

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.19/2022 OF 1ST MARCH 2022

BETWEEN

MADISON GENERAL INSURANCE KENYA LIMITED..... APPLICANT

AND

Lt Col. (RTD) B.N NJIRAINI

THE ACCOUNTING OFFICER (KEBS)..... RESPONDENT

AND

CIC GROUP INSURANCE..... INTERESTED PARTY

Review against the decisions of the Kenya Bureau of Standards in relation to Tender No: KEBS/T007/2021-2022; Provision of Staff Medical Insurance Cover.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member |
| 3. Mr. Nicholas Mruttu | - Member |
| 4. Eng. Kimani Mbiu, OGW | - Member |
| 5. Dr. Paul Jilani | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Bureau of Standards (hereinafter referred to as the "Procuring Entity"), invited sealed tenders from eligible firms for Tender No: KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover (hereinafter referred to as the 'subject tender') by way of Open National Tendering Method advertised in the Daily Nation Newspaper, the Procuring Entity's website (www.kebs.org) and at the Public Procurement Information Portal (www.tenders.go.ke) on 23rd November, 2021 with a closing date of 7th December 2021.

Addenda

The Procuring Entity issued a total of 3 Addenda. Addendum No. 1 dated 24th November 2021 was issued following a discovery that the original Tender advertisement had the wrong tender number. Addendum No. 2 dated 2nd December 2021 was issued extending the tender submission deadline from 7th December 2021 to 12th January 2022 at 10.00 am. Addendum No. 3 dated 15th December 2021 was issued to notify all eligible tenderers that the blank tender document issued to prospective tenderers by the Procuring Entity had been revised and all clarifications sought addressed (hereinafter referred to as the 'Tender Document').

Tender Submission Deadline and Opening of Tenders

At the extended tender submission deadline of 12th January 2022 at 10.00 a.m, the Procuring Entity received seven (7) tenders. The Tender Opening Committee appointed by the Respondent opened the tenders

shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as having submitted their respective tenders as captured in the tender opening register of 12th January 2022:

1. Madison General Insurance;
2. Liason Group;
3. CIC Group;
4. Jubilee Insurance;
5. APA Insurance;
6. Britam General Insurance Company; and
7. UAP Old Mutual Insurance Company

Evaluation of Tenders

A Tender Evaluation Committee appointed by the Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the seven (7) tenders in the following stages as captured in the Evaluation Report signed by members of the Evaluation Committee and dated 23rd January 2022:

- i. Mandatory Requirements and General Conditions Evaluation;
- ii. Technical Evaluation;
- iii. Financial Evaluation; and

Mandatory Evaluation Stage

At this stage, the Evaluation Committee was required to apply Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 26 to 27 of 85 of the Tender Document.

Tenders were required to meet all the requirements of this criteria for evaluation to proceed to the next stage of evaluation.

At the end of evaluation at this stage, five tenders were found non-responsive thus could not proceed to the next stage of evaluation while two tenders (that of the Applicant and the Interested Party) were found responsive to proceed to the next stage of evaluation.

Technical Capacity Evaluation

At this stage, the Evaluation Committee was required to apply Clause 2.2 Technical Evaluation Criteria for underwriters and Technical Evaluation Criteria for Brokers of 2. Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 25 to 29 of 85 of the Tender Document. Tenders were required to meet a minimum score of 80% to proceed to the next stage of evaluation.

At the end of evaluation at this stage, both the Applicant's tender and the Interested Party's tender were found responsive to proceed to the next evaluation stage having attained a score of 88% and 91% respectively.

Financial Evaluation

At this stage, the Evaluation Committee was required to apply Financial Evaluation of 2. Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page

29 to 30 of 85 of the Tender Document. Tenders' financial comparison were required to be undertaken for purposes of identifying the tenderer with the lowest evaluated price.

The Interested Party's tender was ranked 1st with an evaluated tender price of Kshs.186, 142,836/= while the Applicant's tender was ranked 2nd with an evaluated tender price of Kshs.210, 083,911/=.

