document. On the face of the 3<sup>rd</sup> Respondent's tender security, the Board observes the same is an original, it is coloured and contains a Quick Response (QR) bar code and the address of a web page (URL) indicated as:

***To verify, please visit <https://credible-gateway.sidianbank.co.ke/storage/NWWAH2.pdf> or scan the above QR Code]***

The same can be used to verify the said tender security during a due diligence exercise undertaken by the Procuring Entity on the 3<sup>rd</sup> Respondent especially because the said bidder was recommended for award of Lot 1 of the subject tender.

Accordingly, the Board finds that the Procuring Entity rightfully evaluated the 3<sup>rd</sup> Respondent's bid in accordance with section 79 (1) and 80 (2) of the Act on the criteria of tender security because the 3<sup>rd</sup> Respondent provided a tender security in its Technical Proposal valid for 150 days as required by Clause 2 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document duly completed in the format of Standard Forms specified

in page 519 to 520 of the Tender Document and the same was recorded by the Tender Opening Committee in the Tender Opening Minutes of 9<sup>th</sup> December 2020 in accordance with section 78 (6) (c) of the Act.

The fourth issue for determination relates to the question whether the Procuring Entity rightfully evaluated the 2<sup>nd</sup> Applicant's bid in accordance with Clause 3 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document which deals with serialization of bids.

At paragraph 13 of its Request for Review, the 1<sup>st</sup> Applicant avers that one of the mandatory requirements applicable to the subject tender was that the bid documents submitted by bidders must be sequentially serialized (paginated) on every page. Further, at paragraph 20 of its Request for Review, the 1<sup>st</sup> Applicant avers that the 2<sup>nd</sup> Applicant did not meet the requirement of serialization of all pages of its original bid and thus ought to have been found non-responsive at the end of Preliminary Evaluation. According to paragraph 29 of their Memorandum of Response and paragraph 33 of their Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the 1<sup>st</sup> Applicant's allegation that the bid document of the 2<sup>nd</sup> Applicant was not serialized is untrue, unfounded and baseless because the 2<sup>nd</sup> Applicant's bid was duly serialized. On its part, the 2<sup>nd</sup> Applicant avers at paragraph 9 of its Memorandum of Response filed in respect of the 1<sup>st</sup> Applicant's Request for Review that, its bid was sequentially serialized on every page as required in the Tender Document.

Serialization of bids is one of the requirements under section 74 (1) (i) of the Act that the accounting officer of a procuring entity ought to take into account when preparing an invitation to tender. The same forms part of the mandatory requirements in the Tender Document and is specified in Clause 3 of the Mandatory Evaluation Criteria at page 200 thereof as follows: -

***"Bid document MUST be sequentially serialized (paginated) on every page)"***

The 1<sup>st</sup> Applicant avers that the 2<sup>nd</sup> Applicant did not serialize its bid as required in the Tender Document. The Board studied the original Technical Proposal and Financial Proposal submitted by the 2<sup>nd</sup> Applicant and observes that the 2<sup>nd</sup> Applicant's Technical Proposal was submitted in three volumes, that is, Volume 1, 2 & 3 whereas its Financial Proposal is only one Volume. Having studied the 2<sup>nd</sup> Applicant's Technical and Financial Proposals, the Board observes that the same were serialized as follows: -

- *Volume 1 of the 2<sup>nd</sup> Applicant's Technical Proposal is serialized from the first page as "1" to the last page as "367";*
- *Volume 2 of the 2<sup>nd</sup> Applicant's Technical Proposal is serialized from the first page as "368" to the last page as "1169";*
- *Volume 3 of the 2<sup>nd</sup> Applicant's Technical Proposal is serialized from the first page as "1170" to the last page as "1693"; and*
- *The 2<sup>nd</sup> Applicant's Financial Proposal is serialized from the first page as "1" to the last page as "7".*

The Board observes that the 2<sup>nd</sup> Applicant used numerical form of serialization when paginating its bid because the page appearing after page

"1" is serialized as "2" up to the last page serialized as "367" for the first volume of its Technical Proposal. This manner of serialization continued for the 2nd Applicant's second volume of its Technical Proposal which begins with page "368" up to the last page serialized as "1169". Its third volume also continues with this serialization, beginning with the first page serialized as "1170" up to the last page serialized as "1693". Given that its Financial Proposal is separate from its Technical Proposal, the 2<sup>nd</sup> Applicant began serializing the first page of its Financial Proposal as "1" up to the last page serialized as "7".

