

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 90/2021 OF 24<sup>th</sup> JUNE 2021**

**BETWEEN**

**LEGEND MANAGEMENT LIMITED.....APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER,**

**NATIONAL HOSPITAL INSURANCE FUND.....1<sup>ST</sup> RESPONDENT**

**NATIONAL HOSPITAL**

**INSURANCE FUND (NHIF).....2<sup>ND</sup> RESPONDENT**

**NW REALITE LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of National Hospital Insurance Fund in relation to Tender No. NHIF/035/2020-2021 for Letting and Management Services for the NHIF Building, Car Park Building and Contrust House.

**BOARD MEMBERS**

- |                         |              |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa     | -Chairperson |
| 2. Mr. Nicholas Mruttu  | -Member      |
| 3. Mrs. Njeri Onyango   | -Member      |
| 4. Eng. Mbiu Kimani OGW | -Member      |
| 5. Dr. Joseph Gitari    | -Member      |

**IN ATTENDANCE**

Mr. Philemon Kiprop

-Holding brief for the Acting Board Secretary

**BACKGROUND TO THE DECISION**

**The Tendering Process**

National Hospital Insurance Fund (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. NHIF/035/2020-2021 for Letting and Management Services for the NHIF Building, Car Park Building and Contrust House (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Publication Newspaper, the Public Procurement Information Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and the Procuring Entity’s Website ([www.nhif.or.ke](http://www.nhif.or.ke)) on 29<sup>th</sup> April 2021.

**Tender Submission Deadline and Opening of Tenders**

The Procuring Entity received a total of nine (9) tenders by the tender submission deadline of 13<sup>th</sup> May 2021. The tenders were opened by a Tender Opening Committee shortly thereafter in the presence of tenderers’ representatives and recorded as follows:

<b>Bidder No.</b>	<b>Bidder Name</b>
1	M/s Laser Property Limited
2	M/s Villa Care Management Limited
3	M/s Advent Valuers Limited
4	M/s Murage Estate Agents Limited
5	M/s Legend Managemnt Limited

6	M/s Crystal Valuers Limited
7	M/s Gimco Limited
8	M/s Tysons Limited
9	M/s NW Realite Limited

## **Evaluation of Tenders**

An Evaluation Committee evaluated tenders in the following stages:

- i. Mandatory Requirement Evaluation;**
- ii. Technical Requirement Evaluation; and**
- iii. Financial Evaluation.**

### **Mandatory Requirement Evaluation**

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Clause A. Mandatory Requirements of the Evaluation and Qualification Criteria at page 34 of the Tender Document. At the end of evaluation at this stage, three (3) tenders were found non-responsive while six (6) tenders were found responsive thus proceeded to the Technical Evaluation stage. The tenderers whose tenders were found responsive at this stage were recorded as follows: -

<b>Bidder No.</b>	<b>Bidder Name</b>
2	M/s Villa Care Management Limited
4	M/s Murage Estate Agents Limited
5	M/s Legend Management Limited
6	M/s Crystal Valuers Limited
7	M/s Gimco Limited
9	M/s NW Realite Limited

## **Technical Evaluation**

The Evaluation Committee subjected the remaining six (6) tenders to a technical evaluation against the criteria outlined in Clause 1.1: Stage Two Technical Evaluation of the Evaluation and Qualification Criteria at page 35 and 36 of the Tender Document. At the end of this stage of evaluation, all six (6) tenders were found responsive thus eligible to proceed to the Financial Evaluation stage after due diligence and a site visit was carried out.

## **Post Qualification Evaluation**

The Procuring Entity invited tenderers whose tenders had been found successful at the Technical Evaluation Stage to prepare a Demo/Presentation detailing the value addition to the Procuring Entity's properties that the contracted firm will offer, if found to have submitted the lowest evaluated responsive tender, and to provide 3 reference sites that have been successfully managed by such a tenderer, for NHIF to carry out due diligence.