The Interested Party's tender was determined to have the lowest evaluated tender price of Kshs.186, 142,836/= and the Interested Party was determined to be the tenderer who submitted the lowest evaluated responsive tender.

Post-qualification

Vide a letter dated 26th January 2022, the Procuring Entity notified the Interested Party that it will visit the Interested Party on 28th January 2022 at 10:00a.m for purposes of conducting due diligence on the Interested Party to verify information in the Interested Party's tender.

The Evaluation Committee conducted due diligence on the Interested Party to confirm and verify the qualification and information given by the Interested Party in its tender which due diligence included, *inter alia*, confirmation of original County Government Business Permits as captured in the Due Diligence report signed by members of the Evaluation Committee. At the end of the due diligence exercise, the Evaluation

Committee established that the Interested Party was qualified to be awarded the subject tender.

Recommendation

The Evaluation Committee recommended the subject tender be awarded to the Interested Party at a total tender sum of Ksh.186,142,836 (Kenya Shillings One Hundred and Eighty-Six Million One Hundred and Forty-Two Thousand Eight Hundred and Thirty-Six Only) inclusive of all levies per year.

Professional Opinion

Pursuant to Section 84 of the Act, the Procuring Entity's Chief Manager, Supply Chain, Ms. Jane Ndinya, vide a professional opinion dated 28th January 2022, opined that all the subject procurement proceedings complied with the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as 'the Act') and recommended that the Respondent approves the award of the subject tender to the Interested Party at Ksh.186,142,836 (Kenya Shillings One Hundred and Eighty-Six Million One Hundred and Forty-Two Thousand Eight Hundred and Thirty-Six Only) inclusive of all levies which amount was within the Procuring Entity's budget.

Notification to Tenderers

In letters of notification of intention to enter into a contract dated 15th February 2022, the Respondent notified tenderers of the outcome of the evaluation.

THE REQUEST FOR REVIEW NO.19 OF 2022

The Applicant lodged a Request for Review dated 1st March, 2022 and filed on the even date together with a Statement in Support of the Request for Review signed by Hazoron Wambugu, the Applicant's Managing Director, and on 1st March 2022 through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders:

- a) The Respondent's decision awarding KEBS/T007/2021-2022; to the alleged successful bidder be and is hereby set aside and nullified.**
- b) The Respondent's decision notifying the Applicant that it had not been successful in by way of the letter dated 15th February 2022 be set aside and nullified.**
- c) The Board be pleased to review all records of the procurement process (particularly the mandatory evaluation thereof) relating to Tender No. KEBS/T007/2021-2022 and direct the Respondent to undertake fresh evaluation of all bids received in Tender No. KEBS/T007/2021-2022 in strict adherence to the Tender Document, the Act and the Regulations and award to the lowest competitive bidder.**
- d) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and**

e) Such other or further relief or reliefs as this board shall deem just and expedient.

In a Notification of Appeal and a letter dated 1st March 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), Mr. P. J. Okumu, notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 1st March 2022.

On 7th March 2022, the Respondent filed a Memorandum of Response dated 4th March 2022 and signed by the Respondent's advocate, Luise N. Rasanga.

Vide letters dated 7th March 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all

tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 7th March 2022.

On 11th March 2022, the Interested Party filed its Replying Affidavit sworn by Lorna Karaka on 11th March 2022 through the firm of Chepkuto Advocates.

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

The Applicant filed its written submissions dated 17th March 2022 together with its List of Authorities dated 17th March 2022 on 18th March 2022. The Respondent filed its written submissions dated 21st March 2022 on 22nd March 2022. The Interested Party filed its written submissions dated 18th March 2022 together with its List of Authorities dated 18th March 2022 on 18th March 2022.

