

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 79/2022 OF 31stAUGUST 2022

BETWEEN

CIC GENERAL INSURANCE

LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER, KENYA AIRPORTS

AUTHORITY..... 1STRESPONDENT

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

Review of the Tender Document of the Kenya Airports Authority for the Tender No. KAA/OT/HRD/0014/2022-2023 for the Provision of Underwriting Services for Staff Medical Insurance Cover.

BOARD MEMBERS

- | | | |
|-----------------------|---|------------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Mrs. Njeri Onyango | - | Vice Chairperson |
| 3. Eng. Mbiu Kimani | - | Member |
| 4. Mr. Ambrose Ogeto | - | Member |
| 5. Dr. Joseph Gitari | - | Member |

IN ATTENDANCE

- | | | |
|------------------------|---|-----------------------------------|
| 1. Mr. Philemon Kiprop | - | Holding Brief for Board Secretary |
| 2. Ms. Sera Ayoo | - | Secretariat |

BACKGROUND TO THE DECISION

The Kenya Airports Authority, (hereinafter referred to as, "the Procuring Entity"), on 9th August 2022 advertised an open tender with respect to Tender No. KAA/OT/HRD/0014/2022-2021 TRCG/OT/ADM/49/2021-2022 FOR THE PROVISION OF INSURANCE UNDERWRITING SERVICES FOR STAFF MEDICAL INSURANCE COVER (hereinafter referred to as "the subject tender") on MyGov publication issue and also published on the procuring entity's website www.kaa.go.ke for free downloading and bids were to be submitted online and received initially on or before 24th August 2022 which was later extended to on or before 2nd September 2022 at 11.00 a.m.

Tenderers who downloaded the tender document were required to forward their particulars immediately to tenders@kaa.go.ke to facilitate any further clarification or addendum.

Addendums and Clarifications

The procuring entity issued several addenda as follows:

- a) **Addendum 1** dated 19th August 2022 stipulated that the tender closing date was extended from 31st August 2022 to 24th August 2022 at 11.00 a.m.
- b) **Addendum 2** dated 22nd August 2022 corrected the changes on the tender closing date indicating extension was from 24th August 2022 to 31st August 2022 at 11.00 a.m.

- c) **Addendum 3** dated 23rd August 2022 amended some of the mandatory requirements under Items 6, 8, 9,11, and 19 in the tender document.
- d) **Addendum 4** dated 24th August 2022 was indicated to be a tender clarification/addendum issued regarding the subject tender on the mandatory requirements under Items 10,13 and 15 of the tender document. In particular, item Number 13 stated that: *"Must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2019, 2020 and 2021 (or 2022). Provide copies of audited accounts for each of these years."*

Following issuance of Addendum 4, the Applicant herein wrote a letter to the Procuring Entity on the 25th of August 2022, seeking that the requirement under the Item MR-13 be expunged or bequalified as a technical requirement rather than a mandatory/preliminary one since it had no bearing on the Applicant's capability to provide the services under the subject tender.

- e) **Addendum 5** dated 29th August 2022 reiterated that the Mandatory Requirement Number 13 was a mandatory requirement which must be met.
- f) **Addendum 6** dated 1st September 2022 extended the tender closing date to 13th September 2022

REQUEST FOR REVIEW NO. 79/2022

The Request for Review regarding the subject tender was lodged by M/s CIC General Insurance Limited (the Applicant), together with a Supporting Affidavit sworn by McDonald Kang'e, the General Manager of the Applicant's Medical Business, on 31st August, 2022 through the firm of Chepkuto Advocates, seeking the following orders:

- I. A declaration that the Procurement Entity is in breach of the provisions of Article 227(1) of the Constitution and Sections 3 and 58(2) of the Public Procurement and Disposal Act;**

- II. A declaration that the Mandatory Requirement Number 13 under the Mandatory Evaluation Criteria in the Tender documents is discriminatory, unfair and illegal;**

- III. The Mandatory Requirement Item Number 13 under the Mandatory Evaluation Criteria be expunged from the tender document;**

- IV. In addition to prayer III above, the requirement be qualified as a Technical Requirement with reasonable scores assigned to it under the Tender Document as opposed to a Mandatory Requirement;**

V. The Board be pleased to order that the Procuring Entity issues a new tender document embodying the orders sought herein;

V. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

In a Notification of Appeal and a letter dated 31st August 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 suspension of procurement proceedings for the subject tender while forwarding 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 any information and arguments about the subject tender within five days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line

with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act. 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.