## **Financial Evaluation**

At this stage, the Evaluation Committee evaluated financial proposals given by tenderers pursuant to the rates given in the Estate Agents (Remuneration) Rules, 2012. Financial Proposals were recorded as follows:-

### **Villa Care Management**

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
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<b>NHIF BUILDING</b>	Management fee	2.45 %	Letting fee	3.7 %
<b>PARKING COMPLEX</b>	Management fee	2.45 %	Letting fee	3.7 %
<b>CONTRUST HOUSE</b>	Management fee	2.45 %	Letting fee	3.7 %

### **Murage Estate Agents Limited**

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
<b>NHIF BUILDING</b>	Management fee	2.6 %	Letting fee	0 %
<b>PARKING COMPLEX</b>	Management fee	2.6 %	Letting fee	0 %
<b>CONTRUST HOUSE</b>	Management fee	2.5 %	Letting fee	0 %

### **Crystal Valuers Ltd**

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
<b>NHIF BUILDING</b>	Management fee	2.9 %	Letting fee	0 %
<b>PARKING COMPLEX</b>	Management fee	2.9 %	Letting fee	0 %
<b>CONTRUST HOUSE</b>	Management fee	2.9 %	Letting fee	0 %

### **Legend Management Limited**

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
<b>NHIF BUILDING</b>	Management fee	2.9 %	Letting fee	4.25 %
<b>PARKING COMPLEX</b>	Management fee	2.9 %	Letting fee	4.25 %
<b>CONTRUST HOUSE</b>	Management fee	2.9 %	Letting fee	4.25 %

## Gimco Ltd

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
<b>NHIF BUILDING</b>	Management fee	2.9 %	Letting fee	3.5 %
<b>PARKING COMPLEX</b>	Management fee	2.9 %	Letting fee	3.5 %
<b>CONTRUST HOUSE</b>	Management fee	2.9 %	Letting fee	3.5 %

## NW Realite Ltd

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
<b>NHIF BUILDING</b>	Management fee	2.9 %	Letting fee	2.9 %
<b>PARKING COMPLEX</b>	Management fee	2.9 %	Letting fee	2.9 %
<b>CONTRUST HOUSE</b>	Management fee	2.9 %	Letting fee	2.9 %

Tenders submitted by M/s Villa Care Management Limited, M/s Murage Estate Agents Limited and Crystal Valuers Limited were disqualified because they quoted below the minimum fees prescribed in the Estate Agents (Remuneration) Rules, 2012.

## Recommendation/Observation

The Evaluation Committee after a site visit and the Demo/Presentation observed that the Interested Party would bring the best value addition to the organization as required by the terms of technical evaluation and proceeded to recommend award of the subject tender to the Interested Party as the tenderer who submitted the lowest evaluated responsive tender as follows: -

<b>BUILDING</b>	<b>ITEM</b>	<b>FEE IN %</b>	<b>ITEM</b>	<b>FEE IN %</b>
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<b>NHIF BUILDING</b>	Management fee	2.9 %	Letting fee	2.9 %
<b>PARKING COMPLEX</b>	Management fee	2.9 %	Letting fee	2.9 %
<b>CONTRUST HOUSE</b>	Management fee	2.9 %	Letting fee	2.9 %

### **Professional Opinion**

In a professional opinion dated 15<sup>th</sup> June 2021, the Procuring Entity’s Head, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. She concurred with the Evaluation Committee’s recommendation on award of the subject tender, to the Interested Party. The Professional Opinion was approved by the Chief Executive Officer on 15<sup>th</sup> June 2021.

### **Notification to Tenderers**

In letters dated 15<sup>th</sup> June 2021, the Procuring Entity notified all tenderers of the outcome of their respective tenders.

### **THE REQUEST FOR REVIEW**

The Applicant lodged a Request for Review dated 23<sup>rd</sup> June 2021 and filed on 24<sup>th</sup> June 2021 together with an Affidavit in Support of the Request for Review sworn by Boniface K Terer on 23<sup>rd</sup> June 2021 and filed on 24<sup>th</sup> June 2021 and a Supplementary Affidavit sworn by Boniface K Terer on 4<sup>th</sup> July 2021 and filed on 5<sup>th</sup> July 2021 through the firm of H & K Law Advocates, seeking the following orders:

- 1. An order substituting the decision of the 2<sup>nd</sup> Respondent and awarding Tender Number NHIF/035/2020-2021 to the Applicant after reviewing all records of the procurement process (particularly the financial evaluation thereof) relating to the subject tender;***
- 2. An order directing the 2<sup>nd</sup> Respondent to sign a contract with the Applicant in accordance with the Tender and the decision of the Board thus bringing the procurement process to its logical conclusion;***
- 3. Any other or further relief or reliefs as the Board shall deem just and expedient; and***
- 4. The costs of this Review be borne by the Procuring Entity.***

In response, the Respondent lodged a Notice of Preliminary Objection to the Request for Review dated 30<sup>th</sup> July 2021 and filed on even date, together with a Memorandum of Response sworn on 30<sup>th</sup> June 2021 and filed on even date through the firm of Moronge & Co. Advocates. The Interested Party filed an Affidavit of Opposition to the Request for Review sworn by Nahashon Kuria on 6<sup>th</sup> July 2021 and filed on even date through the firm of Ong'anda & Associates Advocates.