It is the Board's considered view that the 2<sup>nd</sup> Applicant serialized its Technical and Financial Proposals in a sequential manner as required in Clause 3 of the Mandatory Evaluation Criteria at page 200 of the Tender Document using the numerical format and thus the 1<sup>st</sup> Applicant's allegation that the 2<sup>nd</sup> Applicant did not meet the requirement of serialization of all pages of its original bid, has not been substantiated.

Accordingly, the Board finds that the Procuring Entity evaluated the 2<sup>nd</sup> Applicant's bid in accordance with Clause 3 of the Mandatory Evaluation Criteria specified at page 200 of the Tender Document read together with section 79 (1) and 80 (2) of the Act in relation to the criterion on serialization of bid documents.

On the fifth issue for determination, the 1<sup>st</sup> Applicant avers at paragraph 27 of its Request for Review that, the disparity in tender awards called for a post-qualification due diligence to give satisfactory assurances as to the integrity of the financial quote vis-à-vis the scope of work in the subject

tender. At paragraph 48 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents depone that they duly complied with section 83 of the Act by verifying the qualifications of the lowest evaluated tenderer to be awarded the subject tender.

The Board studied provisions of the Tender Document and notes that Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document specified that: -

**"2.24. Post qualification**

**2.24.1. In the absence of pre-qualification, the Fund will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.**

**2.24.2. The determination will take into account the tenderer's financial and technical capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.1.2, as well as such other information as the Fund deems necessary and appropriate.**

**2.24.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of**

***the Tenderer's tender, in which event the Fund will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily."***

Section 83 of the Act which is entitled "post-qualification" also refers to the post-qualification as a due diligence exercise undertaken in accordance with the following provisions: -

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

From the confidential document submitted to the Board, there is no evidence that a pre-qualification exercise was undertaken yet a due diligence exercise was applicable in the subject tender. There is also no evidence that a due diligence was undertaken on the lowest evaluated tenderers in the respective lots 1, 2 and 3 of the subject tender in accordance with the procedure specified in section 83 of the Act including preparation of a due diligence report which would have outlined the manner in which such an exercise was undertaken. The Procuring Entity only undertook a Site Visit Demonstration which was part of Technical Evaluation Criteria at the Technical Evaluation Stage specified on page 206 of the Tender Document as follows: -

***"All Bidders who successfully pass the technical evaluation will be invited to demonstrate their proposed solution at a time stipulated by the contracting authority. Bidders will be expected to cover all of the requirements marked as mandatory in the demonstration of The proposed solution in the scenarios they chose to present."***

Section 83 (1) of the Act describes due diligence as a process undertaken after tender evaluation, but prior to the award of a tender on the lowest evaluated tenderer and thus the Site Visit Demonstration undertaken by the Procuring Entity as part of Technical Evaluation does not qualify as a post-qualification exercise undertaken on the lowest evaluated tenderer (s) pursuant to Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act.

In the absence of any evidence of a due diligence report outlining a due diligence exercise undertaken on the lowest evaluated tenderers for Lots 1, 2 and 3 of the subject tender, the Board finds that the Procuring Entity failed to undertake a due diligence exercise in accordance with Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act.

On the sixth issue for determination, the 1<sup>st</sup> Applicant avers at paragraph 25 of its Request for Review that the tender price of Kshs. 135,000,000.00 quoted by the 3<sup>rd</sup> Respondent and the tender price of Kshs. 188,826,047.20 quoted by the 4<sup>th</sup> Respondent do not constitute a reasonable quote for the scope of services in the subject tender. In the 1<sup>st</sup> Applicant's view, the two bidders failed to cover the entire scope of the subject tender and that the current service provider of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is providing a far much lesser scope of consultancy services for biometric registration yet the said service provider offered a contract price of Kshs. 450,540,000.00. The 1<sup>st</sup> Applicant further alleges that the prices quoted by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are overwhelmingly underquoted and thus undermining fair competition.

At paragraph 10 and 11 of its Request for Review, the 2<sup>nd</sup> Applicant avers that the subject tender had a scope that was too wide and too cost intensive to successfully perform and deliver the same at the price awarded to the 3<sup>rd</sup> Respondent for Lot 1 of the subject tender. In the 2<sup>nd</sup> Applicant's view, the award price of Kshs. 135,000,000.00 for Lot 1 was too low when compared to global standards and that the Procuring Entity is obligated under section

60 (3) of the Act to base its requirements including award of a tender on national and international standards.