In opposition of the Request for Review, the Respondents filed their Response to the Applicant's Request for Review dated 4th September 2022 and filed on 5th September 2022.

On 12th September 2022 the Applicant filed a Supplementary Affidavit sworn on even date in response to the Respondents Statement of Response together with their submissions and authorities relied on.

The Respondents filed their submissions on 16th September 2022.

The Applicant's Case

The Applicant has relied on five (5) grounds in support of its Request for Review.

The Applicant avers that the the Procuring Entity is in breach of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") in that:

- (i) The tender document is discriminatory to the extent that the Mandatory Requirement Item Number 13 under the Mandatory Evaluation Criteria which provides that the insurance underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2021, 2020 and 2019unlawfully locks out the Applicant from participating in the bid.
- (ii) Failed to take into account the provisions of the Sections 3 and 58(2) of the Act which provide guidelines on the principles to be adopted in preparation of tender documents in particular that they must be fair and competitive.
- (iii) The Procuring Entity failed to promote fairness and competitiveness in its tender document by adopting the aforesaid discriminatory mandatory requirement therefore contravening the provisions of Sections 58(2)of the Act and the principles of procurement under Article 227(1)of the Constitution.

The Applicant further avers that the Procuring Entity prejudiced the Applicant's legitimate expectation to be accorded a fair and competitive tender process by failing to provide a tender document that is fair for purposes of participation by interested and qualified bidders including the Applicant.

The Applicant states that the impugned Mandatory Requirement Number 13 under the Mandatory Evaluation Criteria is illegal and unjustifiable as it is not in accordance with the provisions of Article 227(1) of the Constitution, the Act and the attendant regulations.

By reason of the said breaches, the Applicant avers that it has suffered loss and damage in that it has lost the right to bid and compete fairly in the award of the Tender and in the circumstances it is only just, fair, and in furtherance of the principles of natural justice and fair administrative action that the orders sought by the Applicant be granted to safeguard the due process and efficacy of remedies availed to the Applicant by the Act.

The Respondent's Case

In response, the Respondent states that they fully complied with the provisions of the Constitution of Kenya, 2010, the Act and the Public Procurement and Asset Disposal Regulations of 2020 (hereinafter referred to as "the Regulations, 2020") contrary to the Applicant's allegations. Additionally, the tender document was prepared in accordance with the provisions of Section 68(3) of the Act and Regulation 68(4) clearly

indicating evaluation criteria which is objective and in line with Article 227(1) of the Constitution.

That following the filing of the Request for Review by the Applicant, the Tender closing date was extended to 13th September 2022 as provided in Addendum 6 dated 1st September 2022.

The Respondents states that the tender document was prepared in accordance with the provisions of Section 68(3) of the Act and Regulation 68(4) clearly indicating evaluation criteria which was objective and in line with provisions of Article 227 (1) of the Constitution. The tender document is fair, non-discriminatory and competitive in so far as the requirements are to be adhered to by all bidders interested in submitting bids for provision of the underwriting services to the Procuring Entity. Mandatory requirement 13 (hereinafter referred to as "MR 13") does not in any way lock out the Applicant as the same applies to all bidders interested in providing the services to the Procuring Entity.

The Respondent admits that item 13 being the requirement for **"a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years"** forms part of the preliminary/mandatory evaluation criteria which must be demonstrated by bidders. This requirement is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios and the sums not being available when required for contracted services. This is a cautionary measure to safeguard against loss of public funds.