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

would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed written submissions dated 4<sup>th</sup> July 2021 and filed on 5<sup>th</sup> July 2021 whilst the Procuring Entity filed Written Submissions dated 7<sup>th</sup> July 2021 and filed on even date.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings, Written Submissions and confidential documents submitted by the 1<sup>st</sup> Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds the following issues call for determination: -

- I. Whether the Board has jurisdiction to entertain the Request for Review pursuant to Section 167(1) of the Act read together with Section 2 and 170 of the Act;**

Depending on the outcome of the first issue,

- II. Whether the Procuring Entity's Evaluation Committee evaluated the Interested Party's tender at the Financial Evaluation stage in accordance with Article 227(1), Section 80(2) of the Act read together with Clause A. Financial Evaluation of the Evaluation and Qualification Criteria of the Tender Document.**

On the first issue framed for determination, the Respondents raised a Preliminary Objection challenging the jurisdiction of the Board pursuant to the provisions of Section 167(1) of the Act in that H & K Law Advocates were neither a candidate nor a tenderer within the meaning and scope of the Act and Regulations 2020 hence lacked the *locus standi* to initiate and file the subject review. It is the Respondents contention that H & K Law Advocates address, was provided for as the contacts of the Applicant instead of the Applicant's address in the subject review thus, the subject review was instituted and filed by a person who was neither a candidate nor a tenderer in the subject tender within the meaning of section 167(1) of the Act read together with section 2 of the Act and therefore the Board has no jurisdiction to entertain the subject review.

In addition, the Respondents contend that one Boniface K Terer who swore an Affidavit in Support of the Request for Review had no authority to sign the same on behalf of the Applicant. In the Respondent's view no evidence was tendered to demonstrate Boniface K. Terer is a Director and Principal of the Applicant. In conclusion, the Respondents urged the Board to find that the Request for Review is fatally defective and the Board has no jurisdiction to entertain the same.

Courts of higher jurisdiction have explained the meaning of jurisdiction. In the Court of Appeal in **Civil Appeal No. 244 OF 2010, Phoenix of E.A.**

**Assurance Company Limited v S. M. Thiga t/a Newspaper Service**

**[2019] eKLR** the court held that-

***"... 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."***

From the foregoing decision of the Court of Appeal, jurisdiction is the premise upon which a court or a tribunal derives the power, authority and legitimacy to entertain any matter before it. In the circumstances, the Board must first as a matter of law, establish whether it has jurisdiction to entertain the subject review before proceeding to entertain the substantive issues raised therein.

The jurisdiction of a court, tribunal or any other decision making body ordinarily flows from the Constitution or legislation. The Jurisdiction of this Board flows from Section 167 (1) of the Act which provides 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."***

A reading of section 167(1) makes it clear that *inter alia* only a person known as a candidate or a tenderer can institute and file a review in such a manner as may be prescribed.

Section 2 of the Act defines a candidate and a tenderer as follows-

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;***

Further, section 2 assigns the meaning of the word "prescribed as follows-

***"prescribed" means prescribed by Regulations under this Act"***

The Regulations contemplated under the Act are the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter referred to as "Regulations, 2020").

Regulation 203 (1) and (2) of Regulations 2020 provide as follows-

**(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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request;***

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

***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***

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

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

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

The Fourteenth Schedule of Regulations 2020 referred to in Regulation 203(1) provides as follows-

**(r.203(1)) FORM FOR REVIEW**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

APPLICATION NO.....OF.....20.....

BETWEEN

.....APPLICANT (Review Board)

AND

.....RESPONDENT (Procuring Entity)

Request for review of the decision of the..... (Name of the Procuring Entity of .....dated the...day of .....20.....in the matter of Tender No.....of .....20..... for .....(Tender description).

**REQUEST FOR REVIEW**

I/We....., the above named Applicant(s), of address: Physical address.....P. O. Box No..... Tel. No.....Email ....., hereby request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds , namely:

- 1.
- 2.