At paragraph 36 of their Memorandum of Response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the Procuring Entity acted in accordance with the law and the Tender Document in awarding the subject tender to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents with respect to Lots 1 & 2 respectively having determined the said bidders' bids were substantially responsive with the lowest evaluated tender prices. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents avers at paragraph 31 of their Memorandum of Response that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' allegations are not substantiated because the 1<sup>st</sup> and 2<sup>nd</sup> Applicants failed to submit the lowest evaluated and responsive tenders and thus cannot purport to rewrite the terms in the Tender Document by pleading "market price" without any jot of reason or evidence.

At paragraph 14 (i) of its Replying Affidavit, the 3<sup>rd</sup> Respondent referred to section 54 (2) of the Act to support its view that the said provision allows a public entity to procure goods and services with known market prices but the said provision does not prohibit a public entity from procuring goods and services at prices that are below the prevailing market prices. In their letter dated 15<sup>th</sup> February 2021 addressed to the Board Secretary, the 4<sup>th</sup> Respondent expressed its confidence and satisfaction with the processes followed by the 1<sup>st</sup> Respondent in awarding Lot 1 and thus, had no objection to the said award.

Having considered parties' pleadings, the Board observes that the Evaluation Committee recommended award of the subject tender to the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent in the 3 lots comprising of the subject tender as follows: -

	<b>Lowest Evaluated Bidder</b>	<b>Lowest Evaluated Price</b>
Lot 1	Medbook Kenya Ltd/Tech Mahindra	Kshs. 135,000,000.00
Lot 2	Technology Associates E.A. Limited	Kshs. 283,596,781.88
Lot 3	Technology Associates E.A. Limited	Kshs. 106,200,030.92

At paragraph 5.0 of the Professional Opinion dated 25<sup>th</sup> January 2021, the Procuring Entity's Head of Supply Chain Management specified that: -

***"The budgetary allocation for this procurement and as provided for in the approved budget and procurement plan is as follows: Supply, Delivery, Install, Test and Commission the ERP and Claims Management System Budget: Kshs. 700,000,000***

***This is therefore to request you to approve award of the Tender for the Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System as follows:***

***Lot 1 recommended for award to Medbook Kenya Ltd/Tech Mahindra at Kshs. 135,000,000/- being the lowest evaluated bidder***

***Lot 2 recommended award to Technology Associates E.A Limited at Kshs. 283,596,781.88 who was the only responsive bidder [lowest evaluated bidder]***

***Lot 3 recommended award to Technology Associates E.A Limited at Kshs. 106,200,030.92 who was the only responsive bidder [lowest evaluated bidder].”***

Clause 1.1 of Section A. Invitation to Tender read together with Clause 1.3 of Section 2.1. Eligible Tenderers of the Tender Document shows the Procuring Entity invited sealed tenders for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System. The Terms of Reference (TOR) for Core Applications System described at pages 30 to 199 of the Tender Document show that the Supply, Delivery, Installation, Test and Commissioning of the ERP and Claims Management System comprises of Lot 1 (Core Applications Systems Modules), Lot 2 (Back Office Functions) and Lot 3 (System Infrastructure). The Head of Supply Chain Management stated the alleged budget of Kshs. 700,000,000/- is for the subject procurement and this would mean the Procuring Entity’s alleged budget of Kshs. 700,000,000/- is for the entire scope of work in Lot 1, Lot 2 and Lot 3 of the subject tender. That notwithstanding, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents never furnished the Board with any financial documents to verify its approved budget or procurement plan and thus the budget of Kshs. 700,000,000/- remains as an allegation stated in the Professional Opinion of the Procuring Entity’s Head of Supply Chain Management in the absence of any proof to the contrary.

It was the 1<sup>st</sup> Applicant's allegation at paragraph 24 of its Request for Review that the Accounting Officer of the Procuring Entity is under a duty of ensuring an award of the subject tender is based on indicative market prices arrived at objectively in the manner prescribed in law under Regulation 33 (3) (aa) and 78 (4) (d) of Regulations 2020.

The Board observes that section 54 (3) of the Act gives the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") obligation to undertake the following: -

***"The Authority shall issue a quarterly market price index as reference guide to assist accounting officers make informed price decisions"***

Further, Regulation 43 (2) of Regulations 2020 states as follows: -

***"In discharging its mandate under section 54 (3) of the Act the Authority shall determine standard goods works and services with known market prices and prepare a quarterly market price index as a reference guide"***

In fulfilling its mandate under section 54 (3) of the Act read together with Regulation 43 (2) of Regulations 2020, the Authority publishes Market Price Indices on its official website ([www.ppra.go.ke](http://ppra.go.ke)) under the specific webpage tab referred to as; "<http://ppra.go.ke/market-price-index/>". Apart from the role of the Authority in relation to the question of market price of goods and services, Regulation 33 (3) (aa) of Regulations 2020 gives the procurement function of a procuring entity an obligation of **"carrying out market**

surveys to inform the placing of orders or adjudication by the relevant awarding authority", in this instance, award of a tender by an accounting officer. Section 84 of the Act requires the Head of Procurement function to prepare a professional opinion whose main functions are specified as follows: -