The Respondents reiterates that item MR-13 of the mandatory requirement is necessary to assure availability of funds for medical services to beneficiaries and their dependents. The requirement is not discriminatory in nature as it seeks to ensure that the successful bidder/underwriter is one with a sound financial standing whose portfolio is skewed to non-motor or medical underwriting business and would thus not commit funds to settlement of motor business to the disadvantage of medical business when required. The Applicant having indicated its vast experience medical insurance business in paragraph 3 of its supporting affidavit should thus have no difficulty in complying with the stated requirement.

The Respondents states that the Applicant is in essence requesting the Board to prepare and/or re-write the tender document for the Procuring Entity and skew it in a manner that would favor it by removing the only safeguard the Procuring Entity has put in place to ensure availability of funds at all times to meet the medical needs of its members. This, the Respondents respectfully state is not within the ambit of the Board as the Procuring Entity understands its needs better and is mitigating against circumstances where funds will not be available for the needs of its members in the event that the same have been allocated to other business portfolios.

The Respondents further state that MR13 is a consistent requirement in the Procuring Entity's tender documents for medical services and has been applied in previous tender documents in 2019 for similar services and hence the tender document is fair, competitive and non-discriminatory.

That the current provider of the services as at the date of filing its response met this requirement and therefore it cannot be said that this requirement was included by the Procuring Entity under the subject tender in order to specifically lock out the Applicant.

The Respondents avers that the Tender document adhered to the criteria in Section 58 (2) of the Act as the same contains sufficient information that allows fairness and competitiveness among interested bidders. This is further buttressed by Addenda Nos. 3,4,5, and 6 that satisfactorily addressed the clarifications sought by bidders on the tender documents and requirements. The Applicant is thus seeking to have unfair advantage over other bidders by seeking to amend the tender document to suit its position and business. The Respondent states that they have maintained fairness, transparency, equity and fully adhered to Article 227(1) of the Constitution and all provisions of the Act in preparation of the tender document in a manner that safeguard public interest. Requirement MR-13 applies to all bidders and not isolated to the Applicant thus no discrimination has been visited upon the Applicant.

The Respondents contend that the prayer by the Applicant that MR 13 be moved to the Technical Evaluation Stage and reasonable score be assigned to it appears to be a contention that the use of a YES/NO criteria at the Technical Evaluation Stage is not objective. It is not lost to the Respondents that the Applicant has not raised an issue with the evaluation criteria at the Technical Evaluation Stage and/or challenged it in its Request for Review. Further, granting the said prayer will defeat the goals and objective of the criteria as the same was aimed at evaluating and

assessing the competencies and manner of provision of the medical services. Additionally, the Technical Evaluation Criteria as stipulated on pages 25 to 27 of the Tender Document does not envisage scoring to determine responsiveness of a bidder. The same comprises of a compliance sheet that has YES/NO answer to the requirements and Table 2 which has a description of medical services that must be provided by the successful bidder.

The Respondent avers that by expunging item MR-13 from the Tender Document will defeat the objective of the Procuring Entity in sourcing for a successful bidder who will assure provision of the services at all times without the danger of diverting funds to other business portfolios they may have. This would also expose other bidders who have submitted their bids to unfair competition and additional costs in preparing fresh bids. Further, inclusion of MR 13 in the mandatory requirements was in line with Section 70 of the Act with respect to preparation of Tender Documents and does not in any way prejudice the Applicant.

It is the Respondents prayer that the Request for Review is ripe for dismissal and none of the orders sought should not be granted as the grounds of appeal are highly subjective, unsubstantiated and marred with assumptions that the Applicant is unable to prove.

Applicant's Rejoinder

In its rejoinder, the Applicant states that the Respondent's issuance of the Addendum Number 6 dated 1st September 2022 purporting to extend the

tender closing/opening date to 13th September 2022 is unlawful since once a request for review has been lodged with the Board, the procurement proceedings of the tender document in question are suspended pending the determination of the application. It is irresponsible and unlawful for the Respondents to ignore the suspension order and attempt to proceed with the procurement process.

