REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 40/2022 OF 4TH MAY 2022

BETWEEN

MEDIVISION EQUIPMENTS LIMITED ..... APPLICANT

AND

ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY..... 1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY..... 2ND RESPONDENT

ROYALE ONLINE LIMITED.....3RD RESPONDENT

Review against the decision of Kenya Medical Supplies Authority in respect to Tender NumberGF ATM COVID-19 RESPONSE 21/22 – OIT – 001 for the Supply of COVID-19 Health Products III.

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Mrs. Irene Kashindi - Member
3. Mr. Ambrose Ogeto - Member
4. Mr. Nicholas Mruttu - Member
5. Dr. Joseph Gitari - Member

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Medical Supplies Authority the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from interested eligible tenderers for Tender NumberGF ATM COVID-19 RESPONSE 21/22 – OIT – 001 for the Supply of COVID-19 Health Products III by way of Open International Tendering method through advertisement in The Standard newspaper, the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) and on the2nd Respondent's website (www.kemsa.co.ke/tenders) on 14th January 2022 with a tender closing date of 10th February 2022 which was subsequently extended to 22nd February 2022 vide an advertisement in The Standard newspaper of 3rd February 2022.

Clarification

The 2nd Respondent issued Clarification 1 dated 9th February 2022 responding to questions raised by prospective tenderers.

Tender Submission Deadline and Opening

At the extended tender submission deadline of 22nd February 2022 at 10:00a.m., the 2ndRespondent received thirty-four (34) tenders according to the minutes of the tender opening signed on 22nd February 2022 by the

subject tender's Tender Opening Committee. Shortly thereafter, the Tender Opening Committee opened the 34 tenders in the presence of tenderers' representatives present and the following tenderers were recorded as having submitted their respective tenders: -

No.	Tenderer's name
1.	Bedi Investments Ltd
2.	Suken International Limited
3.	Tropa International Ltd
4.	Sujuzi Agencies Limited
5.	Surgipharm Limited
6.	Partec East Africa Limited
7.	Joh Achelis & Sohne GMBH
8.	Bak pharm Limited
9.	Petrel Agencies Limited
10.	Royale Online Limited
11.	Healthlearn Media Resource Ltd.
12.	Chem-Labs Limited
13.	Alpha Medical Manufacturers Limited

14.	Crown Solutions Limited-Crown Healthcare Division
15.	Steplabs Technical Services Limited
16.	China Meheco Corporation
17.	Kauffman Pharmaceuticals Limited
18.	Biodesk Africa Limited
19.	Axiology Labs
20.	Medivision Equipments Limited
21.	Harley's Limited
22.	Pasaiba Tourmaline Ltd.
23.	Access Alliance Healthcare Limited
24.	Nairobi Enterprises Limited
25.	Damak Enterprises Ltd
26.	Tropique Medical Limited
27.	Risdo Supplies Limited
28.	Nanjing Dungu& Zebra Investments Limited
29.	Fami Investment Ltd
30.	Daiko General Supplies Limited
31.	Cadan Enterprises

32.	Kwesi Limited
33.	Transagro Enterprises Ltd
34.	R.M. Gikonyo Trading Company Limited

Evaluation of Tenders

A tender evaluation team appointed by the Acting Chief Executive Officer (hereinafter referred to as the'Evaluation Committee') evaluated the 34 tenders in the followingstages

1) Stage A - Preliminary Examination;
2) Stage B - Technical Evaluation and Stage C)Product Evaluation; and
3) Stage D - Financial Examination

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out as A)Preliminary Examination of Specific Evaluation Criteria Section III - Evaluation and Qualification Criteria at page 36 of the blank tender document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document'). Tenders needed to meet all the mandatory requirements at this stage to qualify to proceed to the next stage of evaluation.

At the end of the evaluation at this stage, the Evaluation committee determined twenty-eight (28) tenders responsive while another six (6) tenders were determined non-responsive. The Applicant's tender was among the twenty-eight (28) tenders determined responsive, thus proceeded to the next stage of evaluation.

Technical Evaluation and Product Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out as B) Technical Evaluation and C) Product Evaluation of Specific Evaluation of Section III - Evaluation and Qualification Criteria at page 36 and 37 of the Tender Document respectively. Tenders needed to meet all the technical mandatory requirements and the product requirements on a Yes/No basis at this stage to qualify to proceed to the next stage of evaluation.

At the end of evaluation of this stage, the Evaluation Committee made the following determination with respect to the following items:

1) Item 1: N95 Respirator, Pieces- only the tender submitted by Royale Limited was determined responsive to proceed to the next stage of evaluation;
2) Item 2: Nitrile Gloves, Medium, Powder free, Pack of 100s- only the tenders submitted by Chem-Labs Limited and Alpha Medical

Manufacturers Ltd were determined responsive to proceed to the next stage of evaluation;

3) Item 3: Water resistant plastic aprons (disposable), Pack of 100s- no tender was determined responsive for this item.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out as D) Financial Evaluation of Specific Evaluation of Section III - Evaluation and Qualification Criteria at page 37 of the Tender Document. Tenders' prices would be compared and award recommendation was to be to the lowest evaluated responsive tender.

At the end of evaluation of this stage, the Evaluation Committee recommended award of the subject tender per item to the following lowest evaluated responsive tenderers:

1) Item 1: N95 Respirator, Pieces - to Royale Limited at KES66,005,500.00 being the only evaluated responsive tenderer;
2) Item 2: Nitrile Gloves, Medium, Powder free, Pack of 100s - to Alpha Medical Manufacturers Ltd at USD499, 500.00 being the lowest evaluated responsive tenderer.
3) Item 3: Water resistant plastic aprons (disposable), Pack of 100s - the Evaluation Committee recommended for retender of this item.

Post Qualification

TheEvaluation Committee subjected the tenderers recommended for award to post qualification evaluation to determine whether such tenderers qualified to perform the contract satisfactorily. At the end of post qualification evaluation, the Evaluation Committee observed that Alpha Medical Manufacturers Limited's capacity to perform the contract satisfactorily, could not be fully determined thus recommended award of Item No.2Nitrile Gloves Medium Powder Free to Chem-Labs Limited at USD. 522,500.00 after determining Chem-Labs Limited qualified to perform the contract satisfactorily following a post qualification evaluation exercise on it.

Recommendation

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

1) Item 1: N95 Respirator, Pieces - to Royale Limited at KES66,005,500.00 being the only responsive evaluated tenderer;
2) Item 2: Nitrile Gloves, Medium, Powder free, Pack of 100s - to Chem-Labs Limited at USD. 522,500.00 being the only responsive evaluated tenderer.