- "(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.***
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)"***

The Board studied provisions of Regulations 2020 vis-à-vis the Act and notes that a professional opinion prepared under section 84 of the Act by the Head of Procurement function must meet the requirements specified in Regulation 78 (4) of Regulations 2020 which states as follows: -

***The professional opinion referred to under paragraph (3) shall be in the format set out in the Ninth Schedule of these Regulations and shall include the following information—***

- (a) a review of the procurement or asset disposal proceedings***
- (b) adherence to evaluation criteria stipulated in the bid documents***
- (c) legality of tender award recommendations***
- (d) whether the recommended price for standard goods services and works are within the indicative market prices***
- (e) availability of funds and***
- (f) a recommendation for change of scope where the bid document had provided for change of scope if the successful bid is above the budget available of the procuring entity taking into account the effect of the scope of change to the entire evaluation of the tender”***

The Board studied the format set out in the Ninth Schedule to Regulations 2020 and notes that the same is a format for preparing a professional opinion. Clause 4 of Part B. Legal and Practical Aspects of the Tender, requires the Head of Procurement function to: -

***"State whether the recommended price for standard goods services and works are within the indicative market prices"***

It is evident that the professional opinion prepared by the Head of Procurement function acts as an important aspect between tender evaluation and award recommendation. This explains why Regulation 33 (3) (a) of Regulations 2020 requires the Procurement function to undertake a market survey because the findings of a market survey can assist the Head of Procurement function in advising the accounting officer of a procuring entity whether the recommended price for standard goods services and works are within the indicative market prices. A market survey is therefore one of the ways that a procuring entity can establish whether recommended prices are within the indicative market prices to inform award of a tender.

Secondly, having established the Authority publishes market price indices for goods, works and services on its official website, a procuring entity has the option of referring to the market price indices on the Authority's website and choose the one applicable to its procurement process as indicative of prevailing market prices or contact the Authority for guidance in determining the market price index for the goods, works and/or services being procured.

The Board further notes that a procuring entity has a third option of comparing the market rates of its previous contract on the same goods, works or services being procured in a subsequent tender while taking into consideration the inflation rates for goods and services in the economy. In **PPARB Application No. 99 & 100/2019 (Consolidated, CMC Motors Group Limited & Another v. The Principal Secretary, State**

**Department of Interior, Ministry of Interior and Co-Ordination of National Government**, the Board had occasion to address this question when it held as follows: -

***"The Board notes, the National Treasury previously procured for "Leasing of Motor Vehicles" on behalf of the Procuring Entity herein, being the user of such procured services. The National Treasury, issued Addenda extending the contracts of its current service providers which were lapsing in April 2019, for a further 6 months ending on 15<sup>th</sup> October 2019. The Applicants in this case, confirmed that they agreed to extension of their respective contracts with the National Treasury to from April 2019 to 15<sup>th</sup> October 2019.***

***The Procuring Entity used the prevailing market prices of 2019 indicated in the contracts that were extended by the National Treasury from April 2019 to 15<sup>th</sup> October 2019 including the Applicants' extended contracts.***

***The Board studied the manner in which the second limb of the market survey was conducted and notes, the Procuring Entity was benchmarking with the National Treasury that extended its own contracts, in respect of the same items that the Procuring Entity is procuring under Phase V. Further to this, the Quantity of vehicles are the same in both phases as captured at page 3 of the Market Survey Report.***

***Regulation 10 (2) (e) of the 2006 Regulations states that the functions of a Tender Committee is to ensure: - "the procuring entity does not pay in excess of prevailing market prices". Similarly, Regulation 22 (2) of the 2006 Regulations [that is repealed Public Procurement and Disposal Regulations, 2006] provides that: -***

***"When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions."***

***The Board wonders what else would be an up to date economic and market conditions, if not, prices quoted in the extended contracts that are due to lapse on 15<sup>th</sup> October 2019.***

***The Board observes, at pages 109 to 112 of the Procuring Entity's confidential file, Secretariat Comments of the Procuring Entity's Head of Procurement Unit are attached as part of the Professional Opinion signed on 9<sup>th</sup> August 2019. The Head of Procurement function, at Item 8 (g) thereof states that a cumulative amount of Kenya Shillings One Billion, Eighty-Nine Million, One Hundred and Thirty-Eight Thousand, Two Hundred and Ninety-Four and Thirty-Six Cents (Kshs. 1,089,138,294.36), will be a loss to the Kenyan tax payer, if the Procuring Entity procures the items at the***