By this memorandum, the Applicant requests the Board for an order/orders that:

- 1.
- 2.

SIGNED .....(Applicant) Dated on.....day of ...../.....20.....

FOR OFFICIAL USE ONLY Lodged with the Secretary Public Procurement Administrative Review Board on.....day of| ..... 20.....

SIGNED

Board Secretary

A reading of Regulation 203 (1) and (2) of Regulations 2020 read together with the Fourteenth Schedule of Regulations 2020 gives guidance on who institutes and/or files a Request for Review and the format such a Request for Review should take. The format of the Request for Review envisages at least two persons must be parties to a Request for Review namely, an Applicant before the Board and a Respondent being a Procuring Entity. Further, such a Request for Review is to be accompanied by *inter alia*, such statement as an Applicant considers necessary in support of its review.

Section 170 of the Act provides for more parties to a Request for Review as follows: -

***The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity;  
and***

***(d) such other persons as the Review Board may determine.***

As already noted, a person who institutes and files a review is a candidate or tenderer also known as the Applicant and is thus the person contemplated in Section 170 (a) of the Act as the person who requests for a review.

The jurisdiction of the Board is invoked when a competent Request for Review is filed with it. A competent Request for Review in the circumstances of the subject review is one that *inter alia* (i) has been instituted by an Applicant who is a tenderer and (ii) is accompanied by such statement as the Applicant considers necessary to support its Request for Review.

The Board has carefully studied the Request for Review in the subject review and notes the party indicated as the Applicant is Legend Management Limited and not H & K Law Advocates. Further, a reading of the Procuring Entity's Evaluation Report dated 11<sup>th</sup> June 2021 which forms part of the aforementioned confidential documents shows Legend Management Limited tendered for the subject tender making it a tenderer within the meaning of Section 2 of the Act. The Respondents also admitted at paragraph 14 of their Memorandum of Response that Legend Management Limited tendered in the subject tender.

The Board further notes that H & K Law Advocates are indicated as the advocates on record for the Applicant and not that it is an applicant in the Request for Review. The Board takes judicial notice that no provision of the Act has ousted representation by an advocate of any party to a Request for Review. As a matter of fact, it is permissible for a party to a request for review to opt for representation by an advocate or a representative of its/his/her choice under Regulation 208 of Regulations 2020 which provides as follows-

***Any party to a Request for Review filed under Regulation 203 shall, as at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice.***

Interesting to note is that the Respondents did not act in person when responding to the subject review, instead, they appointed the firm of Moronge & Co. Advocates, to represent them and which law firm filed a Memorandum of Response to the subject review on behalf of the Respondents. The Interested Party appointed the firm of Ong'anda & Associates Advocates to represent them and which firm filed an Affidavit of Opposition to the Request for Review. It is therefore not correct for the Respondents to challenge the locus of the Applicant merely because the Applicant's Request for Review was drawn and filed on behalf of the Applicant by the firm of H & K Law Advocates yet the Respondents Memorandum of Response was also drawn and filed on behalf of the Respondents by the firm of Moronge & Co. Advocates and the Interested Party's Affidavit in Opposition to the Request for Review was filed by Ong'anda & Associates Advocates.

From the foregoing, it is clear H & K Law Advocates filed the subject review on behalf of the Applicant as the Applicant's advocate/legal representative and not that H & K Law Advocates is an applicant in the subject review.

Accordingly, the Board finds the Applicant, Legend Management Limited, had the *locus* to institute the subject review and to be represented by an advocate because it was a tenderer in the subject tender.

With respect to the Applicant's Affidavit in Support of the Request for Review being signed by a person not authorized to institute and prosecute the subject review, the Board has this to say.

In **Leo Investments Limited v Trident Insurance Company Limited [2014] eKLR** the court held as follows:

***"Nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundles of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit."***

From the above case, courts have adopted a practice of not invalidating a suit merely because, a deponent to an affidavit that such suit has been anchored on has not provided a resolution of a corporation, for such a deponent to institute a suit on behalf of such a corporation. Courts would rather allow a ground seeking particulars of such authority instead of invalidating a suit. This position taken by courts of higher jurisdiction is in

line with and gives effect to Article 159 (2)(d) of the Constitution which provides as follows-

