

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 76/2021 OF 2ND JUNE 2021

BETWEEN

AAR INSURANCE COMPANY LIMITEDAPPLICANT

AND

SECRETARY TO INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSIONRESPONDENT

AND

FOUR M INSURANCE BROKERS LTD INTERESTED PARTY

Review against the decision of the Secretary (Accounting Officer) to the Independent Electoral and Boundaries Commission with respect to Tender No. IEBC/OT/21/02/2020-2021, for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal accident (GPA) covers for Commissioners and Staff.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein were | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Mr. Nicholas Mruttu | -Member |
| 5. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

The Independent Electoral and Boundaries Commission (hereinafter referred to as "the Procuring Entity") advertised Tender No. IEBC/OT/21/02/2020-2021, for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal accident (GPA) covers for Commissioners and Staff (hereinafter referred to as "subject tender") on it's Website (www.iebc.or.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 16th March 2021 inviting eligible tenderers to bid for the same. According to Section V. Schedule of requirements found at page 35-40 of the Tender Document, bidders were at liberty to bid for the following lots:-

- Lot-1- Provision of Medical Insurance Cover;
- Lot-2-Provision of Group Life Insurance Scheme; and
- Lot-3- Provision of Group Personal Accident Cover.

Bid submission Deadline and Opening of Bids

The Procuring Entity received forty two (42) bids by the bid submission deadline of 30th March 2021. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

Bidder No.	Bidder Name	Tender Sum	Lot Bided
1	Sapan insurance Brokers Ltd	L2 15,687,298.60 L3 5,219,818	2 & 3
2	CIC General Insurance Ltd	530,724,596	1
3	Royal Associates Insurance Brokers	541,968,374	1,2,3
4	Jubilee insurance	15,901,740	3
5	Four M Insurance Brokers	7,540,766	3
6	Kenya Alliance Insurance	L1 195,275,226 L2 7,489,135 L3 5,360,262	1,2,3
7	Pacis Insurance Co. Ltd	228,446,79	1
8	Jubilee Life Insurance Ltd	7,979,214	2
9	Kenya Orient Life Assurance	6,567,665	2
10	Kenya Orient Life Assurance	3,455,726.57	3
11	Corporate Insurance	6,488,544	3
12	ABSA Life Assurance Ke. Ltd	13,679,927	2
13	Pacis Insurance Co. Ltd	5,340,647	3
14	Saham Assurance	3,920,244	3
15	Geminia Insurance Co.Ltd	16,888,282	2
16	APA Insurance	213,302,596	1
17	Four M Insurance	17,263,578	2
18	Saham Assurance	241,451,384	1
19	Getrio Insurance Brokers Ltd	L2 8,961,660.78 L3 4,918,232	2,3
20	Madison Life Assurance	13,510,626	2
21	Pelican Insurance Brokers K Ltd	L2 16,512,988 L3 11,143,340	2,3
22	Madison General Insurance	L1 193,029,996 L3 3,250,318	1,3
23	UAP Life Assurance Co.	8,256,494	2
24	Geminia Insurance Co. Ltd	8,623,134	3
25	Britam Life Assurance Co. Ltd	17,263,577	2
26	Resolution insurance	239,797,885	1
27	Sanlam General Insurance	612,968,497	1
28	Trident Insurance Co.	20,854,696	1
29	Kenbright Insurance Brokers Ltd	L2 8,256,494 L3 1,639,006	2,3
30	Liaison Group Ltd	3,988,572	3
31	Liaison Group ltd	446,260,218	1
32	AAR Insurance	12,127,519	3
33	Sanlam Life Insurance Ltd	24,291, 439	2
34	Liaison Group Ltd	13,135,330	2
35	Zamara Risk & Insurance Brokers	456,468,392	1
	Zamara Risk & Insurance Brokers	11,399,953	2
	Zamara Risk & Insurance Brokers	10,763,456	3
36	First Assurance	3,86,164	3
37	UAP Old Mutual	Year 1 242,040,592 Year 2 270,439,353	1

38	First Assurance	Year 1 225,112,846 Year 2245,979,963	1
39	Metropolitan Camon Life Assurance Ltd	7,867,350	2
40	Occidental Insurance Co. Ltd	Not indicated	none
41	GA Insurance Ltd K.	219,338,367	1
42	AAR Insurance	438,035,188	1

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids was conducted in the following three stages: -

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

1. Mandatory/Preliminary Evaluation

At this stage, the Evaluation Committee evaluated bids against twelve (12) mandatory requirements listed in Clause A. Preliminary Evaluation found in the Appendix to Instructions to Tenderers at page 19-21 of the Tender Document for the three lots simultaneously. At the end of evaluation at this stage, the Evaluation Committee found that twenty four (24) bidders, were non-responsive. Eighteen (18) bidders were found responsive and eligible to proceed to Vendor Evaluation stage. Amongst the bidders who were found non-responsive is M/s AAR Insurance Company Limited with respect to Lot 1 of the subject tender.

2. Vendor Evaluation

At this stage, the Evaluation Committee evaluated bids in the three lots separately (per lot) against the criteria set out in Clause B. Vendor Evaluation, Evaluation and Comparison of Tenders found in the Appendix to Instructions to Tenderers at page 21 to 24 of the Tender Document.