APPLICANT'S CASE

The Applicant, a current service provider of the Respondent's staff medical insurance cover for years 2019-2021, avers that the Respondent publicly invited interested tenderers to place their tenders for the subject tender

starting from 31st May 2022 (we believe this date is erroneous because we are now in March 2022 as we write this decision) with a submission deadline of 12th January 2022 at 10:00a.m and a tender validity period of 182 days from the date of tender opening. Further, that in response to the said invitation to tender, the Applicant submitted a valid tender for the subject tender before the deadline for submitting tenders.

The Applicant avers that the Tender Document was designed to consist of three stages namely; (a) Mandatory Evaluation stage, which entailed checking for all mandatory documents as listed under paragraph 2.1 and on page 22-27 of the Tender Document, (b) Technical Evaluation stage; which entails checking for satisfaction of all the requirements listed from page 27-29 of the Tender document and (c) Financial Evaluation; which takes into account the prices of the evaluated tenders.

The Applicant avers that it passed the mandatory evaluation stage, technical evaluation stage having attained a score of 88% and proceeded to the financial evaluation stage where its tender was rendered unsuccessful.

According to the Applicant, it received a letter dated 15th February 2022 from the Respondent via email on 17th February 2022 notifying it that its tender was unsuccessful for the reason that the price was not competitive and that the successful tenderer was the Interested Party at a total tender sum of Kshs.186,142,836.

The Applicant alleges that being dissatisfied with the Respondent's decision, it vide a letter dated 21st February 2022 requested for a debriefing on its tender in terms of ranking in line with the debriefing requirements set in the Standard Tender Document and reconsideration on the Notification of Intention to Award in line with the evaluation criteria set out in the Tender Document. According to the Applicant, it received a response from the Respondent by a letter dated 24th February 2022 disclosing all the financial rankings of all the participants in the bid process while insisting that tenders were evaluated strictly as per the evaluation criteria set out in Section 3 of the Tender Document.

The Applicant alleges that it is aggrieved as it has industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and that proof of business permits for major towns was a mandatory requirement under paragraph 2.1, item MR24 of the Mandatory Requirements Criteria therefore the Interested Party could not satisfy this mandatory requirement and the effect of this is that the Interested Party's tender would be deemed non-responsive and could not be evaluated any further at the Technical and Financial stages.

For the foregoing reason, the Applicant alleges that the Respondent's decision to award the subject tender to the Interested Party was prejudicial, unfair and offended the spirit of the Act which requires public

entities to establish practices in order: (a) To maximize economy and efficacy; (b) To promote competition and ensure that competitors are treated fairly; (c) To promote the integrity and fairness of those procedures; (d) To increase transparency and accountability in those procedures; and (e) To increase public confidence in those procedures.

The Applicant alleges that the Respondent has failed to adhere to the requirements of Section 3 of the act by failing to promote competition or ensure that competitors are treated equally and fairly and the Respondent's actions have greatly prejudiced the Applicant and have rendered the proceedings unfair.

The Applicant relies on the following case law to support its case; (a) *Republic v Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) ex parte Meru University of Science and Technology [2019] eKLR* on procuring entities considering conforming, compliant or responsive tenders and (b) *Judicial Review No.90 of 2018 Republic v Public Procurement Administrative Review Board & 3 Others Ex Parte Saracen Media Limited [2018] eKLR* on tenders complying with all aspects of the invitation to tender and meeting all other requirements laid down by the procuring entity in its tender document.

RESPONDENT 'S RESPONSE

The Respondent confirms that the subject tender was advertised on 23rd November 2021 with a tender submission deadline of 7th December 2021

but pursuant to Addendum No.3, the tender submission deadline was extended to 12th January 2022 which extension had an impact on the mandatory requirements specifically MR 24 which required proof of country coverage where tenderers were to submit business permits as evidence.