***amounts quoted by bidders recommended for award in Lots 1, 2, 3, 6, 7 and 8 in this procurement process. This amount is not little amount, and most importantly, the same is taxpayer's money.***

***Article 227 (1) of the Constitution states that: -***

***"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"***

***In addition to this, Article 201 (d) of the Constitution cites one of the principles of public finance as "public money should be used in a prudent and responsible way"***

***The Board finds, the Procuring Entity has the responsibility to comply with the provisions of Regulation 8 (3) (z), 10 (2) (e) and 22 (2) of the 2006 Regulations, read together with Articles 201 (d) and 227 (1) of the Constitution. Hence, the Procuring Entity cannot be faulted for establishing the prevailing market prices under which to procure items for the benefit of saving taxpayer's money" [Emphasis by the Board]***

It is evident that a procuring entity has a third option it can apply in determining prevailing market rates of goods, works or services it is procuring by considering the prices of goods, works or services previously procured in a similar contract for the benefit of saving tax payer's money

whilst taking into account the possibility of inflation rate of such goods, works or services within an economy.

Further, a procuring entity may establish prevailing market prices by requesting known retailers to provide the amount of money they would charge for specific goods, works or services a procuring entity wants to procure. Therefore, information given by known retailers can be useful to a procuring entity in establishing the market rates of the goods, works or services it is procuring.

Having established some of the options a procuring entity may use so as to establish whether recommended prices are within indicative market rates, the Board observes that there is no documentation demonstrating any of the options listed hereinbefore were applied by the Procuring Entity herein. Furthermore, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not furnish the Board with any financial documents to verify its approved budget for the subject tender, but merely alleged that its budget for the subject tender was Kshs. 700,000,000/- without proof to ascertain the same. The Board is therefore not persuaded that the Procuring Entity ensured award of the subject tender is made based on indicative market prices compared to its approved budget for the subject tender.

Section 86 (1) (a) of the Act requires award of a tender where some characteristics of open tender were used to be made in accordance with the following provision: -

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

***(a) the tender with the lowest evaluated price"***

Further, Article 227 (1) of the Constitution requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not demonstrated that award of the subject tender in the three respective lots was cost-effective and competitive having failed to ensure the Procurement function undertakes a market survey and having noted the Head of Procurement function did not ascertain whether the recommended prices for Lots 1, 2 and 3 of the subject tender were within the indicative market prices to inform her professional opinion to the 1<sup>st</sup> Respondent on award of the subject tender.

Accordingly, the Board to finds that the Procuring Entity failed to award the subject tender in accordance with section 86 (1) (a) of the Act and Article 227 (1) of the Constitution because no evidence was furnished to the Board demonstrating that the Procuring Entity's Head of Procurement function established that the recommended prices for Lots 1, 2 and 3 of the subject tender were within the indicative market prices so as to inform award of the subject tender to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

On the seventh issue for determination, the 2<sup>nd</sup> Applicant alleged at paragraph 69 of its Request for Review that the letter of notification dated

26<sup>th</sup> January 2021 is manifestly non-compliant with the express provision of section 87 (3) of the Act which requires the Procuring Entity to disclose the reasons for award of the subject tender to the successful tenderer. At paragraph 25 of their Memorandum of Response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents state that the 2<sup>nd</sup> Applicant was notified together with all other bidders of the outcome of their bids. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid also stated that the 2<sup>nd</sup> Applicant's bid was unsuccessful because it was the fourth lowest evaluated bid.

The Board notes that the 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 contains the following details: -

***"We refer to the above tender for which you participated and regret to inform you that following mandatory, technical/financial evaluation, your bid was not successful***

***Your bid failed at the financial stage. The reason for failure was:***

***Your financial quotation was high.***

***The successful bidders were: M/s Medbook Kenya Ltd/Tech Mahindra for Lot I at a total cost of Kshs. 135,000,000.00 and Technology Associates EA Ltd for Lot II and Lot III at a cost of Kshs. 283,596,781.00 and Kshs. 106,200,030.92 respectively.***

***You are advised to collect your bid bond within fourteen (14) days from the date of receipt of this notification of the intention to award, at the Supply Chain Department Room No. 739 during normal working hours.***

***Notwithstanding the above, we take this opportunity to thank you for the interest shown in participating in this tender..."***

Section 87 (1) and (3) of the Act provide as follows: -

***"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

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

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof"***

The procedural requirements for notification under section 87 (3) of the Act are outlined in Regulation 82 of Regulations 2020 as follows: -

- "(1) The notification to the unsuccessful bidder under section 87 (3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified***
- (2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act"***

Having compared the provisions of section 87 (3) of the Act to Regulation 82 of Regulations 2020, the Board observes that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) it includes the name of the successful tenderer, the tender price and the reason why its bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be that the successful tenderer submitted the lowest evaluated tender price.