Lot-1 Medical Insurance Cover was evaluated against 5 criteria provided for in the Tender Document as follows;

Instruction to tenderers	Evaluation and Comparison of tenders	Pass/fail
Firm's experience	Provide evidence that company has been in existence and in operation as a medical insurance provider for 5 years	
Business Operational Capacity	Provide copies of contracts/purchase orders for underwriter/broker/medical insurance provider with Five (5) corporate clients; One (1) client MUST have above 1,000 employees with medical insurance each year, for the last 2 consecutive years.	
	Provide evidence of presence of medical service providers currently engaged with the underwriter in all Counties in Kenya – MUST provide contracts with medical providers showing coverage of the 47 Counties.	
	Provide evidence of underwriter using Medical Insurance Information Management System	
	Provide copy of ISO Certification	
Financial Capacity	Provide Certified Copy of Audited Accounts MUST prove a Liquidity ratio of minimum 1:1 for each of the last 3 years	

Lot-2 Group Life Assurance (GLA) had 4 criteria outlined as follows:

Instructions to Tenders	Evaluation and Comparison of tenders	Pass/fail
Firm's experience	Provide evidence that company has been providing GLA Policies for the last five (5) years	
Business Operational Capacity	Provide copies of contracts/purchase orders from Five (5) corporate clients whom the underwriter/broker/medical insurance provider has been providing GLA policies for the last three (3) years.	
	Provide evidence of Reinsurance arrangement by the underwriter for Group Life assurance	

	Provide recommendation letters from at least five (5) corporate clients as evidence of good claim settlement record by the underwriter for GLA	
	Provide copy of ISO Certification	
Financial Capacity	Provide Certified Copy of Audited Accounts for the years 2017, 2018, 2019 – Certified by an Auditor	
	The Audited Accounts MUST prove a Liquidity ratio of minimum 1:1 for each of the last 3 years.	
Professional Indemnity Insurance Policy	Provide a valid Professional Indemnity Insurance Policy with a minimum limit of KES. 10 million	
Human Capital and Capacity	The Principal Officer must have relevant degree and a minimum of ACII/AIHK certification – Provide certified copies from Commissioners of Oath.	
	The Principal Officer MUST have Five (5) years of working experience in the insurance industry – provide a CV as evidence.	
	A Technical Officer must have relevant degree and a minimum of ACII/AIHK certification – Provide certified copies from Commissioners of Oath.	
	The Technical Officer MUST have Three (3) years of working experience in the insurance industry – provide a CV as evidence	

Lot-3 Group Personal Accident (GPA) had 4 criteria outlined as follows:

Instructions to tenderers	Evaluation and Comparison of Tenders	Pass/Fail
Firm's experience	Provide evidence that company has been providing GPA Policies for the last five (5) years	
Business Operational Capacity	Provide copies of contracts/purchase orders from Five (5) corporate clients whom the underwriter/broker/medical insurance provider has been providing GPA policies for the last three (3) years.	
	Provide evidence of Reinsurance arrangement by the underwriter for Group Life assurance	
	Provide recommendation letters from at least five (5) corporate clients as evidence of good claim settlement record by underwriter for GPA	
	Provide copy of ISO Certification	
Financial Capacity	Provide Certified Copy of Audited Accounts for the years 2017, 2018, 2019 – Certified by an Auditor	
	The Audited Accounts MUST prove a Liquidity ratio of minimum 1:1 for each of the last 3 years	

Professional Indemnity Insurance Policy	Provide a valid Professional Indemnity Insurance Policy with a minimum limit of KES. 10 million.	
Human Capital and Capacity	The Principal Officer must have relevant degree and a minimum of ACII/AIIC certification – Provide certified copies from Commissioners of Oath	
	The Principal Officer MUST have Five (5) years of working experience in the insurance industry – provide a CV as evidence	
	A Technical Officer must have relevant degree and a minimum of ACII/AIIC certification – Provide certified copies from Commissioners of Oath.	
	The Technical Officer MUST have Three (3) years of working experience in the insurance industry – provide a CV as evidence.	

The following 4 bidders were found responsive for Lot-1 at the end of evaluation at this stage;

- Resolution Insurance
- Zamara Risk & Insurance Brokers
- First Assurance
- GA Insurance Ltd K

The following bidders were found responsive for Lot-2 at the end of evaluation at this stage;

- Four M insurance Brokers
- Pelican Insurance Brokers K Ltd
- UAP Life Assurance Co.
- Kenbright Insurance Brokers Ltd
- Zamara Risk & Insurance Brokers

The following bidders were found responsive for Lot-3 at the end of vendor evaluation stage;

- Four M insurance Brokers

- Pelican Insurance Brokers K Ltd
- Kenbright Insurance Brokers Ltd

Zamara Risk & Insurance Brokers At the end of Vendor Evaluation, M/s AAR Insurance Company Limited was found non-responsive in Lots 2 and 3 of the subject tender.

3. Technical Evaluation

At this stage, the Evaluation Committee applied the Technical Evaluation criteria outlined in Clause C. Technical Evaluation, Evaluation and Comparison of Tenders Appendix to Instructions to Tenderers at page 24 to 26 of the Tender Document. Bidders were required to provide written information with methodology and confirmation of capacity to deliver services to proceed to the Financial Evaluation Stage.

The following 4 bidders were found responsive for Lot-1 at the end of evaluation at this stage and proceeded to Financial Evaluation.

- Resolution Insurance
- Zamara Risk & Insurance Brokers
- First Assurance
- GA Insurance Ltd K

The following bidders were found responsive for Lot-2 at the end of the evaluation at this stage and proceeded to Financial Evaluation Stage.

- Four M insurance Brokers
- Pelican Insurance Brokers K Ltd
- UAP Life Assurance Co.