According to the Respondent, in promoting equal and fair competition to all competitors and guided by Section 79(2a) of the Act, all tenders were evaluated as per the evaluation criteria set out in Section 3 of the Tender Document in strict compliance with the law and the requirements of the Tender Document, considered and reviewed business permits for the year 2021 and 2022 for the five counties as valid submissions and in this regard the Interested Party's tender was responsive having satisfied MR24 thus, was further evaluated at the Technical and Financial evaluation stages.

The Respondent contends that the Applicant's reliance of its industrial knowledge in alleging that the Interested Party did not meet the mandatory requirement is entirely based on the Applicant's own belief, not in good faith and without basis for failure by the Applicant to provide any form of proof or concrete evidence to substantiate such allegation contrary to Section 107(1) and 109 of the Evidence Act which provides for any person who seeks to rely on a fact or allegation to bear the burden of proof to show that the facts or allegation exist. Further, the Respondent contends that the Applicant has not provided any form of proof or evidence to this Board to substantiate the allegation that the Respondent has acted in a

manner that violates the requirements of the law and the Tender Document.

The Respondent confirms that the Applicant's tender just like the Interested Party's tender was responsive at the Mandatory and Technical evaluation stages but the Applicant's tender was unsuccessful at the Financial evaluation stage because the Interested Party offered a more competitive tender compared to the Applicant and consequently, the award of the subject tender to the Interested Party was fair.

The Respondent alleges that the Applicant is trying to arm twist it into awarding the Applicant the subject tender despite the fact that the Applicant presented a non-competitive tender compared to the tender presented by the Interested Party.

It is in this light, the Respondent prays for the Board not to entertain the instant Request for Review which according to the Respondent, is incompetent, fatally defective and should be struck out and dismissed with costs.

The Respondent relies on the following case law to support its response (a) *Andrew Achoki Onchiri v Kenindia Assurance Co. Ltd [2004] eKLR* on courts not entertaining allegations not backed by evidence, (b) *Yunes Mariafu Mukowle v Moses Makokha & 3 others (2016) eKLR* while quoting *Stephen*

Wasike Wakho & another v Security Express Limited (2006) eKLR on the legal dictum of he who alleges must prove, (c) *Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others [2013] eKLR* on allegations based on beliefs, thoughts and apprehensions, (d) *OJSC Power Machines Limited, TransCentury Limited and Civicon Limited v Kenya Electricity Generating Company Limited (KenGen) Appl. No.38 of 2015* on the Board not interfering with an evaluation conducted by an evaluation committee unless it is clearly demonstrated with evidence that the evaluation was done in violation of the provisions of a tender document.

INTERESTED PARTY'S RESPONSE

The Interested Party through its Business Development Manager Medical Division, Ms. Lorna Karaka, depones that it started as an insurance agency within the Kenyan National Federation of Co-operatives (KNFC) in 1968 and has since become a leading cooperative enterprise and micro-insurer in Africa, with three subsidiaries in Kenya, namely CIC General Insurance Ltd, CIC Life Assurance Ltd and CIC Asset Management Ltd and the group has additional regional footprint with presence in South Sudan, Uganda and Malawi.

It is the Interested Party's deposition that it has a proven track record in provision of medical insurance services and as the only cooperative insurance entity listed at the Nairobi Securities Exchange (NSE), it provides cutting-edge insurance and financial services to over 1 million customers through a robust system of 25 local branches, over 1000 financial advisors,

and multiple online platforms. Further that the Interested Party has innovatively created customized products that have positioned it as a trusted insurance and financial services provider with decades of excellence and a strong corporate brand that serves a wide range of customers from cooperatives to corporates, SMEs, NGOs, Government entities and individuals.

In response to the instant Request for Review, the Interested Party confirms that having ability and capacity to carry out the services under the subject tender, it procured the Tender Document as instructed in the advertisement of 23rd November 2021 and started to prepare its tender for purposes of participating in the tender process. However, the Procuring Entity issued Addendum No.2 dated 2nd December 2021 extending the tender submission deadline to 12th January 2022 at 10:00a.m. The Interested Party confirms having submitted its tender by the extended tender submission deadline.