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-***

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

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

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

***(d) justice shall be administered without undue regard to procedural technicalities;...***

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

Taking the circumstances of the subject review, the Applicant filed an Affidavit in Support of the Request for Review sworn by one Boniface K Terer on 23<sup>rd</sup> June 2021 without attaching the Applicant's Director's resolution authorizing Boniface K Terer to prosecute the subject review. However, when the Respondents raised this issue, the Applicant was able to file a Supplementary Affidavit sworn by Boniface K Terer on 4<sup>th</sup> July 2021 attaching its' director's resolution dated 22<sup>nd</sup> June 2021 authorizing Boniface K Terer to prosecute the subject review on its behalf. Taking a cue from courts of higher jurisdiction, it will not serve any justice for this Board to determine that the Request for Review is fatally defective merely because the Applicant's Director's resolution authorizing Boniface K Terer to prosecute the subject review was not provided in the Affidavit in Support of the Request

for Review but was subsequently provided through the Applicant's Supplementary Affidavit.

The Applicant in its Written Submissions, submits that Boniface K Terer, is a Director and Principal Partner of the Applicant authorized by the Board of Directors of the Applicant to swear the affidavit on behalf of the Applicant. It further submits that in addition to the above it has issued a Specific Power of Attorney dated 29<sup>th</sup> December 2020 in which Bernard K Terer is authorized to execute all documents in relation to the subject tender.

Regulation 218 of Regulations 2020 provides that: -

***"The Review Board shall not be bound to observe the rules of evidence in the hearing of a request for review under these regulations."***

In the circumstances, the Board finds that Boniface K. Terer is authorized to prosecute the subject review on behalf of the Applicant thus the Request for Review is properly filed before the Board.

In totality of the first issue framed for determination, the Board finds the Applicant filed a competent Request for Review and thus, the Board has jurisdiction to hear and determine the subject review having found the subject review was instituted by the Applicant, a person with *locus* to institute the subject review by virtue of being a tenderer in the subject tender

and that Boniface K Terer is authorized to prosecute the subject review on behalf of the Applicant.

On the second issue for determination the Applicant contends that the Respondents breached section 86(d) of the Act for failing to disqualify the tender submitted by the Interested Party for failure to provide a financial proposal based on the minimum fees prescribed under the Estate Agents (Remuneration) Rules, 2012 (hereinafter referred to as the "Remuneration Rules"). In their Written Submissions, the Applicant contends that the relevant scale for letting services and for management services is Scale 2 and Scale 4 of the Remuneration Rules respectively. Under Scale 2 of the Remuneration Rules, the scale remuneration as letting fees for a sole agency of a commercial building is 7.5 % of the gross annual rent. The rules provide room for negotiations downwards where management services are involved but caps the fees at no less than half the scale of the letting fees. This means, the minimum letting fees chargeable for sole agency with respect to commercial buildings where management services are involved can be negotiated downwards from 7.5% to 3.75% of the gross annual rent.

On the other hand, the management fees under Scale 4 of the Remuneration Rules provide for 7.5 per cent of the gross rents or by arrangement but not less than 2.5 percent.

The Applicant further contends that the tendered services were for letting and management and therefore the minimum fees under Scale 2 and 4 of

the Remuneration Rules respectively would be not less than 3.75% of the gross annual rent for letting services and not less than 2.5% of the gross rents for Management services. However, the Interested Party quoted 2.9% as its fees in all the categories of tendered services, that is, both letting and management services.

The Respondents contend that the Interested Party's tender was properly evaluated and satisfied all the mandatory, technical and financial requirements in the Tender Document. Further, the Respondents contend that the Interested Party's tender satisfied the requirement under Section 86 of the Act for offering the lowest evaluated price and being the most responsive tender for the subject tender with the lowest letting fee percentage. In the Respondents view, tenders submitted by Laser Property Limited, Advent Valuers Limited and Tysons Limited did not make it to the Financial Evaluation stages since they were disqualified at the Mandatory Evaluation stage and as such, the purported results of the financial evaluation as noted by the Applicant are misconceived. The Respondents contended that the correct and accurate letting fee percentage proposed by Villa Care Management Limited as evaluated at the Financial Evaluation stage was 3.7%, and not the incorrect and inaccurate percentage of 3.75% as indicated by the Applicant.

The Respondents contend the correct and accurate management fee and letting fee percentage proposed by Murage Estates Agents Limited as evaluated at the Financial Evaluation stage was 2.6% and 0% respectively.