- Kenbright Insurance Brokers Ltd
- Zamara Risk & Insurance Brokers

The Following two bidders were found responsive for Lot-3 at the end of evaluation at this stage and proceeded to Financial Evaluation Stage;

- Four M insurance Brokers
- Kenbright Insurance Brokers Ltd

4. Financial Evaluation

At this stage, the Evaluation Committee applied the Financial Evaluation criteria outlined in Clause C. Financial Evaluation, Evaluation and Comparison of Tenders Appendix to Instructions to Tenderers at page 26 of the Tender Document. The lowest evaluated tender was to be considered for award of the subject tender for each Lot.

Lot 1

M/s Resolution Insurance and M/s GA Insurance LTD) did not transfer the grand total on the Price Schedule to the Form of Tender hence were non-responsive at this stage with respect to Lot 1.

Lot 2

M/s UAP Life Assurance Co. and M/s Kenbright Insurance Brokers Ltd) did not transfer the grand total indicated on the Price Schedule to the Form of Tender and hence were non- responsive at this stage with respect to Lot 2.

Lot 3

M/s Kenbright Insurance Brokers Ltd did not transfer the grand total indicated on the Price Schedule to the Form of Tender and hence was non-responsive at this stage with respect to Lot 3.

Recommendation

The Evaluation Committee having successfully conducted Preliminary, Vendor, Technical and Financial Evaluation on capacity to deliver services, recommended award of the subject tender to the following bidders;

Lot-1 Medical Insurance to M/s Zamara Risk & Insurance Brokers at their tender price of **Kshs. 456,468,392.00 (Kenya Shillings Four Hundred and Fifty Six Million, Four Hundred and Sixty Eight Thousand, Three Hundred Ninety Two)** only having determined the said bidder submitted the lowest evaluated tender price for Lot-1.

Lot-2 Group life Assurance (GLA) to M/s Zamara Risk & Insurance Brokers at their tender price of **Kshs. 11,399,953.00 (Kenya Shillings Eleven Million, Three Hundred and Ninety Nine Thousand, Nine Hundred and Fifty Three)** only having determined the said bidder submitted the lowest evaluated tender price for Lot-2.

Lot-3 Group Personal Accident (GPA) to M/s Four M Insurance Brokers at their tender price of **Kshs. 7,540,766.00 (Kenya Shillings Seven Million, Five Hundred and Forty Thousand, and Seven Hundred Sixty Six)** only having determined the said bidder submitted the lowest evaluated tender price for Lot-3.

Professional Opinion

In a Professional Opinion dated 17th May 2021, the Procuring Entity's Director Supply Chain Management reviewed the Evaluation Report executed on 29th April 2021 and concurred with the Evaluation Committee's recommendation on award of the subject tender thus advised the Procuring Entity's Accounting Officer to award the subject tender as follows;

Lot-1 MEDICAL INSURANCE

Bidder No.	Bidder Name	Amount Quoted
35	Zamara Risk & Insurance Brokers Ltd	456,468,392.00

Lot-2 GROUP LIFE ASSURANCE (GLA)

Bidder No.	Bidder Name	Amount Quoted
35	Zamara Risk & Insurance Brokers Ltd	11,399,953.00

Lot-3 GROUP PERSONAL ACCIDENT (GPA)

Bidder No.	Bidder Name	Amount Quoted
5	Four M Insurance Brokers Ltd	7,540,766.00

The said professional opinion was approved by the Procuring Entity's Accounting Officer on 17th May 2021.

Notification to Bidders

In letters dated 19th May 2021, the Procuring Entity's Commission Secretary/CEO notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s AAR Insurance Company Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 31st May 2021 and filed on 2nd June 2021 together with a Supporting Affidavit sworn on 31st May 2021 and filed on 2nd June 2021 and a Further Affidavit sworn on 15th June 2021 filed on 16th June 2021 and a Further Affidavit to the Interested Party's Response sworn on 21st June 2021 and filed on 23rd June 2021 through the firm of Mwaniki Gachuba Advocates, seeking the following orders: -

- i. An order annulling and setting aside the disqualification of the Applicant's tender;***
- ii. An order annulling and setting aside the award of the Tender for Provision of Medical insurance, Group Life assurance (GLA) and Group Personal accident (GPA) covers for Commissioners and staff (Tender No. IEBC/OT/21/02/2020-2021);***
- iii. An order annulling and setting aside the notification of award dated 19th May 2021;***
- iv. An order directing the Applicant's tender be re-admitted and re-examined in accordance with Section 79(2) (a of the Public Procurement and Asset Disposal Act, 2015 and clause 2.7.1 (a), 2.8.1, 2.9.1, 2.20.3 and 2.20.4 of the Tender Document dated 16th March,2021 as read with Section 72 of the Interpretation and General Provisions Act; and***
- v. An order awarding the Applicant with costs of the application.***

In response to the Acting Board's Secretary letter dated 2nd June 2021 notifying the Respondent of the Request for Review and requesting him to file a response, the Respondent lodged a letter dated 8th June 2021 and filed on 11th June 2021 from one Marjan Hussein Marjan the Acting Commission Secretary/ CEO of the Procuring Entity. The Interested Party filed a response through a letter dated 15th June 2021 addressed to the Acting Board's Secretary.

Vide a letter dated 14th June 2021, M/s Zamara Risk & insurance Brokers Ltd (Successful Tenderer in Lot-1 of the subject tender) was notified by the Board's Acting Secretary of the Request for Review and the required three days for providing any information and arguments about the tender by the Applicant herein. The Board Secretary also furnished M/s Zamara Risk & insurance Brokers Ltd with the Board's Circular No. 2/2020 dated 24th March 2020. To date, M/s Zamara Risk & Insurance Brokers Ltd has not filed a response to the Request for Review.