According to the Interested Party, it received a letter dated 26th January 2022 from the Respondent informing it of a due diligence exercise to be conducted on the Interested Party on 28th February 2022 and which due diligence was conducted. Thereafter, vide a notification of award dated 15th February 2022, the Respondent informed the Interested Party that it was the successful tenderer. The Interested Party strongly believes that the Respondent carried out the entire procurement process within the parameters set out under the Act, the Public Procurement and Asset

Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020), the Constitution of Kenya, 2010 (hereinafter referred to as the Constitution') as well as the Tender Document.

In relation to the allegation by the Applicant that it has industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and as a consequence could not have provided the required permits under its tender, the Interested Party contends that pursuant to Section 67(1)(d) of the Act, contents of tenders, proposals or quotations are confidential information which cannot be disclosed to third parties.

According to the Applicant, it complied with MR24 requiring proof of having countrywide coverage with proof of business permits including major towns of Nairobi, Mombasa, Kisumu, Nakuru and Eldoret since it submitted business permits as proof of coverage for the major towns as well as for all the other towns where the Interested Party carries out business contrary to the Applicant's allegation. In support of this, the Interested Party annexed to its Replying Affidavit a list of contacts of its branches countrywide.

The Interested Party contends that the due diligence conducted on it must have been successful because it was awarded the subject tender and this reinforces the fact that the Procuring Entity satisfied itself that the Interested Party provided and met the requirements under the tender

document and existence of countrywide coverage including the major towns as required under the Tender Document.

The Interested Party contends that the Applicant has failed to discharge its burden of proof and by the Applicant throwing in the words 'industry knowledge' without proof is clearly on a fishing expedition and intends to turn the Board into the Applicant's tool of satisfying the Applicant's deep curiosity as to the nature of confidential documents that the Interested Party submitted in a tender to further its great desire to have the Interested Party eliminated from the procurement process at all costs. According to the Interested Party, this fishing expedition that the Applicant is attempting to throw the Board into, amounts to an abuse of the legal process and lacks any basis in fact and/or law, making the instant Request for Review frivolous, vexatious and brought in bad faith.

The Interested Party contends that evaluation of tenders is purely the preserve of evaluation committee who are guided by the provisions of Section 80 of the Act and that upon evaluation; it was determined to be the tenderer with the lowest evaluated price in accordance with Section 86 of the Act. The Interested Party contends that cost-effectiveness is one of the guiding principles of procurement under Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') and that the Applicant's tender price as well as other tenderers tenders were higher in comparison to the its tender price.

The Interested Party contends that procurement processes are competitive, not an industry for a single entity to monopolize and the fact that the Applicant was a service provider of the Procuring Entity's staff medical insurance cover for the years 2019-2021 neither disqualifies nor discredits the Interested Party's ability to conduct the said works required under the subject tender. According to the Interested Party, it is clear beyond peradventure that the Applicant is looking for any means possible to be awarded the subject tender in order to continue providing the current services as it is the current service provider.

According to the Interested Party, the Applicant in a deliberate, desperate, and miserable fishing expedition attempt, has made various spurious allegations that have no legs to stand on and without adducing any evidence to support the same. With this, the Interested Party contends that the instant Request for Review should be struck out with costs to it based on the foregoing reasons.

To support its response to the instant Request for Review, the Applicant relies on the following case law; (a) *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR* on the burden of proof being discharged by the person who would fail if no evidence at all were given on either side, (b) *Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR* on the evidential burden of proof shifting to the defendant depending on the nature and effect of evidence adduced by the claimant, (c) *Muriungi*

Kanoru Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR on the burden of proof.

BOARDS DECISION

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

- 1. Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document;**

Depending on the outcome of the first issue;

- 2. Whether the Interested Party satisfied MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document requiring a tenderer to have countrywide coverage with proof of business permits covering major**

towns including Nairobi, Mombasa, Kisumu, Nakuru and Eldoret.

