

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 99/2022 OF 29<sup>th</sup> NOVEMBER 2022**

**BETWEEN**

**JUBILEE HEALTH INSURANCE LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**FIRST ASSURANCE COMPANY LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Medical Supplies Authority in relation to Tender No. KEMSA-ONT04-2022/2024 for Provision of Medical Insurance Cover for KEMSA Staff

**BOARD MEMBERS PRESENT**

- |                        |              |
|------------------------|--------------|
| 1. Ms. Faith Waigwa    | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member      |
| 3. Dr. Paul Jilani     | -Member      |

**IN ATTENDANCE**

Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Medical Supplies Authority, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from interested eligible tenderers in response to Tender No. KEMSA-ONT04-2022/2024 for Provision of Medical Insurance Cover for KEMSA Staff (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement on 27<sup>th</sup> September 2022 on MyGov Newspaper, on its website ([www.kemsa.co.ke](http://www.kemsa.co.ke)) and also on the Public Procurement Information Portal (PPIP) (<https://tenders.go.ke>). The subject tender's submission deadline was initially set for 12<sup>th</sup> October 2022 at 10.00.

### **Addenda**

The 2<sup>nd</sup> Respondent issued four (4) addenda namely (a) Addendum 1 dated 30<sup>th</sup> September 2022 which revised the provisions of MR8 of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as "the Tender Document"); (b) Addendum 2 dated 5<sup>th</sup> October 2022 which extended the subject tender's submission deadline to 25<sup>th</sup> October 2022 at 10.00 a.m; (c) Addendum No.3 dated 11<sup>th</sup> October 2022 which, *inter alia*, amended the evaluation criteria of the Tender Document with respect to Preliminary Examination (Mandatory Requirement) and Technical Evaluation (hereinafter referred to

as "Addendum No. 3"); and Addendum No. 4 dated 12<sup>th</sup> October 2022 which introduced a new MR14.

### **Submission of Tenders and Tender Opening**

According to the Record of the Tender Opening signed by members of the Tender Opening Committee on 25<sup>th</sup> October 2022 (hereinafter referred to as "Tender Opening Minutes"), a total of ten (10) tenderers submitted their tenders through . Shortly thereafter, the said ten (10) tenders were opened in the presence of tenderer's representatives present and the following ten (10) tenderers were recorded in the 2<sup>nd</sup> Respondent's Record of the Public Tender Opening as having submitted their tenders in response to the subject tender:

<b>TendererNo.</b>	<b>Tenderer Name</b>
1.	GA Insurance Limited
2.	Zamara Risk & Insurance Brokers Limited
3.	CIC Insurance General Insurance Limited
4.	AAR Insurance Kenya Limited
5.	Madison General Insurance Limited
6.	Liaison Group (Insurance Brokers) Limited
7.	Heritage Insurance Company Limited
8.	APA Insurance Limited
9.	First Assurance Company Limited

10.	Jubilee Health Insurance Limited
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### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 1<sup>st</sup> Respondent undertook evaluation of the ten (10) tenders in the following three stages and as captured in an Evaluation Report signed by members of the Evaluation Committee on 4<sup>th</sup> November 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary Examination;
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

### **Preliminary Examination**

At this stage of evaluation, the Evaluation Committee was required to apply the amended evaluation criteria set out in Addendum No.3 and Addendum No.4 as Preliminary Examination (Mandatory Requirement. Tenders were required to satisfy all the 14(fourteen) mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation stage. Failure to satisfy any one of the 14(fourteen) mandatory requirements would render a tender non-responsive at this stage.

At the end of evaluation at this stage, six (6) tenders were found to be non-responsive which included the Applicant's tender, while four (4)

tenders were found responsive which included the Interested Party's tender. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the amended evaluation criteria set out in Addendum No.3 as Technical Evaluation Criteria. Tenders were required to satisfy all the seven (7) technical evaluation requirements on a yes/no basis at this stage to qualify to proceed for evaluation at the Financial Evaluation stage.

At the end of evaluation at this stage, three (3) of the four (4) tenderers who had made it to this stage were found non-responsive while the tender submitted by the Interested Party was found responsive and proceeded for evaluation at the Financial Evaluation stage.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to apply the amended evaluation criteria set out in Addendum No. 3 as Financial Evaluation where prices of tenders were to be compared with a view of awarding the subject tender to the lowest evaluated responsive tender.

The Interested Party's tender being the only tender that made it to this stage of evaluation as can be discerned from the Evaluation Report, quoted Kshs.72, 212,977.00 for the subject tender.

### **Evaluation Committee's Recommendation**

The Evaluation Committee recommended the Interested Party be awarded the subject tender at a total annual premium of Kshs.72, 212,977.00 inclusive of all taxes and levies for being the only evaluated responsive tenderer and to be awarded a two (2) year contract. The annual premium would also cover chronic illness and pre-existing conditions In-patient limit of (a) all categories A (A1 & A2) Kshs. 1,000,000.00; and (b) all categories (B, C & E) Kshs. 750,000.00.

### **Due Diligence**

According to a due diligence report signed by members of the Evaluation Committee on 4<sup>th</sup> November 2022, the Interested Party's Bis Security was authenticated and found to be original and authentic and the Interested Party's Tax Compliance Certificate was verified and found to be current and valid. Accordingly, the Interested Party was found to be eligible for award.

### **Professional Opinion**

In a Professional Opinion as an internal memo to the 1<sup>st</sup> Respondent and dated 10<sup>th</sup> November 2022 (hereinafter referred to as the "Professional Opinion"), the Acting Director Procurement, Dr. Justus Kinoti Ph.D.,

reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and thereafter, concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender. He noted that the total award surpassed the allocated budget with Kshs.5, 212,977.00 and that the Assistant Human Resource Manager vide an email dated 4<sup>th</sup> November 2022 had indicated the deficit would be met from the Human Resource Department.

The award of the subject tender to the Interested Party was approved on 15<sup>th</sup> November 2022 via a signature scribbled on the top left of the first page of the Professional Opinion..

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 15<sup>th</sup> November 2022 signed for the 1<sup>st</sup> Respondent by the Ag. Director Procurement, Dr. Justus Kinoti (Ph.D).

### **REQUEST FOR REVIEW**

On 29<sup>th</sup> November 2022, the Applicant filed a Request for Review dated 29<sup>th</sup> November 2022 together with a Statement in Support of the Request for Review signed by Njeri Njomo, on 29<sup>th</sup> November 2022 through the firm of Gerivia Advocates LLP Advocates seeking the following orders from the Board in verbatim:

- a. The 1<sup>st</sup> Respondent's decision awarding Tender Number KEMSA/ONT 04/2022 – 2024 for Provision of Medical Insurance Cover for KEMSA Staff to the Interested Party be annulled and set aside;***
  
- b. The 1<sup>st</sup> Respondent's letter dated 15<sup>th</sup> November 2022 notifying the Applicant that it had not been successful in Tender Number KEMSA/ONT 04/2022 – 2024 for Provision of Medical Insurance Cover for KEMSA Staff be annulled and set aside;***
  
- c. A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the preliminary evaluation stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act at Sections 80 (2) and 86 and the provisions of Regulation 74 of the Regulations;***
  
- d. The Procuring Entity be directed to re-admit the Applicant at the preliminary evaluation stage and to carry out a re-evaluation noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80 (2)***

***and to carry out the re-evaluation in compliance with Section 79 and 86 of the Act and Regulation 74 of the Regulations;***

***e. The Board in exercise of its discretion, to give directions to the Respondents to re-do or correct anything within the entire procurement process found to not have been done in compliance with the law;***

***f. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and***

***g. 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 29<sup>th</sup> November 2022, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender pursuant to Section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and

contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 29<sup>th</sup> November 2022.