Pursuant to Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency plan to mitigate against Covid-19 pandemic, the Board dispensed with physical hearings and directed that all Request for Review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board. The Applicant filed its written submissions dated 18th June 2021 and filed on 21st June 2021.

BOARD'S DECISION

The Board has considered the Applicant's Request for Review, its Supporting Affidavit, Further Affidavit, the Further Affidavit to the Interested Party's Response, Applicant's written submissions, the Respondent's Response and the Interested Party's Response together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). The Board finds that the following issues call for determination: -

1. Whether the Board has Jurisdiction to entertain the Request for Review. In addressing this issue the Board shall make a determination on the following;

a. Whether the Request for Review was filed within the statutory period of 14 days specified in Sec 167(1) of the Act to invoke the Jurisdiction of the Board.

Depending on the outcome of sub issue (a) above.

b. Whether the contract between the Procuring Entity and M/s Zamara Risk & Insurance Brokers Ltd satisfies the requirements of section 135 (3) of the Act read together with section 168 of the Act for the Jurisdiction of the Board to be ousted by dint of sec 167(4) (c).

Depending on the outcome of issue No. 1 above.

2. **Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation stage in relation to Lot 1 of the Subject Tender in accordance with section 79(1) and 80(2) of the Act with respect to the following criteria:**
 - a. **Clause A (9). Preliminary Evaluation of the Appendix to Instructions to Tenderers at page 20 of the tender document on providing a duly filled signed and stamped Price Schedule in the format provided in section V Schedule of requirements at page 41 of the Tender Document**

3. **Whether the Applicant's letter of Notification of unsuccessful bid dated 19th May 2021 with respect to Lot 1 of the subject tender satisfies the threshold of section 87(3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020")**

On the first limb of the first issue framed for determination, it is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited [1989] eKLR**, Nyarangi JA stated as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity

and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. [Emphasis added]

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that:-

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "

The Supreme Court in the case of ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others [2012] eKLR*** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree

with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings." [Emphasis added]

It therefore follows the jurisdiction of this Board flows from Section 167(1) of the Act which states as follows:

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

In the case of **Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, Korir J held that;

"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 [Emphasis added]

The learned judge went on to express himself as follows on the importance of time lines:

"The timelines in the PP&DA 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 Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned." [Emphasis added]

With respect to the instant Request for Review, section 167 (1) of the Act should be read together with Regulation 203 (1) and (2)(c) (ii) of the Regulations 2020 which states that:

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

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

a);

b);

c) be made within fourteen days of—

i.;

ii. the notification under section 87 of the Act;

or

iii.

d)"

Section 87 of the Act mentioned in Regulation 203 (2) (c) (ii) of Regulations 2020 provides 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

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

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

In the circumstances of the instant Request for Review and in line with the foregoing provisions of the Act and the Regulations 2020, one of the pre-

requisites for invoking the jurisdiction of the Board among other pre-requisites is confirming that the instant Request for Review and its attendant Supporting Statement was filed within 14 days of the Applicant being notified of the outcome of its bid.

The Respondent at paragraph 1 of page 2 of its letter responding to the Request for Review avers that section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 provides that a candidate or a tenderer who claims to have suffered or risk suffering loss or damage due to a breach of a duty imposed on a Procuring Entity 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. The Respondent stated that the Applicant sought for administrative review on the 2nd of June 2021, which is outside the fourteen days of notification of award.

The Interested Party in its letter dated 15th June 2021 at paragraph one stated that the Review Application No. 76 of 2021 by the Applicant was received in their offices on 2nd June 2021 and that it was in contravention of section 203 (c) part XV- Administrative Review of Procurement and Disposal Proceeding- Legal Notice No. 69 which requires appeals to be filed within 14 days from the date of the letter of award. It further stated that the award letters as confirmed by the Applicant in their Supporting Affidavit were dated 19th May 2021 and that the appeal window expired on 1st June 2021.

At paragraph 6 of its Request for Review, the Applicant states that on 20th May 2021, it received notification of award from the Respondent informing it that its tender was unsuccessful.

Section 87 of the Act states 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

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

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

From the above provision, the Respondent is responsible for notifying bidders of the outcome of their bids and should therefore provide evidence of the date letters of notification were dispatched to all bidders. The confidential documents submitted to the Board do not contain any

documentation demonstrating the manner in which bidders were notified, neither did the Respondent attach any documents in its Response to the Request for Review to that effect.

In **Civil Appeal No. 53 of 2017, Eunice Wayua Munyao v. Mutilu Beatrice & 3 others [2017] eKLR**, the court considered the burden of proof as provided in section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya and held as follows:

"Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya clearly captures the aspects of burden of proof and they provide as follows:-

107. Burden of proof

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is trite law that the onus of proof is on he who alleges'

Further, the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** held that:

"The person who makes an allegation must lead evidence to prove the fact. He or she bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

In the instant case, the Respondent did not provide any evidence of dispatch of notification letters to bidders thus failed to discharge its burden of proving the date when bidders were notified of the outcome of their bids.

On the other hand, the Interested Party is the party alleging the Applicant was notified on 19th May 2021, thus bears the legal burden of proving that the Applicant was indeed notified of the outcome of its bid on 19th May 2021. This legal burden has not been discharged throughout these proceedings because no evidence was provided by the Interested Party to support its allegation.

The evidentiary burden of proof is a shifting one and is required as a response to an already discharged initial burden of proof. Since the Respondent and Interested Party failed to discharge its burden of proof, this legal burden cannot shift to the Applicant. The Board is only required to determine the date when the Applicant was notified of the outcome of its bid, on a balance of probabilities.

The Applicant stated that it received its letter of notification on 20th May 2021, an assertion that was not controverted by the Respondent as the party responsible of notifying bidders.