Professional Opinion

In a Professional Opinion dated 14th April 2022, the Ag. Director Procurement of the 2nd Respondent, Dr. Silas E. Njeru (PhD), recommended to the Ag. Chief Executive Officer to award the subject

tender as per the recommendation of the Evaluation Committee as contained in the Evaluation Report signed by members of the Evaluation Committee on 14th March 2022.

The Ag. Chief Executive Officer of the 2nd Respondent, approved the award of the subject tender as recommended by the Evaluation Committee on the same day of 14th March 2022.

Notification to tenderers

Vide letters dated 19th April 2022; tenderers were notified of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

Medivision Equipments Limited, the Applicant herein, lodged a Request for Review dated 4th May 2022 and filed on even date together with a Verifying Affidavit sworn on even date by Akshay Dewan, a Director of the Applicant Company, through the firm of Masika & Koross Advocates seeking for the following orders: -

a) ***Annul in whole the decision of the tender committee of the Procuring Entity.***

b) ***The tender be awarded to the Applicant.***

c) ***The Procuring Entity be condemned to pay Costs of this Request for Review to the Applicant.***

In a Notification of Appeal and a letter dated 4th May 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 4th May 2022.

On 11th May 2022, the 1st and 2ndRespondents filed a Notice of Preliminary Objection dated 10th May 2022 and theirReplying Affidavit sworn on 10th May 2022 by John Kabuchi, the 1st Respondent herein, through the firm of Nyaanga and Mugisha Advocates. Further, the Respondents submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide letters dated 11th May 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective email addresses and Post Office Box as provided by the Respondents, of the existence of the Request for Review while forwarding to 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 on the subject tender within 3 days from 11th May 2022. No tenderer in the subject tender other than the Applicantfiled any pleadings or documents with respect to the subject tender in this review.

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.

On 17th May 2022, the 1st and 2nd Respondents filed their Written Submissions dated 16th May 2022 and their List & Bundle of Authorities dated 16th May 2022. On 23rdMay 2022, the Applicant filed its Written Submissions dated 20th May 2022 and its List & Bundle of Authorities dated 20th May 2022.

APPLICANT'SCASE

The Applicant alleges that the reasons as stated in the regret letter in question are NOT genuine and or qualified but the same have been mischievously and elaborately calculated by the 2nd Respondent to deliberately lock its tender out and which tender in any event complied

with all the mandatory requirements of the Tender Document in light of the instructions to tenderers including the technical specifications as required of the Tender Document. Consequently, the Applicant laments that the 2nd Respondent acted in breach of Section 79(1) of the Act for failing to find that the Applicant's tender was responsive and conformed to all the requirements of the tender as a consequence whereof the Applicant was unfairly evaluated and wrongfully disqualified at the technical evaluation stage. Further, the Applicant avers that it supplied a most responsive technical proposal in light of the terms of reference and technical proposal as supplied.

The Applicant avers that it wrote a letter dated 19thApril2022to the 2ndRespondent *inter-alia* referring the Respondent to page 139 of the its tender as supplied by it and in which contained what was described as NIOSH authorization letter for the manufacturer in accordance with the requirement of the Tender Document as to technical specifications appearing atpart B of pages 35 and 36 of the Tender Document as read together with the addendum thereto and or minutes of the pre-bid conference held on 26th January,2022 specifically at page 3 of 12 thereof.

The Applicant further avers that the 2nd Respondent acted in breach of Section 86(1) (a)of the Act read in light of Section 3 of the Act for failing to find that the Applicant had returned the lowest evaluated price and consequently eligible for award of the subject tender in accordance with the law.

As a result of the 2nd Respondent's actions, the Applicant avers that it is bound to suffer loss and damage that includes; (i) loss of profit it would have made from the subject tender not forgetting the benefits that could have accrued to the 2nd Respondent and the public in terms of quality supply of medical products in question and at a competitive price; (ii) loss of earnings it could have accrued from this contract as the same has been unfairly awarded to a competitor, the 3rd Respondent herein; (iii) it has been unfairly denied an opportunity of undertaking the contract and probably at a reasonable minimum cost; (iv) it has expended considerable amounts of money towards preparing and making itself ready for the entire tendering process.

The Applicant therefore prays that the Board be pleased to annul in whole the decision of the tender committee of the 2nd Respondent, award the tender to it and for the 2nd Respondent to be condemned to pay costs of the instant Request for Review to the Applicant.

In its written submission, the Applicant confirms that it was only interested with, and submitted its tender, in the category of the subject tender for N95 Respirator, Pieces.

In opposition to the Respondents' Preliminary Objection, the Applicant contends that the same was filed outside the timelines permitted under Regulation 209(1) of Regulations 2020 which requiresthe Respondents to

file the preliminary objection within 3 days of being notified of the Request for Review by the Board Secretary thus should be disregarded. Further, the Applicant contends that it could not file the Request for Review on 3rd May 2022 because the Cabinet Secretary for Interior and Co-ordination of National Government, Hon. Dr. Fred Matiangi, in exercise of the powers conferred on him by virtue of Section 2(1) of the Public Holidays Act, Chapter 110 of the Laws of Kenya, declared Tuesday, the 3rd May 2022, to be a public holiday to mark Idd-ul-Fitr and therefore the 19th April 2022 and 3rd May 2022 should be excluded from computation of days under Section 57(a) and (b) of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya making the last day for filing of the instant Request for Review, 4th May 2022. On this, the Applicant relied on the Board's decision in ***PPARB Application No.36 of 2021 Trident Insurance Company Limited v The Accounting Officer, Nandi County Assembly & 2 others.***

In opposition to the second ground of the Respondents' Preliminary Objection, the Applicant contends that the same was made in ignorance of the relevant proceedings commenced in the High Court of Kenya staying the relevant parts of the Act including the relevant regulations thereunder concerning the requirements for security deposit and indeed, the Respondents have abandoned the aforesaid paragraph and or ground in their written submissions thus does not address the ground in any manner or at all.