The 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 (i) was issued in writing and there is no allegation that the same was not made at the same time as the successful bidders, (ii) it disclosed the reasons relating to non-responsiveness of the 2<sup>nd</sup> Applicant's

tender, (iii) it included the name of the successful tenderers, their respective tender prices but failed to disclose the reason why their bids were successful in accordance with section 86 (1) of the Act. Evidently, the 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 does not meet the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 because the reason why the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' respective bids were successful in accordance with section 86 (1) of the Act, was not disclosed.

Accordingly, the Board finds that the 2<sup>nd</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 was not issued in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 because the same did not disclose the reason why the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' respective bids were successful in accordance with the applicable award criterion under section 86 (1) of the Act.

On the last issue for determination, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated at paragraph 9 of their Supplementary Submissions that the 1<sup>st</sup> Applicant introduced a new issue regarding validity of the letter of notification issued to the 1<sup>st</sup> Applicant yet the same was not pleaded by the 1<sup>st</sup> Applicant in its Request for Review. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further stated that issuance of notification letters to the successful and unsuccessful bidders is an indication of conclusion of the subject procurement process in accordance with the law. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' averments prompted the Board to interrogate the Request for Review filed by the 1<sup>st</sup> Applicant and we note

that contrary to the 1<sup>st</sup> Respondent's contention, the 1<sup>st</sup> Applicant avers at paragraph 30 of its Request for Review, that the 1<sup>st</sup> Respondent failed to discharge its legal obligation when issuing the letter of notification dated 26<sup>th</sup> January 2021 to the 1<sup>st</sup> Applicant because the said letter of notification was not executed in accordance with section 87 (3) of the Act.

In addressing this issue, the Board observes that the 1<sup>st</sup> Applicant received a letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 containing the following details: -

***"We refer to the above tender for which you participated and regret to inform you that following Mandatory, technical/financial evaluation, your bid was not successful***

***Your bid failed at the financial stage. The reason for failure was:***

***Your financial quote was high.***

***The successful bidders were; M/s Medbook Kenya Ltd/Tech Mahindra for Lot 1 at a total cost of Kshs. 135,000,000.00 and Technology Associates E.A Ltd for Lot 2 and 3 at a Cost of Kshs. 283,596,781.00 and Kshs. 106,200,030.92 respectively.***

***You are advised to collect your bid bond within fourteen (14) days from the date of receipt of this notification of the intention to award. At the Supply Chain Department-Room No. 739 during normal working hours.***

***Notwithstanding the above, we take this opportunity to thank you for the interest shown in participating in this tender.***

***Your faithfully,***

***[signature affixed]***

***Rose Mugambi***

***FOR: CHIEF EXECUTIVE OFFICER"***

According to section 87 of the Act, an accounting officer of a procuring entity is the person designated to issue notification letters to the successful and unsuccessful bidders. In exercising his duties as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislations. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Constitution puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 further requires public officers to maintain high standards of professional ethics in that: -

***"Section 5 (1) Every public officer shall maintain high standard of professional ethics***

- (2) For the purposes of sub-section (1), a public officer maintains high standards of professional ethics if that officer**
- (a) .....**
  - (b) .....**
  - (c) is transparent when executing that officer's functions;**
  - (d) can account for that officer's actions;**
  - (e) .....**
  - (f) .....**
  - (g) .....**
  - (h) observes the rule of law.**

From the above provisions, the Board notes that the Accounting Officer of the Procuring Entity has an obligation of observing high standards of public service because he is accountable for administrative acts. Section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

***"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that***

***Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.”***

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. This therefore means that an accounting officer has power to delegate his or her authority, but he or she remains accountable for his or her actions and other actions undertaken by a person to whom he or she has granted express authority to act on his or her behalf. To meet the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avert any abuse that may occur without his or her knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the accounting officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the 1<sup>st</sup> Respondent to take necessary steps to ensure that his authority, when delegated, is specific and not open to any form of abuse. It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert abuse by the person to whom authority has been delegated, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that an accounting officer has the power to delegate his authority to issue letters of notification to unsuccessful bidders.