We shall now proceed to determine the issues framed for determination.

Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document

The Applicant alleges from its industry knowledge, the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and for this reason, the Interested Party could not satisfy MR24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document that required tenderers to have countrywide coverage with proof of business permits covering major towns including Nairobi, Mombasa, Kisumu, Nakuru and Eldoret. Further, the Applicant alleges that the Respondent's decision to award the subject tender to the Applicant offends the spirit of the Act and that the Respondent has failed to adhere to the requirements set out in Section 3 of the Act by failing to promote competition or ensure that competitors are

treated equally and fairly. In its written submissions, the Applicant submits that whereas he who alleges must prove, availability of business permits at the time of submission of tender was information within the special knowledge of the Interested Party and therefore, under Section 112 of the Evidence Act, Chapter 80 of the Laws of Kenya (hereinafter referred to as the 'evidence Act') the burden shifts to the Interested Party to demonstrate compliance with MR24 and it is clear from the Interested Party's response that it did not provide the requisite business permits as none has been attached to demonstrate compliance.

The Respondent contends that the Applicant has relied on its industry knowledge without substantiating its allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret because the Applicant has failed to provide any form of proof or concrete evidence in support of such allegation or in support of the allegation that the Respondent has acted in a manner that violates the requirements of the law and the Tender Document. To support this, the Respondent holds the position that any person who seeks to rely on a fact or allegation, such person bears the burden to show that the facts or allegation exist and the law is clear to the extent that he who alleges must prove as provided under Section 107(1) and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya (hereinafter referred to as the 'Evidence Act'). The Respondent further contends that the Applicant's industry knowledge is entirely based on the Applicant's own belief and has not been made in good faith neither has it been supported by any evidence. In its written submissions, the Respondent sums up by

submitting that the instant Request for Review amounts to unsubstantiated accusations based on thoughts, beliefs, apprehensions that the Applicant cannot prove and the Board should not entertain the same.

The Interested Party contends that every allegation by an applicant in a request for review brought under Section 167 of the Act would require to be well proven so as to meet the statutory threshold for claims of suffering loss or damage or the risk to suffer loss or damage based on failure by a procuring entity to fulfil its obligations and that it is a well established principle that whoever makes an allegation (or claim) in such legal proceedings should do so knowing well that it still bears the onus to prove that allegation. According to the Interested Party the Applicant has totally failed to discharge this obligation, is clearly on a fishing expedition and intends to turn the Board into the Applicant's own tool of satisfying its deep curiosity as to the nature of confidential documents that the Interested Party submitted in its tender to further the Applicant's great desire to have the Interested Party eliminated from the procurement process at all costs. In its written submissions, the Interested Party submits that it is trite principle of law that whoever lays a claim before a court or tribunal against another has the burden to prove it under Section 107 and 108 of the Evidence Act. The Interested Party further submits that the Applicant has not furnished the Board with any iota of evidence to prove its claims and nothing stopped the Applicant from conducting the necessary due diligence from the relevant county governments in the major towns through searches and submit the same to this Board as proof of the Applicant's allegations that the Interested Party allegedly does not possess the

necessary business permits to prove coverage. As a consequence, the Interested Party submits that neither the Respondent nor itself bears the evidentiary burden of proof as the Applicant has completely failed to substantiate its claims through evidence and therefore the Applicant's claim fails.

The Evidence Act is an Act of Parliament in Kenya that declares the law of evidence. Section 107, 108, 109 and 112 of the Evidence Act referred to by parties to the instant Request for Review falls under Part 1 of Chapter IV - Production and Effect of Evidence of the Evidence Act and provide as follows:

107. Burden of proof

(1) Whoever desires any court to give judgment 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.

111.....