1ST AND 2ND RESPONDENTS' RESPONSE

The Respondents raise a Preliminary Objection to the Request for Review to be determined *in limine*, that (i) the Request for Review is statutory time-barred having been filed outside the mandatory 14 days' period required under Section 167 (1) of the Act; (ii) the Request for Review is fatally defective for not being accompanied by a refundable security deposit of 3% of the tender sum or maximum Kshs. 10 million contrary to Section 175 (2) of the Act and Regulation 222 of the Public Procurement and Assets Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020);(iii) the Request for Review is grounded on foreign and extrinsic evidence not submitted as part of the Applicant's tender, contrary to Section 76 (2) of the Act thus rendering it fatally and incurably defective; (iv) the Request for Review is misconceived, fatally defective, incompetent, bad in law, mischievous, frivolous, vexatious and is otherwise an abuse of the Board's process, and (v) the Request for Review as drawn and filed lacks merit in view of the circumstances of the Preliminary objection and should be dismissed with costs to the Respondents. On this, the Respondents relied on ***Ruth Njeri Zeyhle v Eberhad Zeyhle & Another [2010] eKLR*** on what conditions a preliminary objection must meet before determination, ***The Owners of Motor Vessel 'Lillian S' v Caltex Oil Kenya Limited (1989) KLR 16 1*** on jurisdiction, ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others, Civil Application No.2 of 2011*** on where the jurisdiction of a court flows from and ***JR Case No.21 of 2015; Republic v The***

Public Procurement and Administrative Review Board & 2 Others on jurisdiction of this Board. Further, the Respondents relied on ***Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR*** on delivery receipt of an email.

The 1st Respondent contends that on 14th January 2022, the 2nd Respondent advertised in the Standard Newspaper an Open International Tender (OIT) inviting potential tenderers to submit duly completed tenders for the subject tender and that all the interested eligible tenderers were instructed to deposit two sets (one original and copy) of duly completed, serialized and paginated tender accompanied with a signed declaration of the number of pages in the Tender Box No.2 marked Global Fund at the reception on the Ground floor KEMSA's Commercial Street Office in Nairobi on or before 10th February,2022. Further, that the subject tender closing date was on 10th February 2022 at 10.00 am but was extended vide an advertisement on 3rd February, 2022 in the same newspaper to close on 22nd February, 2022.

The Respondents contend that the Tender Document consisted of three (3) categories, being, Item 1 - N95 Respirator, Item 2 - Nitrile Gloves Medium Powder Free and Item 3 - Water Resistant Gowns/Plastic Aprons (Disposable) being funded by Global Fund.

According to the Respondents,as part of the mandatory requirements, the Tender Document required tenderers to comply with the following for consideration during preliminary evaluation,that is; '***Pagination and serialization of documents, certificate of incorporation, tax compliance certificate, tender forms i.e. tenderer's eligibility confidential business questionnaire, certificate of independent tender determination, self – declaration forms and commitment to code of conduct as well as the original bid security'.*** Further that, the Tender Document was explicitly clear on provision of the following mandatoryrequirements/documents by tenderers for consideration during technical evaluation:(a) A copy of duly signed ***manufacturer's authorization*** written on the manufacturer's letter head and addressed to the Procuring Entity that is both tender and item specific (was to be provided by tenderers who are not manufacturers), (b) A copy of ***current and validmanufacturing certificate of quality*** issued by independent recognized body to the manufacturer of the product, which must be item specific, (c) A copy of proof of World Health Organization ***(WHO) prequalification***, (d) ***A copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by a stringent regulatory authority (SRA), (e)*** A ***certificate of conformity for CE marking*** which is provided by an entity recognized by any of the Notification Bodies listed for conformity assessment of medical devices in the Nando database and (f) Product sample conforming to technical specifications.

According to the Respondents, since products being procured were technical, the 2nd Respondent held a pre-bid conference on 26th January 2022 with all interested tenderers to address all the clarifications, questions and other unclear issues arising from the Tender Document. In the said meeting, the 2nd Respondent explained to prospectivetenderers all the necessary steps in procurement process including but not limited to the tender submissions, tender evaluation including the preliminary evaluation, technical evaluation, financial evaluation and post qualification for global fund tenders as well as the past performance, notification, performance security, contracting, tax exemption, import permit process and delivery among other issues while being emphatic and making sure that ***mandatory requirements/ documents*** required of the prospective tenderers must be provided/adhered to as indicated in the Tender Document and failure to comply would lead to disqualification. In the aforesaid pre-bid conference, prospective tenderers in attendance were given an opportunity to seek clarification and information on various items including technical requirements and mandatory requirements to provide certificate of conformity for CE marking among others. Further, some prospective tenderers sought clarifications on the code of ethics and particular respirator mask (N95) – item No. 1, and in accordance with IIT Clause 27.1 (clarification of tenders) of the Tender Document, the 2nd Respondent provided written Clarification No. 1 dated 9th February 2022.

According to the Respondents, as required under Section 81 of the Act and Regulations 2020, the 2nd Respondent promptly and adequately provided response to all the questions, clarifications and information sought as indicated in the minutes dated 26th January 2022 prepared after the said pre-bid conference.

The Respondents contend that at the opening of the subject tender, the 2nd Respondent noted that a total of 34 firms had submitted their tenders which were to be subjected to preliminary evaluation, and if they were going to be compliant, their tenders would be evaluated in the technical and financial stages. Further, that out of the three categories, the Applicant only submitted a tender for Item 1, being tender for supply of N95 Respirator and as indicated in the minutes of pre-bid conference and Clarification No. 1, all clarifications sought were fully addressed, and the tenderers were specifically instructed to adhere to the Tender Document.

The Respondents contend that after preliminary evaluation,the Applicant's tender was subjected to ***technical evaluation,*** which was twofold, that is, evaluation of documents submitted and product quality evaluation. However, the Applicant's tender was found to be non-responsive at this stage having failed to provide mandatory documents as required in the Tender Document, and the same was rejected for being non-responsive and did not therefore proceed to the next stage.

According to the Respondents, instead of providing ***proof of WHO prequalification, or copy of the registration or marketing authorizationfor the manufacturer/supplier for the item by any stringent regulatory authorities (SRA), or certificate of conformity for CE marking***, or ***certificate of registration or marketing authorization,*** the Applicant submitted a ***certificate of approval*** issued by a National Institute of Occupational Safety (NIOSH), an American body. Further, that a closer look at the said document shows that the same was issued on 26th August 2015 to ***Venus Safety and Health Pvt, Ltd***, the proposed manufacturer of the product the Applicant sought to supply. However, the Applicant made some handwritten alterations in paragraphs 1, 2 and 3 to suit the specifications in the Tender Document. Further, NIOSH clearly indicated in the certificate of approval that the same was ***"...not an endorsement of the respirator by NIOSH, and as such endorsement shall not be stated or implied in advertisement or other publicity..."***, which statement isnot synonymous with any regulatory or market authorization activities as an authority.