The Applicant states that the Respondents reliance on Section 68(3) of the Act which they are alluding to as indicating the evaluation criteria of the tender document is misleading as Section 68(3) of the Act rather refers to the obligation placed on the procuring entity to avail procurement records after the termination of procurement proceedings or issuance of a contract. The application before the Board pertains to a cause of action that occurred before the submission of bids which is a different stage of the tender process, making the Section relied on by the Respondents inapplicable and misleading.

The Applicant further states that Section 68(4) of the Act provides for the 1st Respondent's duty to prepare the tender document indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective. The Applicant contests the objectivity and fairness of only the impugned mandatory requirement at the Preliminary Evaluation Stage.

The Applicant aver that the Respondent's need to ensure that paid premiums are secured and utilized for the intended purpose and are not diverted to other portfolios which would make the sums unavailable for contracted services and is a cautionary measure has similarly been served

by the presence of Mandatory Requirement MR-9 as amended vide the Addendum No. 3 dated the 23rd August 2022. The justification provided by the Respondent does not qualify the inclusion of the discriminatory mandatory requirement.

The Applicant states that despite having vast experience and the capability to provide the medical insurance services as sought under the subject tender it will be unable to meet the impugned mandatory requirement for reasons that it is equally successful in the motor business which does not undermine the capability of the Applicant to provide the services sought under the tender. That MR-13 differentiates bidders not based on their overall financial muscle but rather their level of engagement in a particular field of insurance, which is separate from and profoundly differs to the field of insurance for which the Respondents issued the tender.

The Respondents actions are an attempt at directly discriminating against bidders who have a particular level of participation in the motor insurance business, resultantly locking out some of the insurance companies including the Applicant and encouraging unfair competition amongst bidders. As a consequence, item MR-13 discriminates against the Applicant based on the unfounded assumption that bidders whose gross underwritten premiums for motor business has been more than 30% of their total general business in the last 3 years would commit funds to the settlement of the motor business to the disadvantage of the medical business.

The Applicant states that Section 3A(1)(a) of the Insurance Act Cap 487 places the duty of ensuring the effective administration, supervision,

regulation and control of insurance business on the Insurance Regulatory Authority (IRA) including the protection of the interest of the insurance policyholders and beneficiaries. As such IRA bears the legal mandate to not only supervise insurers, but also protect insurance policy-holders and beneficiaries. In the event of deviation of funds away from the medical services to beneficiaries, the duty of holding the insurer accountable does not rest with the Respondent who would be acting ultra vires in this instance but rather the Authority.

The Applicant emphasizes that its prayer before the Board does not translate into having the mandatory item MR-13 re-written in its favour but rather have it declares as discriminatory as a mandatory requirement as it locks out bidders including the Applicant who are successful in other fields of insurance.

The Applicant states that the argument set forth by the Respondent that the fact that no queries were raised by other bidders save for the Applicant upon issuance of the clarification on item MR-13 means that the requirement can be met by most bidders is unfounded and safe to say presumptuous. The Respondent's argument that their current services provider meets the criteria set out in the tender document carries no legal weight on the question of whether or not the mandatory requirement under item MR-13 is discriminatory. The principles of equality and fairness require universal application and the current service provider, as an existing beneficiary, cannot be used as a yardstick to measure the fairness of the requirement unless the requirements have been specifically designed by the Respondent to give the current service provider an advantage.

The Applicant avers that while the Respondent claims that the tender document adhered to the criteria in Section 58(2) of the Act, the same was not fair. By including item MR-13 the Respondents sought to unfairly exclude some insurance underwriters who successfully deal in diverse fields in the insurance business, demonstrating clear bias against bidders with noticeable presence in the motor insurance industry.

The Applicant states that the removal of item MR-13 would not hinder the Respondents from finding a successful bidder who will assure provision of the services at all times, without the danger of diverting funds to other business portfolios as demonstrated. It is apparent that the alleged "caveat" adopted for the realization of this purpose only relates to companies involved in motor insurance therefore clearly discriminating against them. Despite existence of multiple types of insurance businesses, the Respondents specifically targeted those involved in the motor vehicle insurance field to the exclusion of all other types of insurance businesses such as travel, life insurance, property insurance etc. Furthermore, with the recent increase in demand for motor vehicle insurance, the Respondents' inclusion of mandatory item MR-13 would thus serve to exclude those who have worked hard to satisfy the demand in the market and is therefore unreasonable and extremely unfair.