In opposition to the Request for Review, on 6<sup>th</sup> December 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavit sworn on 6<sup>th</sup> December 2022, by Terry Ramadhan, the Chief Executive Officer of the 2<sup>nd</sup> Respondent who is also the 1<sup>st</sup> Respondent herein through the firm of Nyaanga and Mugisha Advocates.

Vide letters dated 5<sup>th</sup> December 2022, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 5<sup>th</sup> December 2022.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2022, physical hearings were dispensed with and directions were given for all requests for review applications to be disposed off by way of written submissions. Further, the Board cautioned all parties to adhere to the strict timelines as specified in its directive as it would strictly rely on

documentation filed before it within the timelines specified to enable it 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 received official stamp.

On 9<sup>th</sup> December 2022, the Interested Party filed a Memorandum of Response dated 9<sup>th</sup> December 2022 through the firm of Mwaniki Gachuba Advocates. Additionally, on 13<sup>th</sup> December 2022, the Interested Party filed a Notice of Preliminary Objection dated 9<sup>th</sup> December 2022.

On 13<sup>th</sup> December 2022, the Applicant filed a Further Statement in Response to the Notice of Preliminary Objection and Memorandum of Response by the Interested Party sworn by Njeri Jomo on 13<sup>th</sup> December 2022 together with a Further Statement in Response to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying Affidavit sworn by Njeri Jomo on 13<sup>th</sup> December 2022.

On 13<sup>th</sup> December 2022, the Applicant filed its written submissions dated 13<sup>th</sup> December 2022 together with its List of Authorities dated 13<sup>th</sup> December 2022. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submissions dated 15<sup>th</sup> December 2022 together with their List and Bundle of Authorities dated 15<sup>th</sup> December 2022 on even date. The Interested

Party on 15<sup>th</sup> December 2022 filed its written submissions dated 14<sup>th</sup> December 2022.

### **APPLICANT'S CASE**

The Applicant avers that it participated in the subject tender thus a tenderer and submitted its tender in strict compliance with the terms of the Tender Document, the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the Regulations 2020").

The Applicant avers that vide a notification letter dated 15<sup>th</sup> November 2022 with respect to the subject tender which was initially sent via email on 15<sup>th</sup> November 2022 at 7:09 p.m. and later resent on 18<sup>th</sup> November 2022, it was notified that its tender was unsuccessful having been rendered non-responsive at the Preliminary Examination stage for reasons that *its senior staff 1 had a bachelor of commerce in banking and finance option instead of the required degree in insurance or related field and also had Diploma in Insurance instead of the required advanced diploma in Insurance.*

The Applicant avers that its tender met all the mandatory requirements stipulated in the Tender Document and that the Respondents are in breach of (a) section 79 of the Act and Regulation 74 of Regulations 2020 for finding its tender non-responsive resulting in issuance of the notification letter dated 15<sup>th</sup> November 2022; (b) section 80 (2) of the Act for failing to evaluate its tender in accordance with the procedures and criteria set out

in the Tender Document, particularly Mandatory Requirement No.13 on page 31 of the Tender Document for failing to ensure adherence of the clear evaluation criteria and procedures set out in the Tender Document and introducing an extraneous criteria contrary to the clear criteria set out in the Tender Document; (c) section 86 of the Act for declaring a successful tenderer who was not the lowest priced tenderer hence issuing a notification letter to the wrong tenderer; (d) section 3 by failing to promote transparency and accountability as contained in section 3(a) of the Act which embodies the national values and principles contained in Article 10 (2)(c) of the Constitution for failing to promote fairness, competition, and awarding a tenderer who offered less commercial benefit which goes against the principle of maximization of value for money leading to loss of public funds; (e) Article 227 (1) of the Constitution by failing to ensure the evaluation process was fair, equitable, transparent, and cost effective.

The Applicant avers that the Respondents introduced extraneous requirements which were unfair and prejudicial to it regarding Mandatory Requirement 13 which provided for "*(b) 3 senior staff handling the medical scheme with Degree and Advanced Diploma in Insurance or equivalent – YES/NO – (Mandatory)*". According to the Applicant (a) this requirement called for 3 senior staff handling the medical scheme to have a degree but did not stipulate the nature of the degree required from the senior staff; (b) if the Respondents intended the senior staff to have a Degree in Insurance they would have specifically stated a *Degree in Insurance*; (c)

the "and" that followed the word "Degree" provided for the additional requirements that the senior staff was to have in addition to the Degree; (d) its senior staff referenced in the notification letter, Mr. Mboroki Mwiti Murithi, provided a Bachelor of Commerce Degree (Banking and Finance) from Egerton University; (e) since the Respondents did not specify the nature of the degree that senior staff were to provide, a Bachelor of Commerce Degree ought to suffice as it is a relevant degree for insurance practitioners and; (f) one of the modules offered under the Bachelor of Commerce Degree by Egerton University in year 2 session 1 was an insurance module hence since the nature of degree was not specified, the Degree provided by its senior staff met the mandatory requirements.

According to the Applicant the word "and" immediately after the word "Degree" in Mandatory Requirement No. 13 is used conjunctively to connect the words or phrases and to express the idea that the latter requirements (the phrases that are after the word "and") are to be taken along with the first requirement meaning that the latter requirement of "Advanced Diploma in Insurance or equivalent" was to be taken along with the first requirement i.e. the Degree hence the qualification that the additional requirement of an Advanced Diploma was to be in Insurance was not applicable to the Degree which appeared before the conjunction "and".

The Applicant avers that a plain reading of the reasons provided in the notification letter dated 15<sup>th</sup> November 2022 reveals that the Respondents distorted the requirements in their own Tender Document since the Tender Document did not ask for a Degree in Insurance or related field but only asked for a Degree. Further, that the Tender Document did not cite the Diploma requirement as "Advanced Diploma in Insurance" since the specific criterion in the Tender Document for the Diploma was "Advanced Diploma in Insurance or equivalent".

The Applicant avers that its senior staff met the requirement for a Diploma since he has a Diploma in Insurance from the College of Insurance of Kenya which was an equivalent of an Advanced Diploma in Insurance. The Applicant further avers that (a) most if not all institutions in Kenya that offer Diploma qualifications in Insurance only offer a Diploma in Insurance and not an Advanced Diploma in Insurance; (b) the institution that provides for the qualification of an Advanced Diploma in Insurance is the Chartered Institute of Insurance (CII) which is based in the United Kingdom (UK); (c) the addition of the words "or equivalent" after the phrase "Advanced Diploma in Insurance" in Mandatory Requirement No. 13 on page 31 of the Tender Document is aimed at accommodating alternative qualifications of equal standard, and especially to allow for local equivalents of courses offered in foreign countries; (d) the Diploma in Insurance submitted by its senior staff member from the College of Insurance is a local equivalent of the Advanced Diploma offered by the Chartered Institute of Insurance in the UK; (e) based on information from

the College of Insurance as per its letter dated 24<sup>th</sup> November 2022 and from its website, the said college provides a more affordable and localized alternative to the Advanced Diploma offered by the Chartered Institute of Insurance of the UK which is expensive, out of reach and not well suited for the local insurance industry; (f) since the Tender Document provided for the option of providing an “equivalent” to the Advanced Diploma in Insurance, the Diploma provided by its senior staff from the College of Insurance is an equivalent of the Advanced Diploma offered by the Chartered Institute of Insurance in UK as confirmed by the College of Insurance hence met the requirements of the Tender Document; and (g) it would be unfair and discriminatory to ignore the provisions of the Tender Document that allowed tenderers to provide for an equivalent of the Advanced Diploma by rejecting the local equivalent of a foreign advanced diploma as this would mean that only those with a foreign qualification would be found eligible.