112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

Our understanding of the aforementioned provisions of the Evidence Act is that (i) he who alleges must prove, (ii) the burden of proof lies on the person who would fail if no evidence is given on either side, (iii) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (iv) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

In a plethora of cases, courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

"[47] It is a timeless rule of the common law tradition $\frac{3}{4}$ Kenya's juristic heritage $\frac{3}{4}$ and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always

the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48].....

[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "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."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of

1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52]

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

.....

[64] The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination."

The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claimant that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its

burden of proof (initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

Turning to the circumstances of this instant Request for Review, we note that the same is entirely hinged on the Applicant's own industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as captured in paragraphs 13 and 14 of the instant Request for Review and paragraph 10 of the Statement in Support of the instant Request for Review. Just to be clear, the Applicant is not alleging that the Interested Party does not have countrywide coverage but is instead alleging that the Interested Party does not have business permits covering major towns. The Applicant has adduced no evidence whatsoever to support its allegation claiming that the burden of proof shifted to the Interested Party to demonstrate compliance with MR24.

We do not agree with the Applicant that the burden of proof has shifted to the Interested Party. We say so because, we have hereinbefore established

that the burden of proof rests with he who alleges, and in this instant, the Applicant. Secondly we have established that such burden of proof remains static throughout court proceedings, like the current proceedings before this Board, and it is only the evidential burden of proof that may shift to a respondent, in this instant the Respondent and the Interested Party, depending on the nature and effect of the evidence adduced by the Applicant. In the instant Request for Review, no evidence whatsoever has been adduced by the Applicant before the Board for the Board to assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Party for them to disprove the Applicant's allegation.

We have studied the Finance Acts of Nairobi City County, County Government of Mombasa, County Government of Kisumu, County Government of Nakuru and County Government of Uasin Gishu (in which Eldoret falls) and note that for one to run a business in either of the named counties, one must apply for and be issued with either a business permit or trade licence by the concerned County Government. An example is Section 5(2) of the then Mombasa County Finance Act, 2019 which provided as follows:

"5. Business Licences and Permits

(2) A person who intends to carry out any of the businesses listed in the or under the schedule or the single business permit regulation shall apply for a licence or permit from any

**of the county offices or such other designated agents as shall
be prescribed by the County Government from time to time.**

.....

County Government offices are public offices that form part of the collectivity of offices, *inter alia*, comprising of Government of the Republic of Kenya known as the State, when used as a noun, under Article 260 of the Constitution and which State has a constitutional obligation to give public information to a citizen pursuant to Article 35 of the Constitution on the right to access information held by the State.

We are of the considered opinion that a concerned citizen/person, (whether natural or legal) may seek confirmation from the concerned County Government to confirm whether a person, whether natural or legal, who operates business in such a County has been issued with a business permit noting that business permits are public documents.

We note that the Applicant did not furnish the Board with any proof that it sought and obtained as a matter of fact (from Nairobi City County, County Government of Mombasa, County Government of Nakuru, County Government of Kisumu and County Government of Uasin Gishu) that the Interested Party had not been issued with a business permit but rather decided to rely on what in our considered opinion are the Applicant's own beliefs, thoughts and apprehensions.

It is clear that the burden lies with the Applicant to prove its allegation that the Interested Party does not have business permits covering major towns specifically Nairobi, Mombasa, Nakuru, Kisumu and Uasin Gishu because it is the Applicant who stands to fail in the instant Request for Review if no evidence at all is given by either party to the Request for Review.

In the circumstances, we find the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document. Consequently the Applicant has also failed to substantiate that in awarding the subject tender to the Interested Party, the Respondent breached the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

The effect of our finding on the first issue framed for determination is that the Request for Review has no legs to stand on and the same is ripe for striking out. Consequently, we shall not proceed to address the second issue framed for determination.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders in the Request for Review dated 1st March 2022: -

- 1. The Applicant's Request for Review dated 1st March 2022 with respect to Tender No. KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover be and is hereby struck out.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 22nd Day of March 2022



.....
CHAIRPERSON
PPARB



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SECRETARY
PPARB