BOARD'S DECISION

The Board has considered each of the Parties case, pleadings, documents, written submissions, authorities, and confidential documents submitted by

the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination:

- 1. Whether Addendum 6 dated 1st September 2022 seeking to extend the tender closing/opening date from 2nd September 2022 at 11.00 a.m to 13th September 2022 is null and void.***

- 2. Whether the Mandatory Requirement Item Number 13 under the Mandatory Evaluation Criteria in the Tender Document is discriminatory, unfair and illegal and contravenes the provisions of Articles 227(1) of the Constitution, as read with Section 3 and Section 58 (2) of the Public Procurement and Assets Disposal Act.***

- 3. What orders should the Board grant in the circumstances.***

Issue 1: Whether Addendum 6 dated 1st September 2022 seeking to extend the tender closing/opening date from 2nd September 2022 at 11.00 a.m to 13th September 2022 is null and void.

The Applicant submits that the Respondents purported extension of the subject tender's closing/opening date from 2nd September 2022 to 13th September 2022 vide the 6th addendum dated 1st September 2022 is unlawful by virtue of the provisions of Section 168 of the Act.

Section 168 provides that:

"168. Notification of review and suspension of proceedings

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

The Applicant has further relied on this Board's decision in **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** where the Board pronounced:

"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."

In addressing the above issue, the Board notes that the instant Request for Review was filed on 31st August 2022. The Board's Acting Secretary confirms having issued a Notification of Appeal to the Respondents dated 31st August 2022 which states:

".....

You are hereby notified that on the 31st August 2022, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.

Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.

A copy of the Request for review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24th March 2020.

....."

It is clear from the above Notification of Appeal that once a Request for Review is filed, the procurement proceedings are immediately suspended. The Respondents admits in their Response to the Request for Review to having received the notification and being aware that a request for review had been filed as they state under Clause C Invitation and Opening of Tender at page 3 that:

"Following the filing of the Request for Review by the Applicant, the tender closing date was extended to 13th September 2022 as provided in Addendum 6 dated 1st September 2022."

The Board has studied the said Addendum No 6 dated 1st September 2022 which states:

"....."

The following is a tender clarifications/addendum issued regarding the above tender in accordance to instructions to

tenderers clause 10.3 of the bidding document for the referenced tender.

The closing/opening date is hereby extended to 13th September, 2022 at 11.00 a.m from 2nd September, 2022 at 11.00 a.m.

Kindly amend your tender accordingly and ensure the tender is valid for a period of 126 days and your tender security is valid for a period of 156 days from the NEW closing/opening date of 13th September 2022 at 11.00 a.m.

This addendum forms part of the bidding document and it is binding on all the bidders. All the other conditions remain the same."

It is the Board's considered opinion that the Addendum was issued during suspension of procurement proceedings pursuant to Section 168 of the Act. Any action taken by the Respondent in furtherance of the procurement proceedings before the Request for Review has been heard and the Board rendered its decision is null and void. This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:

"...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the

Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound. 53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point”

Consequently, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board. In this regard therefore, the Board finds that the Procuring Entity’s Addendum No. 6 to the Tender Document dated 1st September 2022, was issued after filing of the Request for Review on 31st August 2022, which filing stayed any further steps being taken with respect to the subject procurement process as from 31st August 2022 rendering the said addendum null and void.

Issue 2: Whether the Mandatory Requirement Item Number 13 under the Mandatory Evaluation Criteria in the Tender Document is discriminatory, unfair and illegal and contravenes the provisions of Articles 227(1) of the Constitution, as read with

Section 3 and Section 58 (2) of the Public Procurement and Assets Disposal Act.