The Applicant avers that it would be instructive to note that the Kenya National Qualifications Authority (KNQA) does not provide for an Advanced Diploma and in terms of diploma qualifications KNQA only provides for KNQF: National Diploma/Master Craft Person III/ Professional Diploma for which the minimum volume of learning is 2400 hours or 240 credits or a minimum of 2 years after level 2 or 120 credits after level 5 (level 5 being a certificate).

It is the Applicant's averments that it risks suffering loss or damage since, it presented very competitive prices (*second lowest priced tender out of the 10 tenders read out at the Tender Opening held on 25<sup>th</sup> October 2022*) and it legitimately stood a good chance of becoming the successful tenderer, if the evaluation of tenders had been undertaken in accordance with the criteria and procedures under the Tender Document and in compliance with the Constitution, the Act and the Regulations.

Consequently, the Applicant prays for the Board's intervention in ensuring that the law is observed by the Respondents by exercising its discretion to ensure that Preliminary Examination of its tender is carried out in accordance with the Tender Document, the Act, the Regulations and the provisions of Article 10 and 227(1) of the Constitution.

### **RESPONDENTS' CASE**

In response, the Respondents contend that Mandatory Requirement No. 13 (b) required the Applicant to provide both a Degree in Insurance and Advance Diploma in Insurance or equivalents of both Degree in Insurance and Advance Diploma in Insurance for the 3 senior staff members, a phrase it considers to be in simple and plain English language with no ambiguity.

The Respondents contend that at the end of the Preliminary Examination stage, it was noted that the Applicant did not provide a Degree in Insurance and Advance Diploma in Insurance or equivalent for one (1) of the key staff members as required by Mandatory Requirement No. 13 (b)

of the Tender Document. The Respondents further contend that contrary to Mandatory Requirement No. 13, for the senior staff member, the Applicant provided a Degree of Bachelor of Commerce (Banking & Finance) from Egerton University and a Diploma in Insurance from the Nairobi College of Insurance. Subsequently, vide letter of notification dated 15<sup>th</sup> November 2022, the Applicant was notified that its tender was unsuccessful.

The Respondents contend that failure to provide any mandatory document or information required under Mandatory Requirement No. 13(b) was an omission and/or deviation and as such, the Applicant materially deviated from the mandatory requirements and could not be determined responsive.

Additionally, the Respondents contend that (a) the allegations that the 2<sup>nd</sup> Respondent used extraneous requirements to disqualify its tender were unsubstantiated, spurious and unfounded; (b) the interpretation by the Applicant of the word "and" between Degree and Advance Diploma as well as the phrase "or" equivalent is skewed, distorted, misleading, and contrary to the cardinal rules of interpretation of words; (c) in ordinary English Language, the use of the word "and" signifies that both conditions are required while "or" signifies that only one condition must be met; (d) the Degree in Bachelor of Commerce (Banking and Finance) provided by the Applicant is not an equivalent of and does not suffice as the Degree in Insurance and the module referred to by the Applicant is not an equivalent

to the Degree in Insurance; (e) the extracts/ screenshots from various websites of College of Insurance, Insurance Institute of East Africa, Chartered Insurance Institute and Kenya National Qualifications Authority as well as letter dated 24<sup>th</sup> November 2022 provided by the Applicant as evidence herein were not part of the Applicant's tender and do not form part of the tender hence the same are foreign materials.

The Respondents contend that the Applicant wants to be given exceptional favoritism and its allegations ought to be rejected since all ten (10) tenderers were evaluated using the same requirement during the Preliminary Examination stage. Having raised issues of interpretation of the requirements touching on Degree and Advance Diploma in Insurance as stipulated in Mandatory Requirement 13(b) of the Tender Document, the Applicant should not benefit from the same by asking for re-evaluation of its tender.

In conclusion, the Respondents contend that the instant Request for Review is unmerited and unfounded and prays for the Board to dismiss the same with costs.

### **INTERESTED PARTY'S CASE**

The Interested Party objects the Request for Review praying for the same to be dismissed with costs *in limine* on the grounds that it is barred and estopped by virtue of the doctrines of acquiescence, laches and exhaustion

in view of Sections 75(2) and 167(1) of the Act, Regulation 203 (2)(c)(i) of Regulations 2020, and Clauses 9.1, 10 and 26.1 of the Tender Document and for being frivolous and vexatious within the meaning of Section 172 of the Act. According to the Interested Party the Applicant became a candidate and aware of alleged defects in Mandatory Requirement 13(b) of the Tender Document on the date that it downloaded the Tender Document and therefore the Board lacks jurisdiction to entertain the Request for Review.

The Interested Party contends that the Request for Review is an omnibus application and offends Section 79, 80(2), 82 and 86 of the Act and Regulations 74 and 203(2)(a) of Regulations 2020 since the Applicant's tender was rendered non-responsive at the Preliminary Examination stage. The Interested Party further contends that the Request for Review is incompetent since the Applicant did not annex any evidence to demonstrate that its tender was subjected to an unfair evaluation criterion or that the Respondents introduced a different evaluation criterion.

The Interested Party contends that Mandatory Requirement No. 13 (b) was clear that both Degree and Advance Diploma were to be in Insurance and the Respondents' award decision was fair, factual and in good faith. The Interested Party contends that the College of Insurance letter dated 24<sup>th</sup> November, 2022 is of no probative and evidential value as the said College of Insurance has no powers to equate the Advanced Diploma in Insurance offered by the Chartered Institute of Insurance, UK to the Diploma in

Insurance offered by the College of Insurance as that is the mandate of the Commission for University Education under Section 5(1)(g) of the Universities Act, 2012. Additionally, that one module in Risk and Insurance was not sufficient to equate the Bachelor of Degree in Banking and Finance to a Degree in Insurance that was required and that the Applicant did not submit with its tender any documentary evidence from either Commission for University Education or the Kenya National Qualifications Authority to demonstrate that the said Bachelor of Commerce in Banking and Finance was equated to a Bachelor's Degree in Insurance.

The Interested Party contends that its tender was the lowest evaluated tender as it was determined responsive, technically qualified and financially acceptable. Accordingly, the Interested Party prays for the Board to dismiss the Request for Review with costs for lacking in merit.

### **APPLICANT'S REJOINDER**

In its rejoinder, the Applicant opposes the preliminary objection raised by the Interested Party and states that the instant Request for Review is not an omnibus and was filed within the statutory timelines provided in the Act and the Regulations raising justiciable issues which touch on relevant provisions of the law and therefore the same is not frivolous and vexatious within the meaning of Section 172 of the Act as alleged.

Further, that since the Request for Review relates to a breach that occurred during evaluation of its tender, it filed the instant Request for Review within the timelines stipulated under section 167 of the Act and

Regulation 203 of Regulations 2020. In support of this, the Applicant avers that (a) contrary to the erroneous statements made by the Interested Party, it has not alleged any defects or ambiguity in Mandatory Requirement No. 13 (b) of the Tender Document; (b) its case is pegged on the extraneous criteria introduced by the Respondents during the evaluation process; (c) the provisions of Section 72 of the Act which relate to modification of tenders are irrelevant since it has not raised any complaints about the contents of Tender Document; (d) the only way the Applicant would have known of the outcome of the evaluation process (including the criteria applied during evaluation) was through the letter of notification issued by the 1<sup>st</sup> Respondent; (e) it was from the notification letter dated 15<sup>th</sup> November 2022 that the Applicant learnt that contrary to the express requirements of the Tender Document, the Evaluation Committee interpreted the requirement of Degree to mean a Degree in Insurance and that they failed to consider the local "equivalent" of the foreign qualification of Advanced Diploma in Insurance; (f) where tenderers are complaining of breaches that occurred during tender evaluation, which breaches can only come to the tenderer's knowledge through notification letters, it would be absurd to find that time should start running when the Tender Document is downloaded or even during the Tender Opening day; and (g) it did not need to seek clarifications or amendment of the Tender Document as claimed by the Interested Party.