It is the Respondents contention that after careful review and consideration, the Evaluation Committee rejected the said document as it did not fulfill technical specifications to be considered as ***certificate of registration or marketing authorization.***

The Respondents contend that vide a letter of notification dated 19th April 2022 sent through email on the same date, the 2nd Respondent notified the Applicant that its tender was non-responsive and unsuccessful as follows: - ***"...You did not provide proof of WHO prequalification, copy of the registration or marketing authorizationfor the manufacturer/supplier for the item (even on emergency basis) by any stringent regulatory authorities (SRA) and certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database..."***

However, vide a letter dated 20th April 2022, the Applicant requested for re-evaluation of its tender based on the ***certificate of approval*** issued by NIOSH and on 28th April 2022, the Respondent informed the Applicant that the document provided was neither a ***certificate of quality, certificate of conformity for CE marking*** nor a ***certificate of registration or marketing authorization,*** but it was a ***certificate of approval*** issued by a non SRA body meant for occupational usage only and that the same was neither valid nor current.

According to the Respondents, it is also important to note the following inadequacies observed in the Applicant's document purporting to be a certificate of registration or marketing authorization;(i) the said document was a certificate of approval and not certificate of registration or marketing

authorization issued by any of listed stringent regulatory authority (SRA); (ii) NIOSH had indicated a disclaimer that the same was not to be considered as marketing endorsement or marketing authorization; (iii) by virtue of the foregoing disclaimer, the document did not qualify to be a certificate of registration or marketing authorization; (iv) the NIOSH document provided was not issued by an SRA since NIOSH deals with work related injury and illness and not drugs and medical supplies; (v) NIOSH is not a listed stringent regulatory authority (SRA) and the only SRA in United States of America which is recognized as ICH member is ***Food and Drug Administration***; (vi) since the N95 Respiratory products procured were for Covid-19 related usage, it was expected that the certificate of registration or marketing authorization submitted would be recent/current since the same are subjected to periodic review by the SRA depending on the intended usage, however, the document provided by the Applicant was issued on 26th August 2015, which is almost six (6) years ago, yet the requirement was that the ***certificate of quality or marketing authorization*** issued to the manufacturer must be ***current***;(vii)the Applicant had also made some handwritten alterations in paragraphs 1, 2 and 3, which can only be interpreted to mean that the same were being done to suit the specifications in the Tender Document; and (viii) The Applicant neither provided proof of WHO prequalification or certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices.

The Respondents contend that having taken into account the foregoing factors, the 2nd Respondent concluded that the Applicant did not provide current and valid certificate of quality, certificate of conformity for CE marking or a certificate of registration or marketing authorization or WHO prequalification which were mandatory requirements for technical evaluation. Accordingly, failure to provide mandatory, valid and current certificate of quality, certificate of conformity for CE marking or a certificate of registration or marketing authorization or WHO prequalification, the Applicant's tender materially deviated and departed from the mandatory requirements of the Tender Document. As such, it could not be determined as a substantially responsive tender and was a candidate for rejection by the 2nd Respondent.

Further, the Respondents contend that Clause No. ITT No. 29 of the Tender Document provides as follows: -

> ***29. Determination of Responsiveness***
>
> ***29.1 The Procuring Entity's determination of a Tender's responsiveness is to be based on the contents of the Tender itself, as defined in ITT 11.***
>
> ***29.2 A substantially responsive Tender is one that meets the requirements of the tendering document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:***
>
> ***a) If accepted, would:***

i) affect in any substantial way the scope, quality, or performance of the Goods and Related Services specified in the Contract; or

ii) limit in any substantial way, inconsistent with the tendering document, the Procuring Entity's rights or the Tenderer's obligations under the Contract; or

b) if rectified, would unfairly affect the competitive position of other Tenderers presenting substantially responsive Tenders.

29.3 The Procuring Entity shall examine the technical aspects of the Tender submitted in accordance with ITT 16 and ITT 17, in particular, to confirm that all requirements of Section VII, Schedule of requirements have been met without any material deviation or reservation, or omission.

29.4 If a Tender is not substantially responsive other requirements of tendering document, it shall be rejected by the Procuring Entity and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

The Respondents further contend that, Section 79 of theAct mandates the 2nd Respondent to determine responsiveness of a tender if it conforms to

all the eligibility and other mandatory requirements in the Tender Document, and its states as follows: -

> ***79. Responsiveness of tenders***
>
> ***(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.***
>
> ***(3) A deviation described in subsection (2)(a) shall—***
>
> ***(a) be quantified to the extent possible; and***
>
> ***(b) be taken into account in the evaluation and comparison of tenders.***

According to the Respondents, the plain reading of the foregoing clearly mandates the 2nd Respondent to determine the substantive responsiveness of tenders submitted by considering the specifications and documents required in the Tender Document. However, vide the letter dated 20th April

2022, the Applicant requested the 2nd Respondent to re-evaluate its tender based on the following new and foreign documents, which were not part of the Applicant's tender; (i) List of Stringent Regulatory Authorities; and (ii) A Memorandum of Understanding 225-18-006 between Food & Drug Administration/ Centre for Devise & Radiological Health and the Centre for Disease Control & Prevention and NIOSH.

The Respondents contend that Section 76(2) of the Act bars any tenderer from altering or offering to change the terms of the tender by introducing new documents after the close of tenders. Accordingly, if the 2nd Respondent yielded to the Applicant's request for re-evaluation of its tender based on new documents which were not part of the Applicant's tender, the 2nd Respondent would have aided an unfair tendering process which would amount to discriminatory treatment of other tenderers. Therefore, the Applicant's attempt to rely on the above documents produced at pages ***28 to 32*** and ***34 – 43 of the Applicant's Bundle of Documents*** amounts to introduction of extrinsic foreign documents not submitted in the Applicant's tender and such documents should not be considered by the Board and should be struck off the record.

The Respondents in response to the specific grounds of the instant Request for Review contends as follows; (i) Section 79 and 86 (1) (a) of the Act and Regulations thereunder were duly complied with as evidenced on the face of the notification letter dated 19th April 2022; (ii) The requirements of Article 227 of the Constitution of Kenya 2010 and Section

3 of the Act were fully adhered to contrary to the Applicant's allegations; (iii) The procurement proceedings particularly in relation to the Applicant's tender were validly done in accordance with the provisions of the Tender Document and Section 19 of the Kenya Medical Supplies Authority Act and (iv) The Applicant's tender was evaluated in accordance with the provisions of the Tender Document and Section 79 of the Act.