The Board studied the letter of notification of unsuccessful bid issued to the 1<sup>st</sup> Applicant and notes that the same was signed by one Rose Mugambi (that is, the Procuring Entity's Head of Supply Chain Management) for the Procuring Entity's Chief Executive Officer (that is, the 1<sup>st</sup> Respondent). Having perused the Procuring Entity's confidential file, the Board did not find a letter of delegation of authority issued by the 1<sup>st</sup> Respondent to the Procuring Entity's Head of Supply Chain Management, authorizing her to issue notification letters to bidders in the subject tender.

In the absence of any proof to the contrary, the Board finds that the 1<sup>st</sup> Applicant's letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021 was not issued by a person authorized in law.

In determining the appropriate orders to grant in the circumstances, the Board observes that the 1<sup>st</sup> Applicant avers at paragraph 31 of its Request

for Review and paragraph 8 of its Written Submissions that upon receipt of its notification letter it wrote to the 1<sup>st</sup> Respondent, through a letter dated 27<sup>th</sup> January 2021 requesting for a summary of the evaluation report in respect of the Preliminary, Technical and Financial evaluation of the subject tender together with minutes of the Tender Opening Meeting but did not receive a response from the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent stated at paragraph 25 of its Supplementary Submissions that upon issuance of a letter of notification of award to the successful bidder and issuance of notification of regret to unsuccessful bidders, the Procuring Entity is not under any duty and/or obligation to supply any reports to bidders.

The Board notes that the 1<sup>st</sup> Applicant referred to a letter dated 27<sup>th</sup> January 2021 written by its Advocates and addressed to the 1<sup>st</sup> Respondent stating as follows: -

***"we refer to the above and your letter of notification of regret dated 26<sup>th</sup> January 2021***

***Pursuant to the said letter and the provisions of section 67 (4) of the Public Procurement and Asset Disposal Act No. 33 of 2015, our client requests to be supplied with summary of evaluation of the subject tenders together with minutes of the Preliminary, Technical and Financial evaluation of the subject tenders together with minutes of the Tender Opening meeting held on 9<sup>th</sup> December 2020 and Financial Proposal Opening meeting held on 25<sup>th</sup> January 2021.***

***Your urgent action is necessary as time is of essence"***

The Board observes that even though the above letter is dated 27<sup>th</sup> January 2021, the Procuring Entity's receiving stamp is affixed therein with the date indicated as 26<sup>th</sup> January 2021. On the other hand, the Applicant lodged its Request for Review on 1<sup>st</sup> February 2021 after receiving a letter of notification of unsuccessful bid dated 26<sup>th</sup> January 2021.

Having considered the above sequence of events, the Board notes that section 67 (4) read together with section 68 (2) (d) (iii) of the Act provides as follows: -

- "67 (1) .....;**
- (2) .....;**
- (3) .....;**
- (4) *Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii) [that is section 68 (2) (d) (iii)]***

- 68 (1) .....;**
- (2) *The records for a procurement shall include—***
  - (a) .....;**
  - (b) .....;**
  - (c) .....**

**(d) for each tender, proposal or quotation that was submitted**

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

**(ii) .....**

**(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed'**

According to the foregoing provisions, it is only an applicant seeking a review that is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used. At the time the 1<sup>st</sup> Applicant wrote to the Procuring Entity through a letter dated 27<sup>th</sup> January 2021, it was not an applicant seeking a review because it had not filed a request for review pursuant to section 167 (1) of the Act, and thus was not entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used, as specified in section 68 (2) (d) (iii) of the Act. Pursuant to section 78 (8) of the Act, **"the accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender"**. This therefore means that as at 27<sup>th</sup> January 2021, the 1<sup>st</sup> Applicant was entitled to a copy of the tender opening

register for the Technical Proposals opened on 9<sup>th</sup> December 2020 and Financial Proposals opened on 25<sup>th</sup> January 2021.

It is not lost to the Board that at paragraph 1 of the prayers in its Request for Review, the 1<sup>st</sup> Applicant sought for the following: -

***"At the preliminary and before hearing of the Request herein, the 1<sup>st</sup> Respondent be directed to furnish the Applicant with a summary of the proceedings of the opening of tenders at the preliminary, technical and financial evaluation. comparison of tenders and evaluation criteria used in accordance with the provisions of section 67 (4) as read together with section 68 (2) (d) (iii) of the Act"***

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. As a result, the instant Request for Review was canvassed by way of written submissions and thus the Board did not conduct a physical hearing to hear parties' cases on the 1<sup>st</sup> Applicant's prayer cited hereinbefore. The Board has however established that the 1<sup>st</sup> Applicant is entitled to: (i) a copy of the tender opening register for the Technical Proposals opened on 9<sup>th</sup> December 2020 and Financial Proposals opened on 25<sup>th</sup> January 2021 pursuant to section 78 (8) of the Act and (ii) a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the

tenders, proposals or quotations, including the evaluation criteria used pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act. Accordingly, the Board shall make appropriate orders for the 1<sup>st</sup> Applicant to be furnished with the foregoing documents in the final orders herein.