The Applicant avers that it only annexed documents that it could legally access in support of its case since most of the documents relating to the

evaluation process are confidential documents and that the documents and other information provided in the Application is for purposes of guiding the Board in making a decision in this matter and not for use by the 2<sup>nd</sup> Respondent's Evaluation Committee. The Applicant further avers that it is aware that modification of tenders cannot be done after the tender has closed and that its tender as submitted at the tender closing date was responsive and did not contain minor or material deviations, reservations, or omissions from the contents of the Tender Document.

On the issue of qualifications and equating or equivalent qualifications, the Applicant avers that (a) the issue of "equivalent" for the Degree requirement does not apply to the requirement for Degree but only in respect of the Diploma. Further the requirement only called for a Degree, meaning any degree, NOT for a Degree in Insurance or equivalent; (b) the Tender Document did not ask tenderers to provide documentary evidence to support the fact that their qualifications are equivalent qualifications as this was the work of the Evaluation Committee; (c) if the Respondents had wanted tenderers to provide documentary evidence to equate their qualifications to any of the requirements in the Tender Document, they would have stated so expressly in the Tender Document. Since there was no such requirement, it was left to the Evaluation Committee to find ways of confirming the equivalents and not disqualify tenderers for not providing requirements that the Tender Document did not include in the criteria; (d) tenderers including the Applicant should not be disqualified for failing to

attach documents which the Tender Document did not require from tenderers. The Tender Document did not specify that tenderers providing an equivalent qualification should attach documents showing why the qualification is an equivalent. Disqualifying a tenderer for failure to provide a requirement that was not part of the criteria is illegal and is a breach of Section 80 (2) of the Act; and (e) the Respondents are not barred from contacting other government agencies, including the Commission for University Education to enable them conduct a fair evaluation process such as helping them in verifying what amounts to an "equivalent" of Advance Diploma in Insurance as provided in the Tender Document. What the Respondents are not allowed to do is to ignore the criteria in their own Tender Document because evaluating "equivalent" qualifications is too onerous for them.

The Applicant avers that its contention is that the Preliminary Examination of its tender was not done in accordance to the provisions of Mandatory Requirement No. 13(b) on page 31 of the Tender Document hence breached the provisions of sections 79 and 80(2) of the Act. In evaluating its tender, the 2<sup>nd</sup> Respondent's Evaluation Committee applied extraneous criteria during evaluation by insisting that the Degree required should be in Insurance despite the fact that the Tender Document did not specify the nature of the Degree. The Evaluation Committee also failed to consider and apply the equivalent qualification to the "Advanced Diploma in Insurance" provided by the Applicant.

The Applicant further avers that the Respondents have an obligation to ensure that the tenderer with the lowest price upon fulfilling the tender requirements is awarded the subject tender and since it offered a very competitive tender, had the Evaluation Committee used the criteria stipulated in the Tender Document in evaluation of the submitted tenders, without applying extrinsic criteria/considerations, it would have resulted in its tender being declared as the lowest evaluated responsive tender.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, together with confidential documents submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

**1. 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 whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

- 2. What is the interpretation of the provisions of MR13 (b) of Section III- Evaluation and Qualification Criteria of the Tender Documentas amended by Addendum No.3 dated 11<sup>th</sup> October 2022 that the 2<sup>nd</sup> Respondent's Evaluation Committee ought to have applied while evaluating and comparing tenders in the subject tender.**
  
- 3. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated and compared tenders in the subject tender with respect to MR13(b) at the Preliminary Examination (Mandatory Requirement) stage in accordance with Section 79 and 80(2) of the Act read with Regulation 74 of Regulations 2020 and Article 227(1) of the Constitution.**
  
- 4. What orders should the Board grant in the circumstances?**

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

The Interested Party objected to the hearing and determination of the instant Request for Review by the Board on what we understand to be failure by the Applicant to move this Board by way of a Request for Review within fourteen days from the date it learnt of the occurrence of the alleged breach by the 2<sup>nd</sup> Respondent. The Interested Party alleges that the Applicant became aware of the defects in Mandatory Requirement No.

13 (b) of Preliminary Examination (Mandatory Requirement) on or about 27<sup>th</sup> September 2022 but inexplicably proceeded to prepare and submit its tender, waited for evaluation and notification of award before lodging the instant Request for Review.

The Interested Party submits that the Applicant is estopped by acquiescence, waiver and the doctrine of exhaustion from complaining after the notification of award since it had three remedies available to it to correct the impugned mandatory requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) during the tendering process. The remedies referred to by the Interested Party are that (a) the Applicant could have requested for clarification from the Respondents before submitting its tender in line with clause 9.1 of Section I- Instructions to Tenderers at page 11 of the Tender Document; (b) the Applicant could have requested for amendment of the Tender Document before submitting its tender in line with provisions of Section 75 of the Act; and (c) the Applicant could have proceeded under Section 167 (1) of the Act and Regulation 203 (1)(2)(c)(i) of Regulations 2020 to file a Request for Review before the subject tender closed, since it was entitled to file the Request for Review within fourteen days for appropriate directions on what it deemed as a deficient mandatory requirement.

On their part, the Respondents in support of the Interested Party's Notice of Preliminary Objection, submits that the Applicant's Request for Review

has been filed out of time since it was filed fourteen days after the Applicant became aware of the alleged breach. The Respondents argue that the Applicant's allegations of breach by the 2<sup>nd</sup> Respondent are centered around Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) which the Applicant deems to be ambiguous, vague and lacked specificity. The Respondents claim that the Applicant became aware of the alleged breach by the 2<sup>nd</sup> Respondent when (a) it obtained or accessed the Tender Document on or after 27<sup>th</sup> September 2022 and; (b) during the opening of the subject tender on 25<sup>th</sup> October 2022 where it was represented.

In opposition to the preliminary objection raised by the Interested Party, the Applicant submits that it is not challenging the contents of the Tender Document nor has it stated that the Tender Document is defective or ambiguous. To support this argument, the Applicant submits that it is challenging the manner in which the 2<sup>nd</sup> Respondent conducted the evaluation exercise by applying an extraneous criterion not provided for in the Tender Document which was a violation of Section 80(2) of the Act. The Applicant contends that a tenderer challenging a breach that occurred during evaluation and being notified through the notification of award letter, like in this case, ought to compute time from the date of receipt of the notification letter. The Applicant submits that (a) the only way it would have known the outcome of the evaluation process was through the letter of Notification of Award dated 15<sup>th</sup> November 2022; (b) the information in the said notification letter was not available to it at any date prior to

receiving the said notification nor was it available during the subject tender opening; and (c) noting that the Request for Review was filed on 29<sup>th</sup> November 2022, its application was filed within fourteen days of notification of award hence not time barred.

It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review noting that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

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."***

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

***"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

***"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

In the case of **Kakuta Maimai Hamisiv 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."*

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

*"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."*

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***“(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 of the Board as:

***“(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 jurisdiction of the Board is provided for under 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 the Board.

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.

The manner in which an aggrieved candidate or 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) ..... [Emphasis by the Board]**

**(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, this request for review is to be in a 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.