As already established, the Interested Party's attempts to controvert the Applicant's position have also not been supported by any evidence thus not proven.

The Applicant deponed at paragraph 6 of its Supporting Affidavit that it was notified on 20th May 2021 which was not controverted by the Respondent. The Board observes that at paragraph 3 of the Applicant's Further Affidavit,

the Applicant depones that it received a copy of its letter of notification on 20th May 2021 but received the original thereof on 24th May 2021.

From the foregoing, the Board observes that the Applicant first learnt of the outcome of its bid through a copy of its notification letter sent on 20th May 2021, a position that was not controverted by the Respondents. Further, the Applicant's allegation of receiving an original of its letter on 24th May 2021 is supported by a receiving stamp dated 24th May 2021 of the Applicant on the face of its letter of Notification. That notwithstanding, the Applicant already learnt of the outcome of its bid on 20th May 2021 and as already established by the Board, this position was not challenged by the Respondent who in any case, did not provide any proof of the date when bidders were notified.

In the absence of proof to the contrary, having noted the Applicant's assertion remains uncontroverted and on a balance of probability, the Board finds that the Applicant was notified of the outcome of its bid on **20th May 2021** vide a letter of notification of award dated 19th May 2021.

In computing time, the Board is guided by section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya (hereinafter referred to as the 'IGPA) which provides as follows:-

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

Since the Board has found the Applicant was notified of the outcome of the subject tender on 20th May 2021, fourteen days started running on the 21st day of May 2021 and lapsed on 3rd June 2021. Accordingly, the instant Request for Review ought to have been filed before the Board on or before 3rd June 2021.

Even if the date of the letters of notification is considered as the date the Applicant was notified of the outcome of the subject tender, that is, 19th May 2021, the instant Request for Review ought to have been filed on or before 2nd June 2021. In all scenarios the Request for Review was filed within the required statutory period of 14 days specified in Section 167 (1) of the Act noting that the instant Request for Review was filed before the Board on 2nd June 2021.

Accordingly, the Board finds that the instant Request for Review was filed within fourteen (14) days of the Applicant being notified of the outcome of the subject tender to invoke the jurisdiction of the Board.

The Second limb of the first issue framed for determination touches on an allegation that a contract was entered into between the Respondent and M/s Zamara Insurance Brokers Limited in Lot 1 of the subject tender. At paragraph 2 of page 3 of the Respondent's response, the Respondent avers that the Procuring Entity received a notification of the Request for Review on 4th June 2021 after it had already entered into contract with the M/s

Zamara Insurance Brokers Limited in Lot 1 of the subject tender. To support this allegation, the Respondent in their response attached an unsigned and undated copy of a contract between the Respondent and M/s Zamara Insurance Brokers Limited.

Section 167 (4) (c) of the Act states as follows;

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

(a);

(b); and

(c) Where a contract is signed in accordance with section 135 of this Act."

Section 135 (3) of the Act states;

"(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

The Jurisdiction of the Board can only be ousted by Section 167 (c) of the Act if the conditions provided in Section 135 of the Act are satisfied.

In the instant case, we are dealing with the date when the contract was signed. The first time the Respondent lodged its pleadings on 11th June 2021, he attached an undated and unsigned copy of a contract between the

Procuring Entity and M/s Zamara Risk Insurance Brokers Limited. In essence, the said contract has no execution Clause neither is it dated.

Since the contract is not dated, the Respondent's allegation that a contract was signed on 4th June 2021 has not been substantiated. That notwithstanding, the unsigned and undated contract is not a valid contract.

In Judicial Review Application No.115 of 2020, African Merchant Assurance Co. Ltd (AMACO) v Public Procurement Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others (Interested Parties) [2020] eKLR where the court held as follows:-

"The requirements of the precondition that will operate to oust the Respondent's jurisdiction therefore are that the contract is in writing, based on the Tender Documents, signed by all the parties namely the Accounting Officer of the Procuring Entity and successful bidder, and after fourteen days have elapsed following the giving of the notification. The section does not provide similar restrictions as regards the time within which a contract once signed should be performed so as to oust jurisdiction, and therefore it can be performed any time after the requirements of section 135 are met."

In Civil Appeal No. 35 of 2018, Ederman Property limited v Lordship Africa Limited & 2 others [2019] eKLR, where the Court of Appeal while considering the import of section 135 (3) of the Act held as follows:-

"the express provisions of Section 135 of the Act states that the written contract should be entered into within the period

specified in the notification but not before fourteen (14) days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period. It is true to say that a contract entered in contravention of the law is against public policy, it is illegal and cannot be allowed to stand"

The Court of Appeal in the above case held that a contract executed in contravention of the law, in this case, section 135 (3) of the Act, goes against public policy, as the contract would be illegal and cannot be allowed to stand.

Section 135 (3) of the Act recognizes that a procurement contract in any procurement process must be signed within the tender validity period.

Evidently, the contract (which is undated and unsigned) furnished to the Board is not a valid contract in law.

It is also worth pointing out that Section 168 of the Act provides that;

"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."

The Board observes that due to intervening events occasioned by suspension of procurement proceedings, the respondent could not sign a contract after notification by the acting Board's secretary of the Request for Review.

On 16th June 2021, the Respondent furnished the Board with another contract dated and signed on **3rd June 2021** between the Procuring Entity and M/s Zamara Risk Insurance Brokers Limited.

The Board already established that the Applicant received a copy of its letter of Notification on 20th May 2021, thus had up to 3rd June 2021 to file a Request for Review. It therefore follows, the earliest date that the Procuring Entity could enter into a contract was **4th June 2021** and not 3rd June 2021.