The 2<sup>nd</sup> Applicant also prayed to be furnished with a summary of the proceedings of the opening of the tender's preliminary, technical and financial evaluation, a comparison of tender, the scores awarded and the evaluation criteria used thereof. The 2<sup>nd</sup> Applicant is entitled to a copy of the tender opening register for the Financial Proposals opened on 25<sup>th</sup> January 2021, a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act and thus, the Board shall make appropriate orders for the 2<sup>nd</sup> Applicant to be furnished with the foregoing documents in the final orders herein.

The Board has found the 1<sup>st</sup> Respondent failed to exercise any of the options available to him so as to ensure the recommended prices in lots 1, 2 & 3 of the subject tender are within indicative market prices. The Board has also found that the Procuring Entity failed to undertake a due diligence exercise in accordance with Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act and that the two Applicants' letters of notification of unsuccessful bid dated 26<sup>th</sup> January 2021

were not issued in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020.

Section 173 of the Act gives the Board discretion to undertake certain actions upon completing a review and in particular, section 173 (b) of the Act states as follows: -

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

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

***(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"***

Pursuant to the discretionary power granted to the Board by section 173 (b) of the Act, the Board deems it necessary to direct the 1<sup>st</sup> Respondent to exercise the options available in ensuring the recommended prices in lots 1, 2 & 3 of the subject tender are within indicative market prices, to undertake a due diligence on the lowest evaluated tenderer (s) in the respective lots of the subject tender in accordance with Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act. The 1<sup>st</sup> Respondent must also ensure the subject procurement process proceeds to its logical conclusion and where an award is made, to issue notification letters to bidders in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020, taking into consideration the Board's findings in this case.

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

### **FINAL ORDERS**

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

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of intention to enter in a contract for Lot I of Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System dated 26<sup>th</sup> January 2021 addressed to the 3<sup>rd</sup> Respondent and to all unsuccessful bidders, be and are hereby cancelled and set aside**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of intention to enter in a contract for Lot II and Lot III of Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System dated 26<sup>th</sup> January 2021 addressed to the 4<sup>th</sup> Respondent and to all unsuccessful bidders, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to furnish the 1<sup>st</sup> Applicant with a copy of the Tender Opening Register for the Technical Proposals opened on 9th December 2020 and a copy of the Tender Opening Register for**

**the Financial Proposals opened on 25th January 2021 pursuant to section 78 (8) of the Act together with a summary of the proceedings of the opening of tenders, a summary of evaluation and comparison of the proposals including the evaluation criteria used, pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act.**

- 4. The Accounting Officer of the Procuring Entity is hereby ordered to furnish the 2<sup>nd</sup> Applicant with a copy of the Tender Opening Register for the Financial Proposals opened on 25<sup>th</sup> January 2021 pursuant to section 78 (8) of the Act together with a summary of the proceedings of evaluation and comparison of the proposals including the evaluation criteria used pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act.**
- 5. The Accounting Officer is hereby ordered to ensure that the recommended prices in Lots I, II and III of Tender No. NHIF/015/2020-2021 for Supply, Delivery, Installation, Testing and Commissioning of an ERP and Claims Management System are within indicative market prices in accordance with Regulation 33 (3) (aa) and 78 (4) of Regulations 2020 so as to inform award of the subject tender in Lots I, II and III in accordance with section 86 (1) (a) of the Act and Article 227 (1) of the Constitution, subject to a due diligence exercise carried out on the lowest evaluated tenderer in Lots I, II and III of the subject tender in**

accordance with Clause 2.24 of Section 2.1. Eligible Tenderers of the Tender Document read together with section 83 of the Act.

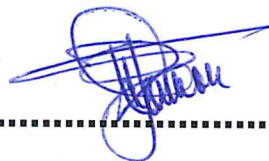
6. Further to Order No. 5 above, the Accounting Officer of the Procuring Entity is hereby ordered to proceed with the subject procurement process to its logical conclusion and where an award is made, to issue notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 taking into consideration, the Board's findings in this Review.
7. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 1<sup>st</sup> day of March 2021



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