Having considered parties' pleadings and submissions on the Preliminary Objection, the issue that calls for determination by this Board is what were the circumstances in the instant case that determine the period when the Applicant ought to have approached the Board?

We have studied the Request for Review and its Statement in Support of the Request for Review dated 29<sup>th</sup> November 2022 and understand the Applicant's contention to be that the Respondents breached Section 80(2) of the Act by failing to evaluate the Applicant's tender in accordance with the procedures and criteria set out in the Tender Document and particularly Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement). The Applicant has stated that it only came to learn of this breach when it was notified in accordance with Section 87 of the Act of its unsuccessfulness in the subject tender vide a notification letter dated 15<sup>th</sup> November 2022 which set out the reason as to why its tender was unsuccessful. According to the Applicant, the 2<sup>nd</sup> Respondent's Evaluation Committee used extraneous criteria to evaluate the Applicant's tender with respect to MR13 (b) at the Preliminary Examination (Mandatory

Requirement) evaluation stage. All parties herein as can be seen from their aforesaid respective cases have provided the Board with what they believe is the interpretation of MR13(b) that is in issue.

From the foregoing, we understand the bone of contention with respect to the Request for Review is on the interpretation of the provisions of MR13(b) and application of such interpretation by the 2<sup>nd</sup> Respondent's Evaluation Committee during evaluation and comparison of tenders at the Preliminary Examination (Mandatory Requirement) evaluation stage.

We have carefully studied the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3)(e) of the Act and note a letter of Notification dated 15<sup>th</sup> November 2022 addressed to the Applicant containing, *inter alia*, the following:

" .....

***We make reference to the above tender and advise that your bid was unsuccessful due to the following reasons;***

<b>No.</b>	<b>Requirement Description</b>	<b>Reason (s) for Non-Responsiveness</b>
<b>1</b>	<b><i>Qualification and experience of key staff</i></b>	<b><i>Senior staff 1 has bachelor of commerce in banking and finance option instead of the required degree in</i></b>

		<p><b><i>insurance or related field and also has Diploma in Insurance instead of the required advanced diploma in Insurance</i></b></p>
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***Further, kindly be advised that the tender was awarded to First Assurance Company Limited at an annual premium of Kshs. 72,212,977.00 inclusive of VAT.***

.....”

We understand the Applicant filed the Request for Review because it is aggrieved by the contents of the letter of Notification dated 15<sup>th</sup> November 2022 because it believes that contrary to what is communicated in the letter of Notification, its staff satisfied the requirements of MR13(b) and which requirements, according to the Applicant, did not require a Degree in Insurance or equivalent and an Advanced Diploma in Insurance or equivalent but rather required a Degree (whose nature was not provided for) and an Advance Diploma in Insurance or equivalent (where no documents were required to prove equivalent of an Advanced Diploma in Insurance).

It is the Board’s considered view that at the point of submitting its tender, the Applicant was cognizant of the mandatory requirements stipulated in the Tender Document as amended by Addendum No.3 dated 11<sup>th</sup> October

2022 and Addendum No.4 dated 12<sup>th</sup> October 2022 and specifically MR13 (b) and did not have a problem with it having understood it to mean that its key staff required to have a Degree (whose nature was not provided for) and an Advance Diploma in Insurance or equivalent (where no documents were required to prove equivalent of an Advanced Diploma in Insurance). To this extent, it is clear to the Board that the Applicant did not have an issue with the provisions and requirements of the Tender Document prior to submitting its tender and was of the belief that in submitting its tender, it had adhered to all the stipulated requirements in Tender Document. It therefore follows, the Applicant could not have filed a Request for Review within 14 days of the time it obtained the Tender Document since it had a legitimate expectation that the 2<sup>nd</sup> Respondent would evaluate its tender using the evaluation criteria stipulated in the Tender Document as understood and interpreted by the Applicant.

It is only after it received the letter of Notification, that the Applicant found out that the interpretation by the 2<sup>nd</sup> Respondent's Evaluation Committee of the provisions of MR13(b) in applying the same when evaluating the Applicant's tender differed from what the Applicant's interpretation of the same was. This is the reason why the Applicant believes the 2<sup>nd</sup> Respondent's Evaluation Committee used extraneous criteria not provided for in the Tender Document to evaluate its tender at the Preliminary Examination (Mandatory Requirement) stage. With this, we are of the considered view that the allegations of breach of the provisions of MR13(b) to the extent of its interpretation and application in evaluating and

comparison of tenders at the Preliminary Examination (Mandatory Evaluation) stage became known to the Applicant when it received the letter of Notification dated 15<sup>th</sup> November 2022 and could not have been known to the Applicant when the Applicant obtained the Tender Document or during the tender submission deadline of 25<sup>th</sup> October 2022.

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 referred to as "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.***

The Applicant alleges that the letter of Notification dated 15<sup>th</sup> November 2022 was sent via email and the initial email which was sent on 15<sup>th</sup> November 2022 at 7:09 p.m. was resent on 18<sup>th</sup> November 2022 since the email address [talk2u@jubileekenya.com](mailto:talk2u@jubileekenya.com) used by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> November 2022 was missing letter "s".

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of its tender, fourteen days started running on 19<sup>th</sup> November 2022 and lapsed on 2<sup>nd</sup> December 2022. The 18<sup>th</sup> November 2022 is excluded pursuant to Section 57(a) of IGPA being the day when the letter of Notification was dispatched by the Respondents, via email, and received by the Applicant, via email. In essence, the Applicant had between 18<sup>th</sup> November 2022 to 2<sup>nd</sup> December 2022 to seek administrative review before the Board. Even if we were persuaded otherwise, which we are not, that the Applicant received the letter of Notification on 15<sup>th</sup> November 2022 as the

Respondents would want us to believe, the Applicant had between 15<sup>th</sup> November 2022 to 29<sup>th</sup> November 2022 having excluded 15<sup>th</sup> November 2022 pursuant to Section 57(a) of IGPA within which to file the Request for Review.

The Applicant filed the Request for Review on 29<sup>th</sup> November 2022, which was within the statutory period of fourteen days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulation 2020 hence properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

Accordingly, we have jurisdiction to hear and determine the Request for Review. Consequently, the Preliminary Objection contained in the Interested Party's Notice of Preliminary Objection dated 9<sup>th</sup> December 2022 and filed on 13<sup>th</sup> December 2022 fails.

We shall now proceed to consider the Request for Review on its merit by determining the remaining substantive issues.

**What is the interpretation of the provisions of MR13 (b) of Section III- Evaluation and Qualification Criteria of the Tender Document as amended by Addendum No.3 dated 11<sup>th</sup> October 2022 that the**

**2<sup>nd</sup> Respondent's Evaluation Committee ought to have applied while evaluating and comparing tenders in the subject tender.**

As aforementioned, the Applicant interpreted the provisions of MR13(b) to mean that key staff are required to have a Degree (whose nature was not provided for) and an Advance Diploma in Insurance or equivalent (where no documents were required to prove an equivalent of an Advance Diploma in Insurance). The Respondents and the Interested Party on their part interpreted the provisions of MR13(b) to mean that key staff are required to have a Degree in Insurance or its equivalent and an Advanced Diploma in Insurance or its equivalent.