Clearly, the contract dated 3rd June 2021 was signed during the stand-still period of 14 days provided in section 135 (3) of the Act, thus rendering the said contract null and void ab initio. The Board finds the contract dated 3rd June 2021 executed between the Respondent and M/s Zamara Risk Insurance Brokers Limited offends the provision of section 135(3) of the Act, goes against public policy and is therefore null and void. Accordingly, the Board's jurisdiction cannot be ousted by an illegality.

In the circumstances and in totality of the first issue framed for determination, the Board finds that it has jurisdiction to entertain the instant Request for Review and shall now proceed to address the substantive issues framed for determination.

Before addressing the remaining issues framed for determination, the Board would like to make an observation that the Applicant only challenged the outcome of its bid for Lot 1 but did not challenge Lot 2 and 3 of the subject tender. At paragraph 8 of its Supporting Affidavit, the Applicant depones that

it also received letters of notification relating to Lot 2 and Lot 3 of the subject tender.

On the second issue for determination, the Applicant in paragraphs one and two of its Request for Review avers that the disqualification of its tender was in breach of section 79 (2) (a) (b) of the Act, Regulation 74 (2), Clauses 2.7.1 (a), 2.8.1, 2.9.1, 2.20.3 and 2.20.4 of the Tender Document as read with Article 47 (1) and 227 (1) of the Constitution and Section 72 of the IGPA.

Further, at paragraph 9 of its Supporting Affidavit, the Applicant states that the notification letter purported that its tender was unsuccessful at the Preliminary Evaluation stage for the reason that its Price Schedule was not in the format provided. The Applicant stated that it summarized its Price Quotation in the Price Schedule Summary Form, and it included class/risk number, description of insurance cover, total price per year¹ and year 2 for each proposed insurance service, taxes payable, the grand total and that its Price Schedule Summary Form was dated, stamped and duly signed. The Applicant further stated that its Price Schedule did not materially depart from the requirements set out in the Tender Document and that it satisfied the Price Schedule format prepared, issued and publicized by the Public Procurement Regulatory Authority.

On the other hand, the Respondent in its response averred that the Applicant's tender ought to have first conformed to all the eligibility and other mandatory requirements in the Tender Document. Further, the Respondent stated that the Tender Document expressly required tenderers to submit

their dully filled and signed Price Schedule in the format provided. The Respondent averred that the Applicant failed to comply with this Mandatory Requirement and that it provided a Price Schedule that was in a different, non-conforming format.

It is the Respondent's position that the Applicant submitted a Price Schedule that was not in conformity with the format provided in respect of Lot 1. The Respondent further stated that the Applicant applied discriminatory approach to compliance because in Lot -2 and Lot-3, it dully filled and submitted the Price Schedules in the format provided for in the Tender Document but deviated in the format in the Price Schedule for Lot-1.

The Respondents averred that the Applicant admits that their bid document had minor deviation from the requirements and that in their view (Respondent's), the Evaluation Committee's hands were tied since the requirements could not be treated as minor deviations and could not be waived.

The Applicant's letter of notification read as follows;

"RE: NOTIFICATION OF AWARD FOR TENDER NO. IEBC/OT/21/02/2020-2021 PROVISION OF MEDICAL INSURANCE, GROUP LIFE ASSURANCE (GLA) AND GROUP PERSONAL ACCIDENT (GPA) COVERS FOR COMMISSIONERS AND STAFF

Reference is made to the above which you participated.

The Commission hereby regrets to inform you that your tender was not successful at the Preliminary Evaluation stage due to the following reasons:-

(i) Price Schedule submitted was not in the format provided.

The commission takes this opportunity to thank you for having participated in the above mentioned tender."

Clause A. (9). Preliminary Evaluation of the Appendix to Instructions to Tenderers at page 20 of the Tender Document

A. Preliminary Evaluation

For Lot-1; Lot-2; and Lot-3

No.	subject	Criteria	mandatory requirements	Pass or fail
9.	Price Quotation	To provide contractual pricing offer of the services to be rendered.	Must submit a dully filled, signed and stamped the <u>Price Schedule in the Format provided.</u> Where bidder is not the underwriter, they MUST attach the original quotation from the underwriter	

From the foregoing, the mandatory requirement directed bidders submit a dully filled, signed and stamped the Price Schedule in the Format provided. Where a bidder is not the underwriter, they MUST attach the original quotation from the underwriter.

Having considered parties cases, we look at the Criteria provided in Clause A. (9). Preliminary Evaluation of the Appendix to Instructions to Tenderers at page 20 of the Tender Document. The format referenced in the above criteria is provided in Section V. Schedule of requirements for Lot 1. Price Schedule Summary Form at page 41 of the Tender Document as follows.

PRICE SCHEDULE SUMMARY FORM

Lot 1: Staff medical Insurance

Please summarize the quoted Annual Premiums for Inpatient, Outpatient, in the table below:

Class/Risk No.	Description Of Insurance cover	Total Premium (Kshs.)	Proposed Underwriter/ Insurance Co.	excess	Free cover limit	Liability limit	others
1.							
2.							
3.							
Total year 1							
Total year 2							
Grand Total							

This was a mandatory requirement giving bidders the obligation of completing a duly filled Price Schedule in the format provided.