The 2nd Respondent further contends that the Applicant's tender was rejected at the technical evaluation stage and the same did not proceed to financial evaluation. Accordingly, it could not be considered as having the lowest evaluated tender price eligible for award of the subject tender.

The Respondents deny alleged losses and damages and specifically state as follows; (a) the alleged losses and damages are unsubstantiated and speculative since it was not a guarantee that the Applicant will be awarded the subject tender; and (b) the Board has no jurisdiction to determine and award damages for alleged loss of profit, benefits, earnings and compensation for expended costs.

In view of the foregoing, the Respondents contend that Applicant's Request for Review Application dated 4th May, 2022 and filed on even date is unmerited, unfounded and full of unsubstantiated claims, as such, the same should be dismissed with costs.

In support of their response, the Respondents rely on ***Republic v Public Procurement Administrative Review Board Ex Parte Kenya Ports Authority Limited & 2 Others [2017] eKLR*** on consideration by a procuring entity of all other aspects of a tender as provided in the Tender Document, ***Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR*** on consideration of a nonconformity as a minor deviation or informality to consider prejudice to other tenderers rather than on the degree of nonconformity while determining non-responsiveness of a tender, ***Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Pelt Security Services Limited [2018] eKLR*** on a procurement system that is fair, equitable transparent, competitive and cost effective, ***Republic v Public Procurement Administrative Review Board & another Ex- parte University of Eldoret [2017] eKLR*** on the Board having no powers to award tender and ***Supreme Court ruling delivered on 4th March 2014 in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR*** on costs following events.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents, written submissions, list & bundle of authorities and confidential documents

submitted by the Respondents to the Board pursuant to Section 67 (3) (e) of the Act and finds that the following issues crystalize for determination: -

I. **Whether the Board has jurisdiction to hear and determine the instant Request for Review.**

In determining the first issue, the Board will make a determination on the following sub-issues:

i. ***Whether the Request for Review dated and filed on 4th May 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020;***

Depending on the outcome of the first sub-issue;

ii. ***Whether the Applicant in failing to accompany the Request for Review dated and filed on 4th May 2022 with a refundable security deposit of 3% of the tender sum or maximum Kshs.10 million as provided for in Section 175(2) of the Act read with Regulation 222 of***

Regulations 2020, rendered the instant Request for Review fatally defective ;

Depending on the outcome of the second sub-issue;

iii. *Whether grounding the Request for Review dated and filed on 4th May 2022 on foreign and extrinsic evidence not submitted as part of the Applicant's tender contrary to Section 76(2) of the Act is a pure point of law to render the Request for Review dated and filed on 4th May 2022 fatally and incurably defective at the preliminary objection stage.*

Depending on the outcome of the third sub-issue;

II. **Whether the Applicant's tender satisfied the following mandatory technical requirements in Clause 2. Bidders who are distributors of B) Technical Evaluation of Specific Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 36 of the Tender Document read with minutes of the Pre-Bid Conference of 26th January 2022 to warrant it to proceed for evaluation at the next stage:**

i. *Manufacturer's Authorization must be on a manufacturer's letterhead and addressed to KEMSAthat is both tender and item specificand signed by an authorized signatory (Applicable to bidders who are not manufacturers)*

ii. *Current and valid manufacturing Certificate of Quality issued by an independent recognized body to the manufacturer of the product. The certificate must be item specific.*

iii. *Proof of WHO prequalification;OR a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA); OR a certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database.*

III. What orders should the Board grant in the circumstances.

Sir Charles Newbold P, in the classic case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA** (hereinafter referred to as the 'Mukisa Biscuit case') defined a preliminary objection as follows:-

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion"

The question of what constitutes a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** (hereinafter referred to as the 'A.G. of Tanzania case') where the Appellate Division of the East African Court of Justice held that:-

"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court."

In both the Mukisa Biscuit case and the A.G. of Tanzania case, courts emphasize that a preliminary objection ought to be based on a pure point of law and should not be based on factual questions requiring evidence to

prove the grounds raised in the preliminary objection. This means, for a preliminary objection to be said to be of pure point of law, facts must be agreed by both the proponent of the preliminary objection and the one opposing the preliminary objection. Simply put, where there are any contested factual details, such a preliminary objection is not based on pure points of law and should therefore be adjudicated substantively on its merits and not as a preliminary point.

Turning to the circumstances of this Request for Review, the Procuring Entity is objecting to the hearing of the entire instant Request for Review on three grounds namely, (i) that the instant Request for Review is statutory time barred having been filed outside the mandatory 14 days' period required under Section 167(1) of the Act, (ii) the instant Request for Review is fatally defective for not being accompanied by a refundable security deposit of 3% of the tender sum or maximum Kshs.10 million provided in Section 175(2) of the Act read with Regulation 222 of Regulations 2020; and (iii) the instant Request for Review is fatally and incurably defective because it is grounded on foreign and extrinsic evidence not submitted as part of the Applicant's tender contrary to Section 76(2) of the Act.

On the first ground of the preliminary objection there is factual consensus among parties herein that the Applicant was notified of the outcome of evaluation of its tender on 19th April 2022 and that the 14 days statutory

period under Section 167(1) of the Act in which the instant Request for Review was set to lapse on 3rd May 2022.To this end, the first ground of the preliminary objection is on a pure point of law.

With respect to the second ground of the preliminary objection, the Applicant has not denied the fact that Section 175(2) read with Regulation 222 of Regulations 2020 provides for a refundable security deposit of 3% of the tender sum. To this end, this ground too is on a pure point of law.

On the third and last ground of the preliminary objection founded on an allegation that the instant Request for Review is grounded on foreign and extrinsic evidence not submitted as part of the Applicant's tender requires examination of the Applicant's original tender submitted to the 2nd Respondent with respect to the subject tender to enable us establish the veracity of these allegations. To this end, this third and last ground of the preliminary objection is not founded on a pure point of law and requires to be adjudicated on merit upon examining the evidence availed by parties herein.

Whether the Request for Review dated and filed on 4th May 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage

of the procurement process as provided in Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020;

The Respondent objects to the hearing and determination of the instant Request for Review on grounds that the 14 days within which the Applicant ought to have filed the instant Request for Review, having been notified of the outcome of evaluation of the subject tender via email on 19th April 2022, lapsed on 3rd May 2022 yet the instant Request for Review was filed on 4th May 2022 thus time barred and therefore the Board has no jurisdiction to hear and determine the same.