The Board has carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender was set out in Section III- Evaluation and Qualification Criteria at pages 28 to 34 of the Tender Document. Clause 2 at page 28 of the Tender Document provided for Preliminary Examination for Determination of Responsiveness and set out the mandatory requirements for Preliminary Examination at page 31 of the Tender Document. These mandatory requirements were later amended by Addendum No. 3 dated 11<sup>th</sup> October 2022 and Addendum No.4 dated 12<sup>th</sup> October 2022 in which case the amendments took precedence over what had earlier been provided in the Tender Document prior to issuance of Addendum No.3 dated 11<sup>th</sup> October 2022 and Addendum No.4 dated 12<sup>th</sup> October 2022. Specifically, MR13 of Preliminary

Examination (Mandatory Requirement) as amended by Addendum No.3 dated 11<sup>th</sup> October 2022 reads as follows:

“

<b>AMENDED EVALUATION CRITERIA</b>		
<b>PRELIMINARY EXAMINATION (MANDATORY REQUIREMENT)</b>		
<b>No.</b>	<b>Description</b>	<b>YES/NO</b>
<b>MR 1</b>	.....	
<b>MR 2</b>	.....	
<b>MR 3</b>	.....	
<b>MR 4</b>	.....	
<b>MR 5</b>	.....	
<b>MR 6</b>	.....	
<b>MR 7</b>	.....	
<b>MR 8</b>	.....	
<b>MR 9</b>	.....	
<b>MR 10</b>	.....	
<b>MR 11</b>	.....	
<b>MR 12</b>	.....	

<b>MR13</b>	<p><b><u>Qualifications and Experience of key staff</u></b></p> <p><b><u>Attach CV's and academic/professional certificates of:</u></b></p> <p><b>a) .....</b></p> <p><b><u>b) 3 senior staff handling the medical scheme with Degree and Advanced Diploma in Insurance or equivalent – YES/NO</u></b></p> <p><b>c) .....</b></p> <p><b>(NB: The attached CV's must be signed by the key staff).</b></p>	
<b>MR 14</b>	.....	

**NOTE:**

- 1. Failure to comply with Mandatory requirements will lead to disqualification. Only bidders who are successful at this stage will proceed to the Technical Evaluation stage.**
- 2. Underwriters who submit two bid documents with different prices will be automatically disqualified."**

The import of the above mandatory requirements of the Tender Document is that tenderers were required to comply with all the 14 mandatory requirements at the Preliminary Examination stage for their respective

tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the fourteen mandatory requirements at the Preliminary Examination, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.

In interpreting the above stated provisions of MR13, we deem it fit to understand the meaning of the words 'and', 'or' and 'equivalent'.

Oxford Dictionary, Eighth Edition defines the word 'and' as a conjunctive used to connect words or parts of a sentence whose simple and plain meaning is (a) in addition to, (b) added. The synonym of the word 'and' is 'plus'. The same Oxford Dictionary defines the word 'or' as disjunctive in that it is used to introduce another possibility while the word 'equivalent' is defined to mean equal in value, amount, meaning, importance etc.

From the foregoing definitions, we note and observe the provisions of MR13(b) has more than one interpretation namely:

- (i) tenderers' are required to have 3 senior staff handling the medical scheme and each of these senior staff should have (a) a Degree and (b) an Advanced Diploma in Insurance or an equivalent of an Advance Diploma in Insurance. These requirements are to be supported by tenderers submitting CV's of their respective

senior staff, duly signed by such key staff, and academic/professional certificates of such key staff; or

- (ii) Tenderers' are required to have 3 senior staff handling the medical scheme and each of these senior staff should have (a) a Degree in Insurance and (b) an Advanced Diploma in Insurance or an equivalent of an Advance Diploma in Insurance. These requirements are to be supported by tenderers submitting CV's of their respective senior staff, duly signed by such key staff, and academic/professional certificates of such key staff; or
- (iii) tenderers' are required to have 3 senior staff handling the medical scheme and each of these senior staff should have (a) a Degree in Insurance or an equivalent of a Degree in Insurance and (b) an Advanced Diploma in Insurance or an equivalent of an Advance Diploma in Insurance. These requirements are to be supported by tenderers submitting CV's of their respective senior staff, duly signed by such key staff, and academic/professional certificates of such key staff.

We note the provisions of MR13(b) did not provide for any documents to be submitted by tenderers to support or prove an equivalent of a Degree, an equivalent of a Degree in Insurance and an equivalent of an Advanced Diploma in Insurance.

To the extent the provisions of MR13 could be interpreted in more than one meaning, like it happened in the case of the Applicant having a different interpretation of the same from that of the Respondents and the Interested Party, we are of the considered view that the provisions of MR13 is ambiguous.

The aforesaid Oxford Dictionary defines the word 'ambiguous' to mean one that can be understood in more than one way; having different meanings.

The question that we are now called upon to answer, is how should a provision of an evaluation criteria of a Tender Document that is ambiguous, for having more than one interpretation, be applied during evaluation and comparison of tenders?

We are alive to the *contra proferentem* rule of interpretation that provides for an ambiguous provision of an instrument to be construed against the drafter of the instrument. In this case, the application of the provisions of MR13 having been found to be ambiguous should be interpreted against the Respondents, who are the drafters of the Tender Document. Put otherwise, the application of the provisions of MR13 having been found to be ambiguous should be interpreted in favour of tenderers.

From the foregoing, we find that the interpretation of the provisions of MR13 (b) of Section III- Evaluation and Qualification Criteria of the Tender Document as amended by Addendum No.3 dated 11<sup>th</sup> October 2022 that the 2<sup>nd</sup> Respondent's Evaluation Committee ought to have applied while evaluating and comparing tenders in the subject tender was ambiguous and should have been interpreted in favour of tenderers and against the Respondents.

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated and compared tenders in the subject tender with respect to MR13(b) at the Preliminary Examination (Mandatory Requirement) stage in accordance with Section 79 and 80(2) of the Act read with Regulation 74 of Regulations 2020 and Article 227(1) of the Constitution.**

The Applicant avers that its tender satisfied all the requirements of the Tender Document and that the Respondents breached Article 227 of the Constitution, Sections 3, 79, 80 (2) & (3), and 86 of the Act for having failed to award it the subject tender. The Respondents contend that the Applicant's tender was rendered non-responsive at the Preliminary Examination stage having failed to meet Mandatory Requirement No.13 (b) of Preliminary Examination (Mandatory Requirement).

The Board is cognizant of Article 227 of the Constitution which requires procurement of goods and services to be undertaken in a system that is

fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework 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) .....**

**b) .....**

**c) ..... and**

**d) ....."**

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

- (1) *The evaluation committee appointed by the accounting officer pursuant to Section 46 of the 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.*
- (3) *The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-*
- (a) *the criteria shall, to the extent possible, be objective and quantifiable;*
- (b) *each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and*
- (4) *.....”*

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

Section 79 of the Act provides for responsiveness of tenders as follows:

- "(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***
- (2) A responsive tender shall not be affected by—***
- (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
- (b) errors or oversights that can be corrected without affecting the substance of the tender.***
- (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."***

From the above provision, a tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. In the case of Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

*"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. 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." [Emphasis ours].*

The Board notes that Regulation 74(1) of Regulations 2020 states that:

***"74. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.[Emphasis by the Board]"***

The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's tender was determined non-responsive at the Preliminary Examination stage for having failed to comply with Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement). Four other tenderers' tenders (namely, G. A Insurance Ltd, Zamara Risk & Insurance Brokers Ltd, Madison General Insurance Kenya Limited and Heritage Insurance Company Ltd) were determined non-responsive for having failed to comply with Mandatory Requirement No.13 (b) of Preliminary Examination while the tender submitted by AAR Insurance Kenya Ltd was determined non responsive for having failed to comply with Mandatory Requirement No.12 and 13(b) of Preliminary Examination.