However, the Applicant only captured a management fee for Contrust House at an incorrect and inaccurate rate of 5%, while at the same time failed to capture the other rates. The consequence of the foregoing inaccuracies by the Applicant as averred by it is that its tender opening notes are erroneous, contain non - existent and incorrect values of the outcome of the financial evaluation of the tenders that made it to the Financial Evaluation stage. As such, it is the Respondents contention that the Applicant's tender opening notes have no probative evidentiary value in so far as it's allegations in support of the Request for Review are concerned.

The Respondents further contend that contrary to the Applicant's averments to the contrary, nothing stops the Respondents from accepting the lowest evaluated responsive tender. They further state that the provisions of the Act being the statute that governs the entire process of procurement for the subject tender supersedes and prevails over the provisions of the Remuneration Rules.

The Interested Party contends that Applicant has not identified the duty under the Act that the Respondent has breached and that they have characterized the entire application with generalized accusations without any allegation(s) of a specific breach and that they are qualified under section 86(1) of the Act as the successful tenderers having conformed to all the eligibility and other mandatory requirements in the tender document. They have stated that the Applicant wants the Board to usurp the role of the evaluation committee established by virtue of section 46 of the Act.

In addressing the issue above the Board notes that Section 80(2) of the Act provides as follows: -

***“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.”***

A reading of Section 80(2) of the Act requires tenders for professional services to be evaluated and compared in the following manner (i) using procedures and criteria set out in the tender document and (ii) taking into consideration statutory instruments issued by relevant professional associations regarding regulation of fees chargeable for services rendered, during evaluation of tenders.

The subject tender is for letting and management services which are professional services rendered by Estate Agents. The fees chargeable to an estate agent who has rendered letting and management services are regulated by the Remuneration Rules.

The Board studied the Tender Document for the subject tender which provides the criteria for Financial Evaluation at Clause A: Financial Evaluation

of Evaluation and Qualification Criteria at page 37 of the Tender Document as follows: -

**"FINANCIAL EVALUATION CRITERIA**

***The Fund will award the contract to the successful tenderer whose tender will have been determined to be substantially responsive after post qualification evaluation and have been determined to be the lowest evaluated tender within the prevailing market rates. All technically responsive bidders MUST give a quotation within the provisions of the real estate Act.***

**Financial Proposal**

***The proposal will be given within the rates as provided for by the Estate Agents Act. Renewal of leases will attract no cost to NHIF Except for the legal fees that will be calculated and negotiated within the Advocates remuneration order where applicable.***

<i>BUILDING</i>	<i>ITEM</i>	<i>FEE IN %</i>	<i>ITEM</i>	<i>FEE IN %</i>
<i>NHIF BUILDING</i>	<i>Management fee</i>		<i>Letting fee</i>	
<i>PARKING COMPLEX</i>	<i>Management fee</i>		<i>Letting fee</i>	
<i>CONTRUST HOUSE</i>	<i>Management fee</i>		<i>Letting fee</i>	

***Note: In case of discrepancy between unit price and total, the unit price shall prevail.***

Scale 2 and 4 of the Remuneration Rules that was enacted pursuant to the Estate Agent Act provide as follows-

***SCALE 2 – LETTINGS***

***Residential:***

***Lease up to one year ..... 7.5% of annual gross rent.***

***Lease of over one year ..... One month's rent.***

***Commercial:***

***Sole agency ..... 7.5% of annual gross rent.***

***General agency ..... 10% of annual gross rent.***

***Fees by negotiation if management services involved but not less than half scale.***

***SCALE 4 – MANAGEMENT***

***Residential: 10 per cent of the gross rents or less according to the circumstances but not less than 5 per cent.***

***Commercial: 7.5 per cent of the gross rents or by arrangement but not less than 2.5 per cent.***

A reading of the above provisions of the Remuneration Rules, the scale letting fees for sole agency of a commercial building is 7.5 % of the gross annual rent. The rules provide room for negotiations downwards where management services are involved but caps the fees at no less than half the scale of the letting fees. This means, the minimum letting fees chargeable for a sole agency with respect to commercial buildings where management services are involved can be negotiated downwards from 7.5% to 3.75% of the gross annual rent. Any negotiations pegged on a percentage lower than

3.75% of the gross annual rent as letting fees for a commercial building will be contrary to the provisions of the Remuneration Rules, tantamount to undercutting and thus null and void.