The Board has been called upon to make a determination on whether the said Mandatory Requirement Item MR-13 is discriminatory and contravenes the provisions of Articles 227(1) of the Constitution, as read with Section 3 and Section 58 (2) of the Act.

We note that the Applicant has stated that it is aggrieved by the tender document and the addenda issued by the Respondent which includes a discriminatory mandatory requirement at the preliminary stage under Item MR-13 under the Mandatory Evaluation Criteria.

Having studied the Tender Document, the Board observes that Section III-Evaluation and Qualification Criteria of the Tender Document sets under clause 1 (c) the evaluation and contract award criteria and states:

"The procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria (ii) has been determined to be substantially responsive to the Tender Documents and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract."

According to the Tender Document, tenders that do not pass the Preliminary Examination are to be considered irresponsive and will not be considered further. Clause 2(a) sets out the Preliminary/Mandatory

Evaluation Criteria being the requirements to be met by the Insurance underwriter. The Board notes that Item MR-13 which must be met states:

"Must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e 2021, 2020, and 2019. Provide copies of audited accounts for each of these years."

The Board observes that Addendum No. 4 dated 24th August 2022 issued by the Respondents stated:

"....."

The following is a tender clarification/addendum issued regarding the above tender in accordance to instructions to tenderers clause 10.3 of the bidding document for the referenced tender.

The mandatory requirements are amended to read as follows:

<i>ITEM</i>	<i>Request/Query</i>	<i>Answer/Clarification</i>
<i>10</i>	<i>.....</i>	<i>.....</i>
<i>13</i>	<i>Must have a portfolio balance between motor and non-motor business with gross underwritten</i>	<i>Must have a portfolio balance between motor and non-motor business with gross underwritten premium for</i>

<p><i>premium for motor business not exceeding an average of 30% of the total general business the last three consecutive years i.e 2021,2020,2019. Provide copies of audited accounts for these years.</i></p>	<p><i>motor business not exceeding an average of 30% of the total general business for each of the last three consecutive year's i.e 2019, 2020 and 2021 (or 2022). Provide copies of audited accounts for each of these years.</i></p>
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The closing/opening date remains 31st August, 2022 at 11.00 a.m.

....."

On 25th August 2022, the Applicant wrote to the Respondents regarding the preliminary/mandatory evaluation criteria requirements to be met by the insurance underwriter: Item MR13 and stated:

"....."

We write to seek that this requirement be expunged or be qualified as a Technical Requirement as it has no bearing on our capacity to administer the medical scheme. We strongly hold the view that the requirement to have underwritten premium turnover of at least Kshs. 3 billion in medical business for each of the last 3 consecutive years (2021, 2020, and 2019) MR9- takes care of the concern to demonstrate ability to administer a scheme of KAA's magnitude.

Further to this motor is the fastest growing class of insurance in the industry since it is mandatory as per the motor vehicle third party insurance Act cap 405 and due to its emotive nature, a larger motor book is a demonstration of efficient level of claims management.

We trust that you will find the above to be in order and look forward to your issuance of an addendum addressing the above concern.

....."

We note that consequently, the Respondents issued Addendum No. 5 dated 29th August 2022 and stated:

"....."

No.	Request/Query	Answer/Clarification
1.	<i>Please refer to the response to item no. 13 on Addendum No. 4. This is a mandatory requirement and must be met.</i>
2

The closing/opening is hereby extended to 2nd September, 2022 from 31st August, 2022 at 11.00 a.m.

....."

The Applicant submits that the mandatory requirement under item MR-13 occasions unfavourable bias against its successful portfolio in the motor insurance business. The Applicant further submits that the requirement targets and directly discriminates against bidders who may carry out a considerable amount of business in motor insurance. That insurers with a particular level of success in the motor insurance field to the exclusion of all other types of insurance businesses such as travel, life insurance, property insurance etc have been specifically targeted and essentially locked out of the tender process contrary to the court's assertion in **Republic V Public Procurement Administrative Review Board & Another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020]eKLR** where the court established that:

"It is important for bidders to compete on an equal footing"

Hence, the Applicant is of the considered view that insurance companies with success in the motor insurance business and who equally have the capacity to provide the services advertised for in the tender should also be accorded a fair opportunity to bid. Nevertheless, the Applicant submits that the Respondent's claim of including item MR-13 to ensure that sums are available for the contracted services is negated by the mandatory requirement under Item MR-9 which demands that the bidders have an underwritten premium turnover of at least Kshs. 3 billion in the Medical business for each of the last three consecutive years. Consequently, Item MR-9 similarly gauges the tender applicant's financial ability to fulfil the

tender requirements thus rendering the mandatory requirement under item MR-13 unreasonable, unjustifiable and completely redundant.