The Interested Party's tender was determined responsive after the Preliminary Examination stage and proceeded to the Technical Evaluation stage. Three other tenderers' tenders (namely, CIC General Insurance Limited, Liaison Group (Insurance Brokers) Ltd and APA Insurance Limited were determined responsive after the Preliminary Examination stage and proceeded to the Technical Evaluation stage.

Having studied both the Applicant's original tender and the Interested Party's tenders submitted to the Board as part of the confidential documents pursuant to Section 67(3) (e) of the Act in response to the subject tender, we note the following with respect to the evaluation criteria MR13

of Preliminary Examination (Mandatory Requirement) that the 1<sup>st</sup> Respondent's Evaluation Committee found the Applicant's tender non-responsive and the Interested Party's tender responsive.

No.	Mandatory Requirement as indicated in Tender Document and as amended by Addendum No.3 dated 11 <sup>th</sup> October 2022	What the Applicant provided in its original tender with respect to MR13	What the Interested Party provided in its original tender with respect to MR13	Criteria used by the Evaluation Committee with respect to MR13 of Preliminary Examination (Mandatory Requirement) of the Tender Document as captured in the in the Evaluation Report	Outcome of the Applicant's original tender and the Interested Party's tender with respect to MR.13 of Preliminary Examination (Mandatory Requirement) and th outcome of evaluatic as captured in the Evaluation Report	Observation by the Board of the Applicant's and Interested Party's original tenderwith respect to MR.13 of Preliminary Examination (Mandatory Requirement) and th outcome of evaluatic as captured in the Evaluation Report

MR 13	Qualifications and Experience of key staff	Provided for staff one, Mboroki Murithi Mwiti:	Provided for staff one George Ogutu	Qualifications and Experience of key staff	Applicant's tender	The Board notes that the evaluative criteria for MR13 (b) indicated in the Evaluation Report differs from what provided for in the Tender Document as amended by Addendum No.3 dated 11 <sup>th</sup> October 2022 since the Evaluation Committee introduced the requirement of "
	Attach CV's and academic/professional certificates of:	• Certified CV duly signed by the staff at pages 367 to 370	• Certified copy of CV duly signed by the staff at page 462	a).....	• Reason given is that Senior staff 1 has Bachelor of Commerce in Banking and Finance option instead of the required	
	b) 3 senior staff handling the medical scheme with Degree and Advanced Diploma in Insurance or equivalent – YES/NO	• Certified copy of Degree of Bachelor of Commerce (Banking & Finance) certificate from Egerton University at page 371	• Copy of Degree of Bachelor of Commerce (Insurance option) certificate	b) 3 senior staff handling the medical scheme with Degree and Advanced Diploma in Insurance <b>and 5 years'</b>		
	c).....	• Certified copy of a Diploma in Insurance certificate				

<p>(NB: The attached CV's must be signed by the key staff).</p>	<p>from College of Insurance at page 372</p> <p>Provided for staff two, Samuel Munyekenye:</p> <ul style="list-style-type: none"> <li>• Certified CV duly signed by the staff at pages 374 to 378</li> <li>• Certified copy of certificate of an Associate from Insurance Institute of Kenya (IKK) at page 379</li> <li>• Certified copy of Diploma in</li> </ul>	<p>from University of Nairobi at page 464</p> <ul style="list-style-type: none"> <li>• Copy of Degree of Master of Business Administration from University of Nairobi at page 463</li> <li>• Copy of Diploma in Insurance certificate from the</li> </ul>	<p><b><u>experience</u></b></p>	<p>Degree in Insurance or related field and also has Diploma in Insurance instead of the required Advanced Diploma in Insurance.</p> <ul style="list-style-type: none"> <li>• Interested Party's tender determined to have passed Preliminary</li> </ul>	<p>years' experience during evaluation tenders.</p> <ul style="list-style-type: none"> <li>• The Board notes that the Applicant tender was rendered non-responsive on account of the qualifications of staff 1 who had a Bachelor's Degree in Commerce (Banking and Finance) instead of a Degree in Insurance as alluded by the</li> </ul>
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		<p>Insurance certificate from College of Insurance at page 380</p> <ul style="list-style-type: none"> <li>• Certified copy of Degree of Bachelor of Commerce (Insurance option) certificate at page 381</li> </ul> <p>Provided for staff three, Eric Avulala Imbwenya,</p> <ul style="list-style-type: none"> <li>• Certified CV duly signed by the staff at pages 383 to 386</li> </ul>	<p>Chartered Insurance Institute at page 465</p> <p>Provided for staff two, Paul Sewe</p> <ul style="list-style-type: none"> <li>• Certified copy of CV duly signed by the staff at page 466</li> <li>• Copy of Degree of Bachelor of Commerce (Insurance</li> </ul>	<p>Examination and recommendation for Technical Evaluation.</p>	<p>Respondents.</p> <ul style="list-style-type: none"> <li>• The Board notes that none of the Interested Party's senior staff had a Degree in Insurance but rather two senior staff of the Interested Party had obtained Bachelor of Commerce Degree with a specialization/option in Insurance with a third senior staff of the Interested</li> </ul>
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	<ul style="list-style-type: none"> <li>• Certified copy of Degree of Bachelor of Arts certificate from University of Nairobi at page 387</li> <li>• Certified copy of Degree of Master of Business Administration certificate from University of Nairobi at page 388</li> <li>• Certified copy of certificate of an Associate from</li> </ul>	<p>option)certificate at page 469</p> <ul style="list-style-type: none"> <li>• Copies of certificate of award to use the description title of Chartered Insurer and certificate electing one as an associate of the Chartered Insurance Institute and</li> </ul>		<p>Party had a Degree of Bachelor of Education (Science).</p> <ul style="list-style-type: none"> <li>• The Board notes that two senior staff of the Applicant had certificates of Diploma in Insurance.</li> <li>• The Board notes that one senior staff of the Interested Party had a Diploma in Insurance and another one senior</li> </ul>
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		<p>Insurance Institute of Kenya at page 389</p>	<p>entitlement to use the designatory letters ACII at page 467 and 468</p> <p>Provided for staff three, Jane Muthee:</p> <ul style="list-style-type: none"> <li>• Certified copy of CV duly signed by the staff at page 470</li> <li>• Copy of CII Level 6 Advanced</li> </ul>		<p>staff had an Advance Diploma Insurance.</p>
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				Degree of Master of Business Administration certificate from University of Nairobi at page 472				
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From the analysis enumerated in the above table, it is clear to the Board that the Evaluation Committee applied different interpretation of Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) when evaluating the Applicant's tender as compared to the Interested Party's tender. One example (and there are more if the above table analysis is cited) is that the Evaluation Committee disqualified the Applicant's tender on account of one of its senior staff not having a Degree in Insurance because what was submitted was a Bachelor Degree in Commerce (Banking & Finance) yet it did not disqualify the Interested Party's tender for failure of the third senior staff, Jane Muthee, not having a Degree in Insurance but providing a Degree in Bachelor of Education (Science) and a Master of Business Administration. This in our view buttresses our earlier finding that the provisions of MR13 is ambiguous because it connotes more than one meaning when interpreted. Further, the Evaluation Committee introduced a new criterion to MR13(b) requiring 5 years' experience during evaluation and comparison of tenders which was not a criterion made known to tenderers at the time of the subject tender's submission deadline.