In opposition to the said objection, the Applicant contends that indeed the 14 days were set to lapse on 3rd May 2022 but 3rd May 2022 was gazette as a public holiday thus by virtue of Section 57(b) read with Section 57(a) of the Interpretation of General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as the 'IGPA') the last day for filing of the instant Request for Review was 4th May 2022 thus the Request for Review was filed within the 14 days statutory period under Section 167(1) of the Act.

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyaragi, JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR***:

"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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis is ours]

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held 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. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR,** that "***whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.***"(emphasis ours).

Going by the decision of the Court of Appeal in the aforementioned Isaak Aliaza case, the argument by the Applicant that the preliminary objection was filed outside the 3 days period, from the date the Respondents' were notified of the instant Request for Review, as provided for in Regulation 209(1) of Regulations 2020 is immaterial where such preliminary objection, like in the instant review, touches on the jurisdiction of the Board because

an issue of jurisdiction can be raised at any time during the pendency of an administrative review.

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows:

> ***"(68) 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...."***

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

Article 227 of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') provides for the principles of public procurement and for the establishment of the Act, *inter alia,* as follows:

> ***'227. Procurement of public goods and services***
>
> ***(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) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following-***
>
> ***(a) categories of preference in the allocation of contracts;***
>
> ***(b) the protection or advancement of persons, categories or groups previously disadvantaged by unfair competition or discrimination;***
>
> ***(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and***
>
> ***(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt*** **practices or serious violations of fair employmentlaws and practices.'**

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

> ***27. Establishment of the Public Procurement Administrative Review Board***
>
> ***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.***

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

> ***28. Functions and powers of the Review Board***
>
> ***(1) The functions of the Review Board shall be—***
>
> ***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***
>
> ***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function

being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided forunder Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

> ***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***
>
> ***167. Request for a review***
>
> ***(1) 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.***
>
> ***(2) .....***
>
> ***(3) .....***

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168. .....

169. .....

170. .....

171. .....

172. .....

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

Section 2 of the Act assigns the meaning of 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;***

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(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) 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) .....

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) .....

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, such request for review is to take the form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

> ***87. Notification of intention to enter into a contract***
>
> ***(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.

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a

notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

It is common ground among parties herein, that the Applicant received a letter of regret via email from the Respondents on 19th April 2022 and which letter of regret notified the Applicant, *inter alia,* the reasons why the Applicant's tender was unsuccessful. This Letter of Regret is what is envisaged as the notification under Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

There being consensus that the Applicant received the Letter of Regret from the Respondents outlining the reasons why the Applicant's tender was

unsuccessful on 19th April 2022, Regulation 203(2) (c) (ii) of Regulations 2022 was the option available for the Applicant to challenge the reasons advanced by the Respondents why the Applicant's tender was unsuccessful.

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

57. Computation of time

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

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

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or

taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the reason advanced by the Respondents on why the Applicant's tender was unsuccessful, the 19th April 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received the Letter of Regret from the Respondents. This means, 14 days started running from 20th April 2022 and were set to lapse on 3rd May 2022. However, we have taken judicial notice that vide a Gazette Notice No.4844 and dated 25th April 2022, Dr. Fred Matiangi, the Cabinet Secretary for Interior and Co-ordination of National Government, declared and gazetted Tuesday, the 3rd May 2022 as a public holiday to mark Idd-ul-Fitr in exercise of the powers conferred to him by Section 2(1) of the Public Holidays Act, Chapter 110 of the Laws of Kenya. To this end, Tuesday, the 3rd May 2022 is an excluded day for purposes of computation of time in this review pursuant to Section 53(b) of the IGPA because the last day of the 14 day period was a public holiday. Accordingly, the last day of the 14 day period included the next following day after 3rd May 2022 being, 4th May 2022. In essence, the Applicant had between the 19th April 2022 and 4th

May 2022 to seek administrative review before the Board with respect to challenging the reasons advanced by the Respondent on why the Applicant's tender was unsuccessful. The Applicant filed the instant Request for Review on 4th May 2022, the same was therefore within the 14 days period provided in Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of against the Respondent on 19th April 2022 and taking into consideration Gazette Notice No.4844 dated 25th April 2022 which declared Tuesday, 3rd May 2022 a public holiday.

We find and hold that the Request for Review dated and filed on 4th May 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020.

Whether the Applicant in failing to accompany the Request for Review dated and filed on 4th May 2022 with a refundable security deposit of 3% of the tender sum or maximum Kshs.10 million as provided for in Section 175(2) of the Act read with Regulation 222 of Regulations 2020, rendered the instant Request for Review fatally defective ;

The Respondents objected to the hearing and determination of the instant Request for Review on ground that the same is fatally defective for not being accompanied by a refundable security deposit of 3% of the tender sum or maximum of Kshs.10 million as provided in Section 175(2) of the Act read with Regulation 222 of Regulations 2020.

The Applicant opposed this objection arguing that the same was made in ignorance of the relevant proceedings commenced in the High Court of Kenya staying the relevant parts of the Act and Regulations 2020 concerning the requirements for security deposit and that indeed, the Respondents abandoned this ground of objection in the Respondents' written submissions which does not address this issue in any manner or at all.

Section 175(2) of the Act provides as follows:

> ***'175. Right to judicial review to procurement***
>
> ***(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.***

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

....."

Regulation 222 of Regulations 2022 provides as follows:

'222. Security fee

The filing of the judicial review application under section 175 (2) of the Act shall be accompanied by a refundable security fee valued at 3% of applicant's tender sum subject to a maximum ten million shillings in a mode of payment determined by the High Court.'

A reading of Section 175(2) of the Act and Regulation 222 of Regulations 2020 clearly shows that the security fee of 3% of an applicant's tender sum subject to a maximum ten million shillings is with respect to filing of an application for judicial review at the High Court by a person aggrieved by a decision of the Board and not with respect to filing a Request for Review before the Board, such like in the instant review.

Secondly, we take judicial notice that conservatory orders were issued on 27th July 2020 by Honourable Mr. Justice Weldon Korir staying the implementation and or operation of any Regulation of Regulations 2020, requiring the deposit of 15% of the Applicant's tender sum or 3% of the Applicant's tender sum before the commencement of Judicial Review proceedings in respect of public procurement in ***High Court Constitutional and Human Rights Division Petition No.E26 of 2020 Roads and Civil Engineering Contractors Association, Energy Sector Contractors Association v Attorney General & Cabinet Secretary for National Treasury and The Public Procurement Administrative Review Board & The National Assembly.***

Given the foregoing we note that a person aggrieved by a decision of the Board seeking judicial review by the High Court is currently not required to pay security fee of 3% of the tender sum subject to a maximum ten million shillings when filing a judicial review application under Section 175(2) of the Act and that the provisions of Section 175(2) of the Act and Regulation 222 of Regulations 2020 are not applicable to the instant review before the Board.