The Respondents submits that Item MR-13 is a consistent requirement in the Procuring Entity's tender documents for medical services and has been applied in previous tender documents in 2019 for similar services hence the same is fair, competitive and non-discriminatory.

The Respondent further states that that the Mandatory Requirement Item MR-13 was applicable to all parties who wished to participate in the subject tender and not just the Applicant. According to the Respondent, this requirement is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios when required for contracted services. This is a cautionary measure to safeguard against loss of public funds. That the Act does not list requirements to determine economic and financial standing of bidders thus it was incumbent on the Procuring Entity to include Item MR-13 in the tender document. This was also to foster transparency on required information on insurers financial and economic standing and in compliance with Section 70(3) & (6) (a) of the Act.

Further, the Respondent submits that the mandatory requirement MR13 must not generally be treated as a hindrance to access the market rather it ought to be treated as defining what the market is in terms of what the Procuring Entity wants to buy hence not a hindrance to trade. The Respondent terms this as the doctrine of excluded buying decisions and

states that the Act permits the Procuring Entity to exclude insurers for lack of financial and economic standing and to ascertain that the successful bidder has adequate financial resources to perform the contract alongside other commitments.

The Board observes that Section 60 of the Act provides that an accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

The mandatory requirement MR-13 in the subject tender has been challenged on the grounds of being discriminatory against the Applicant and locks it out of the bidding process.

Black's Law Dictionary, 9th Edition defines "discrimination" as

(1) the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship

(2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

In the case of **Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another [2018] eKLR** Justice Mwita while addressing the issue of discrimination stated:

"27. In the case of Peter K Waweru v Republic [2006]eKLR, the court stated of discrimination thus:-

"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that. (1)Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

.....

43. I agree with the Court's observation in the case of Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that

separates legitimate differentiation from constitutionally impermissible differentiation,(Nelson AndayiHavi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality.(National Coalition for Gay and Lesbian Equality v Minister for Justice-supra)"

The Board also observes that in the case of ***James Nyasora Nyarangi & 3 others v Attorney General [2008] eKLR*** (hereinafter referred to as "the James Nyasora case") Nyamu J. (as he then was) while discussing discrimination stated:

"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in Section 82 of the Constitution.

Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:

- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and***
- (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.***
- (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”***

From the James Nyasora case the Board notes that discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. Additionally, it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. The law does not prohibit discrimination but rather unfair discrimination. For the Applicant to succeed on the issue of discrimination, it must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution.

With this in mind, the Board notes that the principles of public procurement as enumerated under Article 227(1) of the Constitution provides that:

(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.

Section 3 of the Act provides that public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- a) the national values and principles provided for under Article 10;***
- b) the equality and freedom from discrimination provided for under Article 27;***
- c) affirmative action programmes provided for under Articles 55 and 56;***
- d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);***
- e) the principles of public finance under Article 201;***
- f) the values and principles of public service as provided for under Article 232;***
- g) principles governing the procurement profession, international norms;***
- h) maximisation of value for money;***

- i) promotion of local industry, sustainable development and protection of the environment; and***
- j) promotion of citizen contractors.***

The Board wishes to point out that one of the key functions of the Public Procurement Regulatory Authority as stipulated under Section 9(1)(f) of the Act is to:

- (f) prepare, issue and publicise standard procurement and asset disposal documents and formats to be used by public entities and other stakeholders.***

Further, Section 58 of the Act provides for use of standard procurement and asset disposal documents and states:

- (1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***
- (2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.***

Section 70(1) of the Act dictates that the Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities. Further, Section 70(4) states that:

"An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments."