In our considered view, the provisions of MR13 (b) was not fairly or equally applied by the Evaluation Committee when evaluating the Applicant's and Interested Party's tenders. We further observe that application of the provisions of MR13 (b) was also not fairly or equally applied to the disqualification of tenders submitted by G.A Insurance Limited, Zamara Risk & Insurance Brokers Limited, AAR Insurance Kenya Limited, Madison

General Insurance Kenya Ltd and Heritage Insurance Company Limited when evaluating and comparing them against the Interested Party's tender at the Preliminary Examination (Mandatory Requirements) stage. We say so because the reasons given for disqualification of the said tenders with respect to the provisions of MR13(b) as captured at page 10 of the Evaluation Report is as follows:

## **"Findings**

**The following bidders were disqualified from further evaluation due to the following reasons:**

### **Bidder no.1 (GA Insurance Ltd)**

#### **Qualification and experience of key staff:**

- Senior staff 3 did not have degree in Insurance neither advanced diploma in Insurance as required.

### **Bidder no.2 (Zamara Risk & Insurance Brokers Ltd)**

#### **• Qualification and experience of key staff:**

- Senior staff 2 has Diploma in Insurance instead of the required advanced diploma in Insurance
- Senior staff 3 has diploma in Insurance instead of the required advanced diploma in Insurance

#### **Bidder no.4 (AAR Insurance Kenya Limited)**

**Provide Comprehensive and current schedule of preferred hospitals and doctors in all the 47 counties**

- **There is no hospital or doctor representation in Tharak Nithi County**

#### **Qualification and experience of key staff:**

- Senior staff 1 has degree in HR instead of Insurance or related field and Diploma in Insurance instead of the required advanced diploma in Insurance
- Senior staff 2 has master in HRM instead of Insurance or related field as required
- Senior staff 3 has diploma in Insurance instead of the required advanced diploma in Insurance

#### **Bidder no.5 (Madison General Insurance Kenya Ltd)**

#### **Qualification and experience of key staff:**

- Senior staff 1 has Diploma in Insurance instead of the required advanced diploma in Insurance
- Senior staff 2 has degree in Education instead of degree in Insurance or related field.

#### **Bidder no.7 (Heritage Insurance Company Kenya Limited)**

**Must submit written and signed confirmation to the effect that they will NOT charge administration processing fees on excess incurred by members before processing discharge.**

- The bidder did not submit a written and signed confirmation to the effect that they will NOT charge administration processing fees on excess incurred by members before processing discharge.”

**From the foregoing, we find the 2<sup>nd</sup> Respondent’s Evaluation Committee evaluated and compared tenders in the subject tender with respect to MR13 (b) at the Preliminary Examination (Mandatory Requirement) stage in an unfair manner contrary to the provisions of Section 79 and 80(2) of the Act read with Regulation 74 of Regulations 2020 and Article 227(1) of the Constitution due to the ambiguous nature of MR13(b).**

**What orders should the Board grant in the circumstances?**

We have found that the Request for Review filed on 29<sup>th</sup> November 2022 was filed within time hence the Applicant properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. We deem it fit to dismiss the Preliminary Objection contained in the Interested Party’s Notice of Preliminary Objection dated 9<sup>th</sup> December 2022 and filed on 13<sup>th</sup> December 2022 for lacking in merit.

We have established that the provisions of Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) as amended by Addendum No.3 dated 11<sup>th</sup> October 2022 is ambiguous and subject to more than one interpretation and/or meaning.

The Board is cognizant of the *doctrine of contra proferentem* rule in interpretation of instruments which provides that if there is ambiguity, a clause or term of such an instrument will be interpreted against the party who is the drafter of the instrument and usually relies on such clause or term of an instrument. This doctrine has been defined by Black's Law Dictionary, 9<sup>th</sup> Edition, at page 377 as:

***"The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter".***

The prerequisite for the applicability of the *doctrine of contra proferentem* is the prevalence of ambiguity as was observed in the case of **Horne Coupar v Velletta & Company 2010 BCSC 483** where the Supreme Court of British Columbia held that ***"ambiguity in a contract is the precondition to apply this doctrine though where the ambiguity is established, the rule is applied directly."***

Similarly, in **Civil Appeal No. 1942 of 2009 Bank of India & Another V K. Mohandas & Others, 2009 (5) SCC 313** where a question arose with

respect to the interpretation of some provisions of the voluntary retirement scheme of 2000 of the Appellant, Justice R.M. Lodha opined that ***"it was the Appellant who ultimately formulated the terms in the Contractual Scheme which stated, "the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995," therefore they bear the risk of lack of clarity, if any."***

Turning to the circumstances of the instant Request for Review, the Tender Document was prepared by the Respondents who subsequently invited sealed tenders from eligible tenderers in response to the subject tender. We have established that Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) as amended by Addendum No. 3 dated 11<sup>th</sup> October 2022 is ambiguous for having more than one interpretations and/or more than one meaning. It therefore follows, the *contra proferentem* rule applies to the circumstances of the instance Request for Review and the ambiguous provisions of MR13 (b) should be construed against the Respondents and in favour of tenderers.

As such, to allow for a level playground for all tenderers and promote the principle of fairness in accordance with Article 227(1) of the Constitution, we deem it fit and just that the provisions of Mandatory Requirement No. 13 (b) of Preliminary Examination (Mandatory Requirement) as amended by Addendum No.13 dated 11<sup>th</sup> October 2022 should not be applied in the

evaluation or comparison of any tenders submitted in response to the subject tender due to its ambiguous nature as already held by the Board. Effectively, any tender that was determined non-responsive at the Preliminary Examination (Mandatory Requirement) stage **on account of having not complied with only Mandatory Requirement No. 13(b) as amended by Addendum No.3 dated 11<sup>th</sup> October 2022 should be admitted to the Technical Evaluation stage.** For avoidance of doubt, a tender that failed to meet any other mandatory requirements at the Preliminary Examination (Mandatory Requirement) in addition to Mandatory Requirement No. 13(b) should not be admitted for evaluation at the Technical Evaluation stage.

The upshot of our decision is that the instant Request for Review succeeds in terms of the following specific orders:

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 29<sup>th</sup> November 2022:

- 1. The Preliminary Objection contained in the Interested Party's Notice of Preliminary Objection dated 9<sup>th</sup> December 2022 and filed on 13<sup>th</sup> December 2022 be and is hereby dismissed.**

- 2. The letter of Notification of Award of Tender No. KEMSA-ONT04-2022/2024 for Provision of Medical Insurance Cover for KEMSA Staff dated 15<sup>th</sup> November 2022 issued for the 1<sup>st</sup> Respondent and addressed to the Interested Party be and is hereby nullified and set aside.**
  
- 3. The letter of Notification of Regret of Tender No. KEMSA-ONT04-2022/2024 for Provision of Medical Insurance Cover for KEMSA Staff dated 15<sup>th</sup> November 2022 issued for the 1<sup>st</sup> Respondent and addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**
  
- 4. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender, together with all other tenders that were determined non responsive at the Preliminary Examination (Mandatory Requirement) stage of evaluation on account of non-compliance with only MR13(b) of Preliminary Examination (Mandatory Requirement) criterion of evaluation as amended by Addendum No.3 dated 11<sup>th</sup> October 2022, to the Technical Evaluation stage and proceed with evaluation of the Applicant's tender together with the aforementioned tenders and all other tenders that were determined eligible to proceed to the Technical**

Evaluation stage by conducting a re-evaluation at the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.

5. Further to Order No. 4, the 1<sup>st</sup> Respondent is hereby ordered, to proceed with the procurement process of Tender No. KEMSA-ONT04-2022/2024 for Provision of Medical Insurance Cover for KEMSA Staff to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.

6. Given the findings herein, each party shall bear its own costs in the Preliminary Objection and in the Request for Review.

Dated at NAIROBI, this 20<sup>th</sup> Day of December 2022.



CHAIRPERSON

PPARB



SECRETARY

PPARB