Accordingly, the Applicant in failing to accompany the Request for Review dated and filed on 4th May 2022 with a refundable security deposit of 3% of the tender sum or maximum Kshs.10 million as provided for in Section

175(2) of the Act read with Regulation 222 of Regulations 2020**does not**render the instant Request for Review fatally defective.

Whether grounding the Request for Review dated and filed on 4th May 2022 on foreign and extrinsic evidence not submitted as part of the Applicant's tender contrary to Section 76(2) of the Act is a pure point of law to render the Request for Review dated and filed on 4th May 2022 fatally and incurably defective at the preliminary objection point.

As earlier held, this ground of the preliminary objection is not founded on a pure point of law and can only be canvassed on merit.

In totality of the three grounds of the Respondents' Preliminary Objection and noting that all the grounds therein have failed, we find and hold that the Respondents' Preliminary Objection dated 10th May 2022 and filed on 11th May 2022 fails and is dismissed in its entirety. Consequently, we find and hold that the Board has jurisdiction to hear and determine the instant Request for Review.

Whether the Applicant's tender satisfied the mandatory technical requirements in Clause 2. Bidders who are distributors of B)

Technical Evaluation of Specific Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 36 of the Tender Document read with minutes of the Pre-Bid Conference of 26th January 2022 to warrant it to proceed for evaluation at the next stage.

Section 79(1) of the Act provides for responsiveness of tenders and requires tenders to conform to all mandatory requirements in a Tender Document and provides as follows:-

> ***'79. Responsiveness of tenders***
>
> ***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

Section 80(1) and (2) of the Act on the other hand provides for the evaluation committee to evaluate tenders and in evaluating tenders, the Evaluation Committee is required to use the procedures and criteria set out in the Tender Document. The said Section 80(1) and(2) of the Act read as follows:

> ***'80. Evaluation of tenders***

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(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.'

We note from page 4 of 12 to 5 of 12 of the Pre-Bid Conference meeting minutes of 26th January 2022 held between the 2nd Respondent and prospective tenderers, the 2nd Respondent informed tenderers that the technical evaluation criteria for the subject tender will comprise of the following mandatory requirements and failure to comply with any of them will lead to disqualification:

- ***Manufacturer's Authorization must be on a manufacturer's letterhead and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers)***

- ***Current and valid manufacturing Certificate of Quality issued by an independent recognized body to the manufacturer of the product. The certificate must be item specific.***
- ***Proof of WHO prequalification; OR a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA); OR a certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database.***

Further, the 2nd Respondent informed prospective tenderers that only tenders that are successful at the technical evaluation stage will proceed to the next stage of evaluation.

With this background on the mandatory technical criteria for evaluation of tenders at the technical evaluation stage, on determination of a responsive tender and on how evaluation of tenders is conducted, we shall now proceed to determine whether the Applicant's tender satisfied the following mandatory technical requirements by examining the Applicant's original tender submitted to the 2nd Respondent in the subject tender against the Evaluation Report signed by the Evaluation Committee on 14th March 2022 both documents forming part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act:

- ***Manufacturer's Authorization must be on a manufacturer's letterhead and addressed to KEMSA that is both tender and item specific and signed by an authorized signatory (Applicable to bidders who are not manufacturers)***

At page 137 of the Applicant's original tender the Applicant submitted a Manufacturer's Authorization dated 22nd February 2022 addressed to the 2nd Respondent, typed on the letterhead of Venus Safety & Health MENA FZE, the official manufacturers of NIOSH N95 Masks, signed by Deepak James, its Key Accounts Manager,*inter alia,* authorizing the Applicant to submit a tender in the subject tender to provide N95 Respirator manufactured by Venus Safety & Health MENA FZE and to subsequently negotiate and sign contract.

According to page 14 of 51 of the Evaluation Report, the Evaluation Committee determined that the Applicant's tender provided a Manufacturers authorization letter from and by Venus Safety & Health, Taloja, Mumbai, India thus the Applicant was not disqualified on this criterion.

- ***Current and valid manufacturing Certificate of Quality issued by an independent recognized body to the manufacturer of the product. The certificate must be item specific.***

At page 139and 140 of the Applicant's original tender the Applicant submitted a letter dated 26th August 2015 addressed to Venus Safety and Health Pvt. Ltd, typed on the letterhead of Department of Health & Human

Services, Centers for Disease Control and Prevention (CDC) signed by David Chirdon, the Chief, Conformity Verification and Standards Development Branch, National Personal Protective Technology Laboratory, *inter alia,* informing Venus Safety and Health Pvt. Ltd that the National Institute for Occupational Safety and Health (NIOSH) has reviewed a request for approval of the model CVN95+ air purifying filtering facepiece with exhalation valve for protection at a N95 filter efficiency level of 1st April 2015 and that the request is granted.

At page 141 of the Applicant's original tender the Applicant submitted a Bureau Veritas Certification with a revision date of 28th August 2021 signed by Jagdheesh N. Manian the Head- Certification, South Asia Commodities, Industry & Facilities Division certifying the Management System of Venus Safety & Health PVT. LTD has been audited and found to be in accordance with the requirements of the Management System Standard ISO 9001:2015with the scope of certification being Design, Manufacture & Supply of Respiratory, Hearing, Head, Face/Eye Protective Equipment, for Safety and Health Applications & Fit Test Services for Respiratory Protection Devices.At page 142 of the Applicant's original tender the Applicant submitted the Bureau Veritas Certification also signed by Jagdheesh N. Manian the Head- Certification, South Asia Commodities, Industry & Facilities Division in the name of Venus Safety & Health PVT. LTD on Standard ISO 9001:2015while indicating the Site, Address and Scope.

According to page 15 of 51 of the Evaluation Report, the Evaluation Committee determined that the Applicant's tender provided a current and valid manufacturing Certificate of Quality issued by Bureau Veritas ISO 9001:2015 Certificate No.IND.19.10562 expiring on 3rd December 2022 thus the Applicant was not disqualified on this criterion.