In response to this criteria the Applicant provided a duly completed Price Schedule at page 237 of its original bid in the following format:

Class/Risk No.	Description Of Insurance cover	Total Premium (Kshs.) Year 1	Total Premium (Kshs.) Year 2	Proposed Underwriter/ Insurance Co.	excess	Free cover limit	Liability limit	others
1.	Inpatient	83,062,666	88,877,0530	AAR Insurance				
2.	Outpatient	84,275,492	90,174,777	AAR Insurance				
3.	Maternity	9,529,225	10,196,270	AAR				

				Insurance				
4.	Dental	14,727,785	15,758,730	AAR Insurance				
5.	optical	16,008,462	17,129,054	AAR Insurance				
6.	Smart cards	4,241,179	2,120,589	AAR Insurance				
Taxes		934,256	999,652					
Total		212,779,064	225,256,124					
Grand Total		438,035,188						

The Board studied the format provided in the Tender Document in comparison with the format in the Applicant's original bid and notes that; the format provided in the Tender Document required bidders to provide total annual premiums for year 1 and year 2 in rows (horizontally). On the other hand, the Applicant provided total annual premiums for year 1 and year 2 in columns (vertically).

The Board observes that the Applicant changed the format of the Price Schedule for Lot 1, thus did not complete its Price Schedule in accordance with the format provided for in the Tender Document.

To support its allegation that it complied with the criterion in issue the Applicant alleged that by changing the rows and columns of the format provided in the Tender Document was a minor deviation.

Section 79 (1) (2) of the Act states as follows;

“(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. (2) A responsive tender shall not be affected by—

(a) Minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) Errors or oversights that can be corrected without affecting the substance of the tender."

Section 80(2) of the Act states as follows;

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

The Applicant's allegation prompted the Board to determine whether mandatory requirements can be classified as a minor deviation.

In **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte BABS Security Services Limited [2018] eKLR** the Court held that: -

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

[Emphasis by the Board]

In **Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR** (hereinafter referred to as "the KEMSA Case"), the Court had this to say on minor deviations or informalities at paragraphs 45 as follows:

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

In **PPARB Application No. 1 of 2017 - Nomads Construction Company Limited v. Kenya National Highways Authority & Another** - (hereinafter referred to as "the KENHA Case") the Board held at page 24 of the decision as follows: -

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

In view of the several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since the

requirements cannot be treated as minor deviations and cannot also be waived. The Applicant had no option other than to comply with them and the failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at the Preliminary Evaluation Stage as the Procuring Entity did"

In **Republic v. Public Procurement Administrative Review Board & another Ex parte Meru University of Science and Technology [2016] eKLR** this Court expressed itself as hereunder:

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

78. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or

oversights that can be corrected without touching on the substance of the tender.

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

81. A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party.”

The Board has compared the finding of the Court in the KEMSA Case, the Meru University Case and the Board’s finding in the KENHA Case. In doing so, we observe that mandatory requirements cannot be treated as minor deviations especially in instances where such an action would give a particular bidder an unfair advantage over other bidders who complied with the mandatory requirements specified in the Tender Document. The Court in the Meru University Case expressly stated that a Procuring Entity is bound by its Bid Documents because Mandatory conditions cannot be waived.

It is evident that Mandatory requirements cannot be classified as minor deviations or minor informalities. The Board is bound by decisions of the High Court especially in the circumstances where the High Court has

consistently held that Mandatory Requirements cannot be considered as minor deviations.

It is worth pointing out that the Tender Document provided other formats for Price Schedule for Lot 2 and for Lot 3 of the subject tender respectively. For Lot 2 (Group Life Assurance), the Price Schedule at page 41 of the Tender Document appears as follows:

Item No.	Description of Insurance cover	Proposed underwriter/insurance Co.	Total Premium (Kshs.)
1.	Death		
2.	Last Expenses Cover		
3.	Free Cover Limit		
4.	Critical illness benefit		
Others(please Specify)			
Total Year 1			
Total Year 2			
Grand Total			

The Applicant provided a duly completed Price Schedule for Lot 2 in the following format:

Lot 2: Group Life assurance

Item No.	Description of Insurance cover	Proposed underwriter/insurance Co.	Total Premium (Kshs.)
1.	Death	Pioneer Assurance	
2.	Last Expenses Cover	Pioneer Assurance	
3.	Free Cover Limit	Pioneer Assurance	20,641,234
4.	Critical illness benefit	Pioneer Assurance	
Others(please Specify)			
Total Year 1			20,641,234.00
Total Year 2			20,641,234.00

Grand Total		41,282,468.00
-------------	--	---------------

On the other hand, the Price Schedule for Lot 3 (Group Personal Accident) found on page 42 of the Tender Document appears as follows:

Item	Sum Insured	Description of Insurance cover	Proposed Underwriter/ Insurance	Total Premium (Kshs.)
GPA	Estimated annual earnings (Kshs.) 104,248,655.90 Total population 855	Accidental Death-5 years basic salary		
		Permanent and total disability- 5years basic salary		
		Temporary total permanent disability- weekly earnings up to 104 weeks		
		Temporary total permanent disability		
Others(please Specify)				
Total Year 1				
Total Year 2				
Grand Total				

The Applicant provided a duly completed Price Schedule for Lot 3 in the following format:

Lot 3: Group Personal Accident

Item	Sum Insured	Description of Insurance cover	Proposed Underwriter/ Insurance	Total Premium (Kshs.)
	Death	Accidental Death-5 years basic salary	AAR INSURANCE KENYA LIMITED	2,220,496
GPA	Last Expenses Cover	Permanent and total disability- 5years basic salary	AAR INSURANCE KENYA LIMITED	2,220,496
	Free Cover Limit	Temporary total permanent disability-	AAR INSURANCE KENYA LIMITED	1,082,582

		weekly earnings up to 104 weeks		
	Critical illness benefit	Temporary total permanent disability	AAR INSURANCE KENYA LIMITED	513,00
Others(please Specify)				
Total Year 1			20,641,234.00	6,063,780
Total Year 2			20,641,234.00	6,063,740
Grand Total			41,282,468.00	12,127,519

The Board has studied the tables in Lot-1, Lot-2 and Lot-3 and it is evident the Applicant knew the manner in which it ought to have completed the Price Schedules because for Lot 2 and Lot 3, the Applicant provided duly completed Price Schedules in the format provided in the Tender Document. The Board wonders why the Applicant would alter the format of Price Schedule for Lot-1 but comply with the format for Price Schedule for lot 2 and Lot 3.