What emerges from the above statutory provisions is that the preparation of a tender document is the mandate of the accounting officer in consultation with the relevant department and the Public Procurement Regulatory Authority.

Section 70(6) provides what is to be set out in the tender document and states:

"The tender documents shall set out the following –

- (a) the specific requirements prepared under section 60 relating to the goods, works or services being procured and the time limit for delivery or completion;***
- (b)"***

Notably, Section 60(1) dictates that an accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

Applying the formulae in the James Nyasora case in determining whether the Mandatory Requirement Item MR-13 is a permissible classification, it is the Board considered view that the differentia is that the insurance

underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2019, 2020 and 2021 (or 2022) and must provide copies of audited accounts for each of these years.

On the other hand, the object to be achieved by this mandatory requirement is that it is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios when required for contracted services. This has been said to be a cautionary measure to safeguard against loss of public funds. The Procuring Entity wants to ensure that the successful bidder is one with a sound financial standing and would thus not commit funds to settlement of motor business to the disadvantage of medical business when required. The Procuring Entity's cautionary measure cannot be said to be irrational as the Board takes judicial notice of instances where medical insurance policies have failed to be honored by an insurer.

The Board opines this to be a reasonable objective and considers Justice Mativo's holding in the case of **Judicial Review Application No. 646 of 2017 Konton Trading Limited V Kenya Revenue Authority & 3 others** while addressing the concept of reasonableness stated at paragraph 64 that:

"Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather

the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.”

Consequently, despite the fact that insurers offering motor insurance have been treated differently from insurers offering other types of insurance such as travel, life insurance, property insurance etc, this cannot be termed as discrimination and does not amount to unfavourable bias as there is a clear rational relation between the differentia and the object of the mandatory requirement MR-13.

In light of the above, and bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that the specific requirements of a Tender Document are within the preserve of the Procuring Entity. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and open competition and are applicable to all parties who wish to participate in the subject tender.

It is therefore the finding of the Board that the Respondents did not breach the provisions of Article 227 (1) of the Constitution read together with Section 3 and Section 58 (2) of the Public Procurement and Assets Disposal Act by providing for the Mandatory Requirement under Item MR-13 in the Tender Document which requires that the insurance underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2021, 2020 and 2019.

Issue 2: What orders should the Board grant in the circumstances.

In determining the appropriate orders to issue in the circumstances, the Board has established that Addendum No. 6 dated 1st September 2022 was issued during the pendency of the Request for Review filed on 31st August 2022 and is hence null and void.

The Board has also established that the Mandatory Requirement under Item MR-13 in the Tender Document is not discriminatory and that the Procuring Entity adhered to the principles to be adopted in preparation of Tender Documents as set out under Article 227 (1) of the Constitution read together with Section 3 and Section 58 (2) of the Public Procurement and Assets Disposal Act.

In totality of the foregoing, the Request for Review is for dismissal and the Board proceeds to make the following specific orders:

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 31st August 2022:

- 1. The Request for Review filed on 31st August 2022 by the Applicant herein with respect to Tender No. KAA/OT/HRD/0014/2022-2023 for the Provision of Underwriting Services for Staff Medical Insurance Cover be and is hereby dismissed.**

2. The Procuring Entity's Addendum No. 6 dated 1st September 2022 with respect to Tender No. KAA/OT/HRD/0014/2022-2023 for the Provision of Underwriting Services for Staff Medical Insurance Cover issued during the pendency of the instant Request for Review filed on 31st August 2022 be and is hereby nullified and set aside.
3. The Board hereby directs the Accounting Officer of the Procuring Entity to extend the tender submission deadline for Tender No. KAA/OT/HRD/0014/2022-2023 for the Provision of Underwriting Services for Staff Medical Insurance Cover to by a minimum of 7 days from the date of this decision taking into consideration the Board's findings in this Request for Review.
4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 21stDay of September, 2022.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