- ***Proof of WHO prequalification; OR a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA); OR a certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database.***

We have carefully perused the Applicant's original tender submitted to the 2nd Respondent in the subject tender and note that there is no document provided by the Applicant in its original tender that speaks to WHO prequalification or known as registration or marketing authorization for the manufacturer/supplier for the item by any stringent regulatory authorities or known as a certificate of conformity for CE marking which is provided by an entity recognized by the Notified Bodies listed for conformity assessment of medical devices in the Nando database.

At page 15 of 51 of the Evaluation Report, the Evaluation Committee determined that the Applicant's tender did not provide either of the three

documents required under this criterion. It is on this basis that the Applicant's tender was determined non-responsive at the Technical Evaluation stage and the Applicant was notified as much in a Letter of Regret dated 19th April 2022.

However, the Applicant vide a letter dated 20th April 2022, referred the 1st Respondent to page 139 of its original tender in which the Applicant indicated that page 139 of its original tender was a NIOSH authorization letter for the manufacturer that conforms to '*a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA).* Further, the Applicant informed the 1st Respondent vide the Applicant's letter dated 20th April 2022, that as per WHO guidelines and definition of Stringent Regulatory Authorities, in this case NIOSH as per proof enclosed in the Applicant's letter can be any regulatory authority associated with an ICH member, which in this case is US FDA through a legally binding, mutual recognition agreement. To support this argument, the Applicant enclosed to its letter of 20th April 2022 and forwarded, *inter alia,* the following documents to the 1st Respondent with a request for review and re-evaluation of the Applicant's tender: (a) list of SRA; (b) ICH member list and (c) Memorandum of Understanding between Regulatory authority and ICH member and which documents, we note **did not** form part of the Applicant's original tender at the submission deadline of 22nd February 2022 at 10:00a.m.

We understand the Applicant to say that the letter contained at page 139and 140 of the its original tender submitted to the 2nd Respondent by the submission deadline of 22nd February 2022 at 10:00a.m is*a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA).* This letter is dated 26th August 2015, addressed to Venus Safety and Health Pvt. Ltd, typed on the letterhead of Department of Health & Human Services, Centers for Disease Control and Prevention (CDC), National Institute for Occupational Safety and Health (NIOSH), signed by David Chirdon, the Chief, Conformity Verification and Standards Development Branch, National Personal Protective Technology Laboratory, *inter alia,* informs Venus Safety and Health Pvt. Ltd that the National Institute for Occupational Safety and Health (NIOSH) has reviewed a request for approval of the model CVN95+ air purifying filtering facepiece with exhalation valve for protection at a N95 filter efficiency level of 1st April 2015 and that the request is granted. However, the said letter at paragraph 5 thereof contains the following words;

> '***This certificate of approval is not an endorsement of the respirator by NIOSH, and such endorsement shall not be stated or implied in advertisements or other publicity.....***"

We note that the requirement under this criterionfor *a copy of the registration or marketing authorization for the manufacturer/supplier*for the item yet the letter contained at page 139 of the Applicant's original tender which the Applicant relies on to argue that it met this criterion was a

certificate of approval and not a registration or marketing authorization for the manufacturer/supplier for the item. Infact, the said letter contained at page 139 of the Applicant's original tender categorically states that such a letter as a certificate of approval, does not endorse the respirator by NIOSH and proceeds to bar any such endorsement in advertisements. With this it is clear that the letter contained at page 139 of the Applicant's original tender was not *a copy of the registration or marketing authorization for the manufacturer/supplierfor the item (even on emergency basis) by any of the stringent regulatory authorities (SRA).* We therefore concur with the 2nd Respondent that the Applicant's tender had to be determined non-responsive on this criterion for failure to comply with a mandatory technical criterion.

In **Miscellaneous Application 407 of 2018 Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR** (hereinafter referred to as the Meru University case),Justice John M. Mativo held as follows with respect to responsiveness of tenders and waiver of mandatory requirements of a tender document:

> ***"The materiality of irregularities is determined primarily by assessing whether the tender requirements have been***

substantively achieved. The starting point is Section 79 of the act which provides as follows:-

79. Responsiveness of tenders

(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.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

72. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner:-

a. A bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance

with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.

b. ..... Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.

73. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

74. ..... Bidders should, in other words, comply with tender conditions; 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 bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender

conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

75. Under section 79 (2) (a) (b) of the act, the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. .....

76. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined as:-

> *"one that is merely a matter of form and not of substance.....*

77. The decision as to whether or not a particular nonconformity constitutes a minor deviation or informality under procurement law has sometimes been characterised as a discretionary one.....

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. .....

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.

80. ..... The Evaluation Committee has a duty to act fairly. ..... The Bid documents contained clear instructions to bidders. No contest was raised before me that the requirements cited by were not in the bid documents.

.....

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.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it. .....

83. .....

84. .....

85. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit

the best solution through a process that is fair, equitable, transparent, cost-effective and competitive."

Just like in the Meru University case, the Applicant has not challenged the requirement for tenderers to submit *a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA).* The Meru University case buttressed the fact that mandatory requirements of a tender document cannot be waived because doing so would defeat the principle of fairness under Article 227(1) of the Constitution which requires all tenderers to compete on an equal footing.

Given the foregoing we find that the Applicant's tender did notsatisfy the mandatory technical requirements in Clause 2. Bidders who are distributors of B) Technical Evaluation of Specific Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 36 of the Tender Document read with minutes of the Pre-Bid Conference of 26th January 2022 specifically on providing *proof of WHO prequalification; OR a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA); OR a certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database*to warrant it to proceed for evaluation at the next stage.

What orders should the Board grant in the circumstances.

Having found that Applicant's tender did not satisfy the mandatory technical requirements in Clause 2. Bidders who are distributors of B) Technical Evaluation of Specific Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 36 of the Tender Document read with minutes of the Pre-Bid Conference of 26th January 2022 specifically on providing *proof of WHO prequalification; OR a copy of the registration or marketing authorization for the manufacturer/supplier for the item (even on emergency basis) by any of the stringent regulatory authorities (SRA); OR a certificate of conformity for CE marking which is provided by an entity recognized by any of the Notified Bodies listed for conformity assessment of medical devices in the Nando database* to warrant it to proceed for evaluation at the next stage, we find the Request for Review signed and filed on 4th May 2022 is devoid of merit and the same is for dismissal.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 4th May 2022: -

1. **The Request for Review dated 4th May 2022 and filed on even date be and is hereby dismissed for lacking in merit.**

2. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 25th day of May 2022

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**