This same analogy applies when interpreting the permissible percentage payable for management fees for commercial buildings. The rules provide for a scale fee of 7.5% of the gross rents but parties involved can have an arrangement to reduce the percentage as low as 2.5% of gross rents. This means, the minimum management fees chargeable with respect to commercial buildings is 2.5% of the gross rents. Any negotiations pegged on a percentage lower than 2.5% of the gross rents as management fees for a commercial building will be contrary to the provisions of the Remuneration Rules, tantamount to undercutting and thus null and void.

Upon perusal of the Interested Party's original tender, the Board notes the financial proposal provided by the Interested Party provided for a percentage of 2.9% for both letting and management fees with respect to NHIF Building, Parking Complex and Contrust House which are commercial buildings. The Board already established that the minimum permissible letting fees is 3.75% of the gross annual rent. Accordingly, the Interested Party's tender fails to satisfy the criteria set out at the financial evaluation stage with respect to letting fees because it provided a percentage of 2.9% which percentage is below the permissible minimum of 3.75% of the gross annual rent.

In ***Republic v The Public Procurement and Administrative Review Board Ex Parte Meru University of Science & Technology*** the court held as follows-

***"Tender should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents.....a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some were allowed to circumvent tender conditions. It is important for bidders to compete on equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions...."***

From the foregoing case, tenders need to comply with the criteria set out in a tender document and an evaluation process must be fair to enable all tenderers to compete on an equal footing.

We note, whereas the Respondents disqualified tenders submitted by "M/s Villa Care Management Limited for quoting 2.45% on management fees, M/s Crystal Valuers Ltd for quoting 0% on letting fees and M/s Murage Estate Agents Ltd for quoting 0% on letting fees, the Respondents did not disqualify the Interested Party's tender despite the Interested Party having submitted a financial proposal that provided for a 2.9% which percentage was below the minimum permissible of 3.75% of the gross annual rent as provided

under Scale 2 of the Remuneration Rules thus failing to meet the criteria set out for evaluation at the Financial Evaluation stage.

One of the constitutional principles of public procurement as enshrined in Article 227(1) of the Constitution is applying a system that is fair when state organs and public entities contract for goods or services. From the foregoing, it is clear the Respondents did not evaluate tenders in the subject tender in a fair manner because they found the Interested Party's tender responsive at the Financial Evaluation stage despite the same having not complied with criteria set out in the tender document for financial evaluation at the Financial Evaluation stage because the Interested Party's tender proposed a percentage below the permissible minimum percentage with respect to management fees as provided under the Remuneration Rules.

Accordingly, the Board finds the Interested Party's tender was not evaluated in accordance with Article 227(1) of the Constitution, Section 80(2) of the Act read together with Clause A: Financial Evaluation of Evaluation and Qualification Criteria at page 37 of the Tender Document and Scale 2 of the Remuneration Rules.

The effect of the above findings is that the Request for Review succeeds with respect to the following orders.

## **FINAL ORDERS**

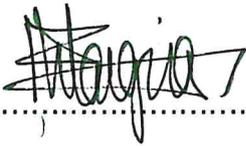
In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following specific orders in the Request for Review-

- 1. The 1<sup>st</sup> Respondent's Letters of Notification of Unsuccessful tender in Tender No. NHIF/035/2020-2021 for Letting and Management Services for the NHIF Building, Car Park Building and Contrust House dated 15<sup>th</sup> June 2021 addressed to the Applicant herein and all other unsuccessful tenderers, be and are hereby cancelled and set aside.**
  
- 2. The 1<sup>st</sup> Respondent's Letter of Notification of an Award of Tender No. NHIF/035/2020-2021 for Letting and Management Services for the NHIF Building, Car Park Building and Contrust House dated 15<sup>th</sup> June 2021 addressed to the Interested Party, be and is hereby cancelled and set aside.**
  
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's tender together with all other tenders that qualified for Financial Evaluation, at the Financial Evaluation Stage and conduct a re-evaluation at the Financial Evaluation stage in accordance with Article 227(1) of the Constitution, Section 80(2) of the Act, read together with Clause A: Financial Evaluation of Evaluation and Qualification Criteria at page 37 of the Tender Document and**

**Scale 2 and 4 of the Remuneration Rules within 14 days from the date of this decision taking into consideration the Board's findings herein.**

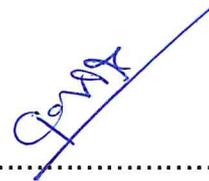
- 4. Given that the procurement proceedings of the subject tender are not complete; each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 14<sup>th</sup> day of July 2021**



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