It is evident the Applicant knew the format in which it ought to have completed the Price Schedule for Lot 1 because it provided the Price Schedule for Lot-2 and Lot-3 in the format provided in the Tender Document.

Evidently, the Applicant was the author of its own misfortune because it deliberately altered the format of the Price Schedule in Lot-1 but complied with the format for Lot-2 and Lot-3.

The Applicant cited Section 72 of IGPA which states;

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a

deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

The above provision gives a condition to the effect that, where there is express provision of a format, deviations would not be permitted. However, where the format is not expressly provided, then deviation from that format would be permitted. Turning to the instant case, the Tender Document expressly provided a format for price schedule under Section V. Schedule of requirements for Lot 1. Price Schedule Summary Form at page 41 of the Tender Document thus failure to comply with the format provided means that any deviations are not permitted. In the circumstances, section 72 of the IGPA cited by the Applicant cannot come to its aid in this case where we have established a format was expressly provided for a mandatory requirements which cannot be waived.

Article 227 of the Constitution of Kenya, 2010 states;

“(1) When a State organ or any other public entity contracts For goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2).....

Article 227 (1) of the Constitution cites fairness as one of the principles guide public procurement and asset disposal procedures. Bidders should compete

on an equal footing. It would disenfranchise other bidders who complied with the format provided for Price Schedule for services only to learn that other bidders such as the Applicant were given an undue advantage despite their failure to comply with the format provided for completing the Price Schedule for Lot 1 of the subject tender. No argument was advanced before this Board to the effect that deviations from mandatory requirements would not prejudice other bidders who chose to comply with the criterion in issue as directed.

In the circumstances, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Tender Evaluation Stage in relation to Lot-1 of the Subject Tender in accordance with Section 79(1) and Section 80(2) of the Act in respect to the criteria given because the Applicant failed to provide a duly completed Price Schedule for Lot 1 in the format provided for at page 41 of the Tender Document.

On the third issue for determination, the Applicant at paragraph 3 of its Request for Review averred that the notification letters for award of tender were in breach of Section 87(3) of the Public Procurement and Asset Disposals Act, 2015, Regulation 82(3) of the Public Procurement and Asset Disposal Regulations, 2020 as read with Article 10 (2) (c), 201 (a) and 227 (1) of the Constitution of Kenya, 2010.

The Applicant further stated in its Supporting Affidavit at paragraph 17 and 18 that the Respondent did not disclose the successful tenderer, the tender price and the reason why the tender was successful which rendered the procurement process unfair, opaque and prejudicial to the Applicant. As a

result of the said non-disclosure of the successful tenderer, the Applicant states that it was unable to join the successful bidder as a party to this Application.

Regulation 82 of Regulations 2020 states 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."

Section 87 (3) of the Act referenced above states as follows;

"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."

Section 86(1) of the Act states,

"(1) 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;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges"

Section 87 (3) of the Act which was outlined herein before read together with regulations 82 of Regulations 2020 provides for a notification letter to be issued to an unsuccessful bidder at the same time as the successful bidder is notified, in writing within the tender validity period, outlining the specific reasons why an unsuccessful bidder was unsuccessful, disclosing the identity of the successful bidder, the reason why such a bidder was successful (in this case the lowest evaluated bidder in Lot 1), the amount at which award was made to the successful bidder.

Article 10 (2) of the Constitution cites national values and principles of governance which include good governance, integrity, transparency and accountability. Further Article 227 (1) of the Constitution mentions the principle of transparency as one of the guiding principles in public procurement procedures. These principles would serve no purpose if a procuring entity disregards them at whim especially in this case where the identity of the successful bidder in Lot-1, the reason why such a bidder was the successful bidder and the tender sum for which award was made was not disclosed to the Applicant.

The Board has studied the letters of Notification to the Applicant and notes that the Procuring Entity only informed the Applicant that "***Price Schedule submitted was not in the format provided***". The letter does not include the identification of the successful bidder in Lot-1 and it does not give the reason why it was the successful bidder nor its tender sum contrary to the provisions of section 87(3) of the Act and 82 of Regulations 2020.

Accordingly, the Applicant's letter of notification does not satisfy the threshold of section 87(3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020.

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

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of unsuccessful bid in Lot 1 of Tender No. IEBC/OT/21/02/2020-2021, for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal accident (GPA) covers for Commissioners and Staff dated 19th May 2021 addressed to the Applicant and all other unsuccessful bidders be and are hereby canceled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of award of Lot-1 of Tender No. IEBC/OT/21/02/2020-2021, for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal accident (GPA) covers for Commissioners and Staff dated 19th May 2021 addressed to M/s Zamara Risk & Insurance Brokers be and is hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue new letters of notification of the outcome of evaluation of Lot-1 of Tender No. IEBC/OT/21/02/2020-2021, for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal accident (GPA) covers**

for Commissioners and Staff to all tenderers in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision taking into consideration the Boards findings in this Review.

4. Given that the subject procurement process has not been completed, each party shall bear their own costs in the Request for Review.

Dated at Nairobi this 23rd day of June 2021



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB

