

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 3/2023 OF 12<sup>TH</sup> JANUARY 2023**

**BETWEEN**

**HARLEYS LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**MEDCURE HEALTHCARE LTD ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/025/2022-23/MS for Framework Agreement for Supply of Drugs (Supplementary).

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. CPA Isabel Juma   | -Member      |
| 3. Mr. Jackson Awele | -Member      |

## **IN ATTENDANCE**

Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

## **PRESENT BY INVITATION**

### **APPLICANT**

- **HARLEYS LIMITED**

1. Mr. Justus Omollo - Advocate, Sigano & Omollo LLP  
Advocates
2. Ms. Cynthia Bondi - Advocate, Sigano & Omollo LLP  
Advocates
3. Mr. Nishil Haria - Director

### **RESPONDENTS**

- **THE ACCOUNTING OFFICER, KENYA  
PORTS AUTHORITY AND KENYA  
PORTS AUTHORITY**

1. Mr. Amos Cheruiyot - Advocate, Legal Services Department
2. Mr. Daniel Amuyunzu - Manager, Procurement & Contract  
Management

### **INTERESTED PARTY**

- **MEDCURE HEALTHCARE LTD**

1. Ms. B. Kimathi - Advocate, B. Kimathi Advocates

## **OTHER INTERESTED PARTIES**

1. Mr. Iruki Kailemia -Managing Director, ACE  
Pharmaceuticals Ltd
2. Mr. Simon Walioli - Symbio Healthcare Ltd

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

Kenya Ports Authority, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from tenderers who can demonstrate technical and financial capability to supply the goods, works and services of the nature, complexity and size envisaged in Tender No. KPA/025/2022-23/MS for Framework Agreement for Supply of Drugs (Supplementary) (hereinafter referred to as the "subject tender") using an open method of tendering and by way of an advertisement on 1<sup>st</sup> September 2022 on the 2<sup>nd</sup> Respondent's website [www.kpa.co.ke](http://www.kpa.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 25<sup>th</sup> October 2022 at 1000 hrs.

### **Addenda**

The 2<sup>nd</sup> Respondent issued three (3) addenda namely (a) Addendum No. 1 dated 11<sup>th</sup> October 2022 which amended the schedule of requirements to include several additional items (hereinafter referred to as "Addendum No. 1"); (b) Addendum No. 2 dated 17<sup>th</sup> October 2022 which amended the schedule of requirements to include additional items; and (c) Addendum No.

3 dated 21<sup>st</sup> October 2022 which clarified that the number of copies to be submitted shall be an original, one copy of the original and a soft copy in a flash disk and extended the submission deadline for the subject tender to Tuesday, 1<sup>st</sup> November 2022 at 1000hrs.

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

According to the Minutes of the Tender Opening signed by the Chairman of the Tender Opening Committee on 10<sup>th</sup> November 2022 and the members of the Tender Opening Committee on 9<sup>th</sup> November 2022 (hereinafter referred to as "Tender Opening Minutes"). A total of thirty-four (34) tenderers submitted their tenders. The said thirty-four (34) tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

<b>No.</b>	<b>Name of Firm</b>
1.	M/s Medfo Kenya Ltd
2.	M/s. Omaera Pharmaceuticals Ltd
3.	M/s Dolopharma Healthcare Ltd
4.	M/s Pharma Plus
5.	M/s Vincare Consulting Ltd
6.	M/s. Statim Pharmaceuticals Ltd

7.	M/s Symbio Healthcare
8.	M/s Medicure Healthcare
9.	M/s Phillips Healthcare
10.	M/s Medox Pharmaceuticals Ltd
11.	M/s Wessex Pharmaceuticals
12.	M/s Laborex (K) Ltd
13.	M/s Makupa Chemists Ltd
14.	M/s Harleys Ltd
15.	M/s Sai Pharmaceuticals (K) Ltd
16.	M/s Rangechem Pharmaceuticals Ltd
17.	M/s Surgipharm Ltd
18.	M/s Certeris Pharma
19.	M/s Ace Pharmaceuticals Ltd
20.	M/s Galaxy Pharmaceuticals Ltd
21.	M/s Doctor Pharma (K) Ltd
22.	M/s Nila Pharmaceuticals Ltd
23.	M/s Krishna Chemists Ltd
24.	M/s Science scope Ltd
25.	M/s Prunus Pharma Ltd

26.	M/s Syner-Med Pharmaceuticals (K) Ltd
27.	M/s Phillips Therapeutics Ltd
28.	M/s Ceturion Laboratories Ltd
29.	M/s Ripple Pharmaceuticals Ltd
30.	M/s Goodman Agencies Ltd
31.	M/s Dawa Life Sciences
32.	M/s Highridge Pharmaceuticals Ltd
33.	M/s Eastleigh Pharmaceuticals
34.	M/s Surgilinks Ltd

### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent reviewed the minutes of the Tender Opening Committee and noted that during the subject tender's opening, the firm itemized as No. 28 was erroneously read as M/s Ceturion Laboratories whereas the correct name for No. 28 was M/s PSM Pharmaceuticals.

The Evaluation Committee undertook evaluation of the thirty-four (34) tenders as captured in an Evaluation Report signed by the Chairperson and

two members of the Evaluation Committee on 24<sup>th</sup> November 2022 while one member and the Secretary of the Evaluation Committee signed on 28<sup>th</sup> November 2022 (hereinafter referred to as the "Evaluation Report).

At the end of evaluation, eighteen (18) tenders were found to be non-responsive which included the Applicant's tender, while sixteen (16) tenders were found responsive which included the Interested Party's tender which were recommended for award as can be discerned from page 10 of 18 of the Evaluation Report.

The Evaluation Committee observed that a total of one hundred and forty-six drugs were not quoted for as listed under clause 4.1 Drugs Not Quoted at page 6 of 18 to page 9 of 18 of the Evaluation Report.

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

The Evaluation Committee recommended retendering for all the drugs in Clause 4.1 of the Evaluation Report which were not quoted for and award of the subject tender to the sixteen (16) tenderers who met all the requirements to supply drugs to the 2<sup>nd</sup> Respondent as listed at pages 10 of 18 to 18 of 18 of the Evaluation Report.

### **Professional Opinion**

In a Professional Opinion dated 16<sup>th</sup> December 2022 captioned Matters Arising No. 055/2022-23 From: Memo No. 004/2022-23 dated 29<sup>th</sup> July, 2022 and received at the Managing Director's office on even date (hereinafter referred to as the "Professional Opinion"), the Manager, Supply Chain Management (PP & INV), Mr. Johnson N. Gachanja, for the General Manager Supply Chain Management 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.

The award of the subject tender to the sixteen (16) tenderers, at their quoted prices VAT inclusive in Kenya Shillings/USD as contained in the Evaluation Report to be supplied on the basis of as and when required for a period of three (3) years, was approved on 16<sup>th</sup> December 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 22<sup>nd</sup> December 2022 signed for the Ag. Managing Director, Amb. John Mwangemi.

### **REQUEST FOR REVIEW**

On 12<sup>th</sup> January 2023, the Applicant filed a Request for Review dated 11<sup>th</sup> January 2023 together with a Supporting Affidavit sworn by Nishil Haria, its director, dated 11<sup>th</sup> January 2023 through the firm of Sigano & Omollo LLP Advocates, seeking the following orders, verbatim:

- a) ***The notification of award of the subject Tender No. KPA/025/2022-23/MS Framework Agreement for Supply of Drugs (Supplementary) to the undisclosed successful bidders be and is hereby annulled and set aside.***
- b) ***The notification of unsuccessful bid dated 22<sup>nd</sup> December 2022 and delivered via email on 29<sup>th</sup> December 2022 which was addressed to the Applicant in the Tender No. KPA/025/2022-23/MS Framework Agreement for Supply of Drugs (Supplementary) be annulled and set aside.***
- c) ***The procuring entity be and is hereby directed to re-admit the Applicant's bid for technical and financial evaluation in accordance with the criteria contained in the tender document.***
- d) ***Any other relief that the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.***
- e) ***Costs of the Review.***

In a Notification of Appeal and a letter dated 12<sup>th</sup> January 2023, 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, 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 12<sup>th</sup> January 2023.

The Respondents appointed Mr. Turasha J. Kinyanjui Advocates, the 2<sup>nd</sup> Respondent's in-house counsel, to act on their behalf and the said advocate filed on 20<sup>th</sup> January 2023 a Notice of Appointment of Advocates dated 19<sup>th</sup> January 2023, a Memorandum of Response dated 19<sup>th</sup> January 2023 and an Affidavit in Support of the Respondents' Memorandum of Response sworn by Daniel Amuyunzu on 19<sup>th</sup> January 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide letters dated 18<sup>th</sup> January 2023, 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 about the subject tender within 3 days from 18<sup>th</sup> January 2023.

On 19<sup>th</sup> January 2023, Ace Pharmaceuticals Ltd sent an email to the Board in response to the aforesaid Notification of Appeal dated 18<sup>th</sup> January 2023 forwarding a letter dated 18<sup>th</sup> January 2023.

On 20<sup>th</sup> January 2023, the Interested Party filed a Notice of Appointment of Advocates dated 20<sup>th</sup> January 2023, a Memorandum of Response dated 20<sup>th</sup> January 2023, an Affidavit in Support sworn by Isaac Karega, its director, on 20<sup>th</sup> January 2023 and written submissions opposing the Request for Review dated 20<sup>th</sup> January 2023.

On 21<sup>st</sup> January 2023, Doctor Pharma Kenya Ltd sent a letter dated 20<sup>th</sup> January 2023 via email to the Board in response to the aforesaid Notification of Appeal dated 18<sup>th</sup> January 2023 and letter dated 18<sup>th</sup> January 2023.

On 23<sup>rd</sup> January 2023, Phillips Therapeutics Limited sent an email to the Board forwarding a letter dated 23<sup>rd</sup> January 2023 in response to the

aforesaid Notification of Appeal dated 18<sup>th</sup> January 2023 and letter dated 18<sup>th</sup> January 2023.

On 24<sup>th</sup> January 2023, Phillips HealthCare Technologies Limited sent an email to the Board forwarding a letter dated 24<sup>th</sup> January 2023 in response to the Notification of Appeal dated 18<sup>th</sup> January 2023 and letter dated 18<sup>th</sup> January 2023.

Pursuant to the Board's Circular No.02/2022 dated 24<sup>th</sup> March 2020, physical hearings were dispensed with and directions given for all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 20<sup>th</sup> January 2023 Counsel for the Applicant, Mr. Justus Omollo, wrote to the Board Secretary via an email dated 20<sup>th</sup> January 2023 attaching a letter of even date requesting for (a) a physical hearing of the instant Request for Review; (b) the Respondents to avail Mr. Daniel Amuyunzu at the hearing of

the instant Request for Review for purposes of cross-examination on the contents of his Affidavit in Support of the Memorandum of Response with respect to binding of the Applicant's tender; and (c) an opportunity for the Applicant to inspect the its tender submitted to the Board by the Respondents as part of the confidential documents.

On 23<sup>rd</sup> January 2023, Counsel for the Respondents, vide a letter dated 23<sup>rd</sup> January 2023 addressed to the Applicant and copied to the Board and dispatched via email to the Applicant and the Board, opposed the Applicant's request for a physical hearing of the instant Request for Review and for cross examination of Mr. Daniel Amuyunzu on the grounds that (a) the Respondents did not understand the basis of the request since confidential documents pertaining the subject tender had been forwarded to the Board; (b) the Respondents were currently working under the directions given by the Board in Circular No. 02/2020 dated 24<sup>th</sup> March 2020 which enlists the mandatory directions regarding conduct of matters before the Board and as such the Respondents had not planned for travels and accommodation connected to the hearings of procurement matters before the Board and would require the Applicant to meet the costs of a return air ticket to Mombasa for Mr. Daniel Amuyunzu and the Respondent's advocate together with their subsistence and accommodation in Nairobi should a physical hearing take place; and (c) the Respondents did not understand the basis for the request to inspect the Applicant's tender since the said tender was part of the confidential documents submitted to the Board.

Vide a Hearing Notice dated 25<sup>th</sup> January 2023 and a letter dated 25<sup>th</sup> January 2023, the Acting Board Secretary, communicated via email the directions with respect to online hearing of the instant Request for Review to all parties therein and to all tenderers in the subject tender. The said directions required, *inter alia*, (a) all parties in the instant Request for Review to attend, on Monday, 30<sup>th</sup> January 2023 at 12:00 noon, an online hearing of the Request for Review through the link availed in the said letter and the said Hearing Notice; (b) the Applicant to cross examine Mr. Daniel Amuyunzu on the manner in which the Applicant's tender was bound and the Respondents were required to avail Mr. Daniel Amuyunzu at the time and date stipulated for the online hearing in the said Hearing Notice; (c) all parties to comply with stipulated timelines in the Board's Circular No.02/2022 dated 24<sup>th</sup> March 2023 which was communicated to still be in force save for online hearing and filing of supplementary submissions arising from the cross examination of Mr. Daniel Amuyunzu.

The directions required parties to file and serve upon all parties any supplementary submissions arising from the cross examination of Mr. Daniel Amuyunzu by the Applicant and any other person in support of the instant Request for Review application on or before 14:00 hrs on Tuesday, the 31<sup>st</sup> day of January 2023 and on or before 12:00 noon on 1<sup>st</sup> February 2023 by the Respondents and any other person in opposition to the instant Request for Review.

On 31<sup>st</sup> January 2023, the next day after the hearing of the instant Request for Review, the Applicant filed a Supplementary Affidavit sworn by Nishil Haria on 31<sup>st</sup> January 2023.

Vide a letter dated 31<sup>st</sup> January 2023 communicated to the Board via email, the Respondents acknowledged receipt of the Applicant's Supplementary Affidavit under protest. Vide a letter dated 31<sup>st</sup> January 2023 communicated to the Board via email and filed on 1<sup>st</sup> February 2023, the Interested Party acknowledged receipt of the Applicant's Supplementary Affidavit under protest.

On 1<sup>st</sup> February 2023, the Interested Party filed Supplementary Submissions opposing the Request for Review dated 1<sup>st</sup> February 2023.

On 1<sup>st</sup> February 2023, the Respondents filed their written submissions dated 1<sup>st</sup> February 2023.

### **CROSS EXAMINATION OF MR. DANIEL AMUYUNZU BY THE APPLICANT**

During the online hearing on 30<sup>th</sup> January 2023, the Applicant was represented by Mr. Justus Omollo appearing with Ms. Cynthia Bondi on behalf of the firm of Sigano & Omollo LLP, the Respondents were represented by their in-house Counsel, Mr. Amos Cheruiyot, the Interested

Party was represented by Ms. B. Kimathi on behalf of the firm of B. Kimathi Advocates, and ACE Pharmaceuticals was represented by its Managing Director, Mr. Iruki Kailemia.

The Chairperson of the Board directed Ms. Sarah Ayoo, a case officer at the Secretariat of the Board, to display to all parties the Applicant's original tender submitted by the 1<sup>st</sup> Respondent as part of the confidential documents pursuant to section 67 of the Act since Mr. Sigano had placed a request for its inspection. Ms. Ayoo displayed to all parties, through the video camera of the Board's computer HP 24 All-in-One PC Model 24- f0000ne SN#8cc9052J85, the Applicant's original tender from top to bottom, the left part thereof, front, first, second and back page of the Applicant's original tender submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act.

Thereafter, the Chairperson of the Board administered an affirmation on Mr. Daniel Amuyunzu, the 2<sup>nd</sup> Respondent's Manager, Procurement and Contract Management, in accordance with Section 16 of the Oaths and Statutory Declarations Act and thereafter, Mr. Daniel Amuyunzu was led into adopting his Affidavit in Support of the Respondents' Memorandum of Response sworn on 19<sup>th</sup> January 2023 by the Respondents Counsel, Mr. Amos Cheruiyot, while relying on the same as his evidence in the proceedings before the Board with regard to the instant Request for Review. The Applicant's Counsel Mr. Omollo proceeded to cross-examine Mr. Daniel Amuyunzu.

During cross-examination, Mr. Amuyunzu on enquiry by Applicant's Counsel whether he knew or had met a lady by the name Sarah Apolot on 19<sup>th</sup> January 2023 testified that he did not recall a lady by the name Sarah Apolot and that he did not recall meeting her on 19<sup>th</sup> January 2023.

On enquiry by Applicant's Counsel on whether he participated in the procurement proceedings, Mr. Amuyunzu testified that his office requires that he participates during preparation of the Tender Document, participate at review of the Evaluation Report, and preparation of the Professional Opinion. He further testified that he was the deputy of the procurement function at the 2<sup>nd</sup> Respondent's offices but was not a member of the Tender Opening Committee and neither was he present during the subject tender's opening.

On enquiry by Applicant's Counsel on whether he saw that the Applicant's original tender was spiral bound on 1<sup>st</sup> November 2022 during the subject tender's opening, Mr. Amuyunzu testified that he did not see the Applicant's tender on 1<sup>st</sup> November 2022 during the opening of the subject tender but was aware that submitted tenders remained in custody of the 2<sup>nd</sup> Respondent.

Mr. Amuyunzu further testified and affirmed on enquiry by the Applicant's Counsel that the purpose of submitting a firmly bound document was to avoid or avert any mischief. He also testified and affirmed that he was aware

of his confidentiality obligation and that disclosure of confidential information would lead to being barred from holding a public office.

Counsel for the Applicant enquiry on interference of tenders was objected to by Counsel for the Respondents, Mr. Cheruiyot, and the objection was upheld by the Chairperson of the Board. Further, Counsel's enquiry, on whether the standard tender document prepared by the Public Procurement Regulatory Authority, which Mr. Amuyunzu had confirmed to being aware of, provided for tenderers to submit firmly bound tenders, was objected to by Mr. Cheruiyot and the objection was upheld by the Chairperson of the Board.

The Applicant's Counsel proceeded to ask Mr. Amuyunzu whether he sent letters of notification to tenderers with the annexed schedule of successful tenderers and this line of questioning was objected to by the Respondent's Counsel for not being within the issue of binding of Applicant's tender. The Chairperson of the Board upheld the objection. A further objection was upheld when the Applicant's Counsel proceeded to enquire on an email written by the Applicant upon notification for not being within the required line of questioning on binding of the Applicant's original Tender. All the aforementioned objections were upheld on the basis that the line of questioning during cross examination by Mr Omollo was not with respect to the binding of the Applicant's tender.

Upon enquiry by Applicant's Counsel on when he learnt that the Applicant's original tender was spirally bound, Mr. Amuyunzu testified that he learnt of the spiral binding of the Applicant's tender when the Evaluation Committee submitted its report though he could not recall the specific date the report was submitted to him because he did not have access to office documents at his location during the online hearing.

During re-examination by the Respondents' Counsel, Mr. Amuyunzu clarified that his job description was Manager, Procurement and Contract Management at the 2<sup>nd</sup> Respondent's offices and confirmed that in his capacity, he handled procurement matters involving tenders. Mr. Amuyunzu testified that the subject tender required a tenderer to submit an original tender, a copy of their original tender, and soft copy of the original submitted tender saved in a flash disk. He further testified that the Applicant's tender was spiral bound.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

After the close of cross examination of Mr. Daniel Amuyunzu, and during the online hearing, Counsel for the Applicant, Mr. Justus Omollo, fully relied on the Request for Review dated 11<sup>th</sup> January 2023 supported by the Supporting Affidavit sworn by Nishil Haria sworn on 11<sup>th</sup> January 2023 and urged for the same to be allowed as prayed. Mr. Omollo submitted on two grounds of the Request for Review being (a) the Respondents contravened section 87(3) of

the Act by failing to disclose specific and cogent reasons for disqualification of the Applicant's tender and refusing to disclose the specific and cogent reason to the Applicant despite having been requested to expound by the Applicant on the reason given that the Applicant's tender was not firmly bound; and (b) the Respondents breached section 87(3) read with Regulation 82(3) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') by failing to disclose particulars of successful tenderers.

On the first ground, Mr. Omollo submitted that the Respondents breached section 87(3) of the Act by failing to disclose specific reasons for disqualification of the Applicant's tender despite a follow up by the Applicant which was not responded to and that the Applicant only came to learn in these proceedings that its tender was spiral bound yet the Applicant submitted a tender that was book bound, sewn with thread, and duct taped at the left side of its tender. In Counsel's view, a procuring entity ought to ensure safe custody of tenders and that they are not tampered with since any risk of tampering can only be by the procuring entity or its officers and such risk cannot be borne by a tenderer.

Mr. Omollo further submitted that the Applicant's clarification ought to have been addressed within five (5) days as per the Tender Document and the Respondents, as an afterthought stated that the Applicant's tender was spirally bound and this reason was issued as a cover up for the lapse of not

relaying the requested information. As such, Counsel submitted that the Respondent's decision was unfair as the Applicant was disqualified on a flimsy ground.

Mr. Omollo submitted that the question of spiral binding was to be identified during the subject tender's opening yet no evidence was adduced by any of the members of the Tender Opening Committee and that Mr. Daniel Amuyunzu only saw the Applicant's tender down the stream since he is of the view that there is no interaction with submitted tenders when preparing the Professional Opinion.

Mr. Omollo further submitted that the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") has provided a standard Tender Document which does not prohibit a tenderer from submitting a spiral bound document hence for the Respondents to cook their own evaluation criteria, is an attempt to minimize competition.

Mr. Omollo urged the Board to note that the Applicant's tender did not appear as loose and that it was firmly held together in the spiral binding and submitted that this deviation, if at all, was not one that affects the Applicant's tender per provisions of section 79 of the Act.

Upon enquiry by the Board on whether there was any requirement in the Tender Document that tenders be spiral bound as part of the preliminary mandatory requirements and whether the Applicant at any point before submitting its tender raised an issue with the 2<sup>nd</sup> Respondent on the mandatory requirement in the subject tender requiring submitted tenders not to be spiral bound, Mr. Omollo in response submitted that (a) his client didn't challenge the requirement since its tender was book bound ; and (b) Section III-(2)(3) states that bid submission shall be firmly bound and not be loose.

Upon further enquiry by the Board on what the Applicant understood by the term mandatory requirement and whether non-compliance with a mandatory requirement could be termed as a minor deviation, Mr. Omollo submitted that (a) section 79 of the Act contemplates specific circumstances and where a tenderer has met substantive mandatory requirements even though not entirely, such tender is substantially responsive and; (b) this goes to the requirements of the subject tender requiring a tender to be firmly bound with no loose pages and having seen the Applicant's tender, there was no loose page hence the Applicant's tender met the substantive requirement of being firmly bound.

On the second ground, Mr. Omollo submitted that the Applicant was greatly prejudiced by the Respondents' breach of section 87(3) read with Regulation 82(3) of Regulations 2020 by failing to disclose particulars of successful

tenderers since this was the reason why it wasn't able to join interested parties to the Request for Review.

Mr. Omollo submitted that the Act requires an accounting officer to notify both successful and unsuccessful tenderers of intention to enter into a contract and such letter of notification emanates from an accounting officer yet in the subject tender, the email notifying the Applicant of intention to enter into a contract came from one Mkabale who is not the accounting officer of the 2<sup>nd</sup> Respondent despite issuance of notification being an obligation of the 1<sup>st</sup> Respondent.

The Board enquired from Counsel on the reason given in the letter for the Applicant's disqualification and Counsel responded by reading out the letter dated 22<sup>nd</sup> December 2022 addressed to the Applicant by the Respondents and indicated that the Appendix mentioned therein was not attached. Counsel further submitted that the Applicant was left to speculate on whether some pages in its tender were loose since the notification did not state that the Applicant's tender was spiral bound which prompted the Applicant to seek clarification on its disqualification.

### **Respondents Submissions**

In response to the submissions by the Counsel for the Applicant, Counsel for the Respondents, Mr. Amos Cheruiyot, fully relied on the Respondents'

Memorandum of Response dated 19<sup>th</sup> January 2023 and Affidavit in Support of the Respondents' Memorandum of Response sworn by Mr. Daniel Amuyunzu on 19<sup>th</sup> January 2023 together with the confidential documents submitted to the Board pursuant to Section 67 of the Act.

Mr. Cheruiyot submitted that the subject tender's evaluation criteria were specific and that the evaluation criteria at page 37 of the Tender Document as read out by the Applicant's Counsel did require firm binding of tenders but was specific on barring submission of spiral bound or box file tenders hence non-compliance with this requirement cannot be termed as a minor deviation.

Mr. Cheruiyot submitted that section 79(1) of the Act dictates that a responsive tender must conform to all mandatory requirements to determine eligibility and a tenderer who has any issue ought to have sought clarification before close of the subject tender. Mr. Cheruiyot further submitted that the allegations of tampering have not been substantiated and that the Applicant's tender was spiral bound and any form of spiral binding is loose and can easily be tampered with hence the mandatory requirement.

In response to the issue of issuance of the letter of notification of intention to enter into a contract dated 22<sup>nd</sup> December 2022, Counsel submitted that the 1<sup>st</sup> Respondent can delegate this responsibility and proof of such delegation was contained in the confidential file submitted to the Board.

Mr. Cheruiyot submitted that the Tender Opening Committee is different from the Evaluation Committee and each committee operates under different rules. Further, that section 78 of the Act dictates that no tender is to be disqualified at the tender opening. Counsel submitted that the Evaluation Committee observed the law and urged the Board to dismiss the Request for Review.

The Board enquired on whether the tender opening minutes recorded what a tender read out at the opening of tenders comprised of and if it was to be bound in a specific manner. In response, Counsel submitted that there was no record of any specifications of tenders submitted by tenderers as evaluation is strictly done by the Evaluation Committee and in considering that mandatory requirements are part of evaluation, section 78 (7) of the Act provides that no tenderer shall be disqualified by the procuring entity during opening of tenders.

On the question of whether the letter of notification dated 22<sup>nd</sup> December 2022 dispatched to tenderers included the list of successful tenderers and whether the said list provided information on prices of successful tenderers, and reasons why they were successful, Counsel submitted that he was not sure and that the said letters were advanced via email together with the attachment of successful tenderers and that the tender prices were read out during the opening of the subject tender. Counsel failed to clarify when hard copies of the letters of notification were dispatched, if at all.

## **Interested Party's Submissions**

Counsel for the Interested Party, Ms. B. Kimathi submitted that she would rely fully on the Interested Party's Memorandum of Response dated 20<sup>th</sup> January 2023, Affidavit in Support sworn by Isaac Karega on 20<sup>th</sup> January 2023, and written submissions.

## **ACE Pharmaceuticals' Ltd Submissions**

Mr. Iruku Kailemia, the Managing Director of ACE Pharmaceuticals submitted that the issue raised in his email dated 19<sup>th</sup> January 2023 was on his disqualification and reasons given by the 1<sup>st</sup> Respondent on why ACE Pharmaceuticals' tender was rendered non-responsive. On enquiry by the Board on which party he supported, he submitted that he was in support of the Applicant's case since he had also been locked out unfairly and so was the Applicant as demonstrated.

## **Applicant's Rejoinder**

In a rejoinder, Mr. Omollo submitted that the Respondents' Advocate having confirmed that nothing was noted at the opening of tenders pertaining to the Applicant's tender, and on enquiry by the Board on what the Tender Opening Committee is required to note at opening of tenders pursuant to section 78(6) and how the said provision could be reconciled with Counsel's submission on binding of the Applicant's tender, Mr. Omollo conceded that

there was no obligation to note aspect of binding as provided in section 78(6) of the Act.

Mr. Omollo further submitted that the letters of notification of intention to award of contract did not indicate reasons why tenderers were successful, and that it would have been easy for the Tender Opening Committee to note that the Applicant submitted a spiral bound tender and such reason indicated in the Applicant's letter of notification of intention to award contract. Counsel submitted that there was tampering with the Applicant's tender and urged the Board to order investigation on how the Applicant's tender moved from book bound to spiral bound.

Regarding the question of what the Applicant picked out as tampering following display of the Applicant's original tender by Ms. Ayoo, and whether the Applicant saw any traces of its original tender having been tampered with, Mr. Omollo displayed on his screen as a way of example, what he said to be a form of a book bound document and which was bound with tape on the left side and threaded through a row of holes along the left hand edge.

Mr. Omollo attempted to demonstrate to the Board the Applicant's allegation of how its original tender could have been tampered with by removing the duct tape from the left side of the document and claimed that the document had a row of holes in the same format as a spiral bound document and if the thread holding the pages through the row of holes was removed, it would

not be visible and there would be no thread markings and the plastic spiral would be inserted through the row of holes, transforming the document to a spiral bound document. On enquiry by the Board on removal of the duct tape that it was clear that the duct tape came of ripping the left edge of the back page, Mr. Omollo submitted that the front and back pages could not show any duct tape had been removed since they were common and could easily be replaced.

At the conclusion of the online hearing, the Chairperson reiterated the Board's directions on filing of supplementary submissions by parties after the online hearing as communicated in the directions of online hearing dated 25<sup>th</sup> January 2023. The Chairperson re-iterated, following an enquiry by the Respondent's Advocate, Mr. Amos Cheruiyot inquiring what documents were to be filed, that parties would only be allowed to file supplementary submissions and that no pleadings were to be filed.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pursuant to Section 67(3)(e) of the Act and oral submissions of parties and finds that the following issues call for determination.

- 1. Whether the Applicant has substantiated its allegations that its original tender was tampered with by the Respondents;**
- 2. Whether the Applicant's tender satisfied the Mandatory Requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document to proceed for further evaluation at the Tender Evaluation stage;**
- 3. Whether the 1<sup>st</sup> Respondent's Letter of Notification dated 22<sup>nd</sup> December 2022 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020;**
- 4. What orders should the Board grant in the circumstances?**

Before addressing the issues framed for determination, the Board would like to dispense with three preliminary aspects arising from the proceedings before it.

During the online hearing, Mr. Iruki Kailemia on behalf of the 2<sup>nd</sup> Interested Party submitted that his email to the Board dated 19<sup>th</sup> January 2023

concerned the ACE Pharmaceuticals' disqualification. The Board enquired from Mr. Iruki whether or not he was supporting the Request for Review and in response, Mr. Iruki submitted that the reasons given on why ACE Pharmaceuticals' tender was non-responsive were false since ACE Pharmaceuticals' tender provided the required organizational structure and the CV of the registered pharmacist and their request for details of successful tenderers and prices quoted from the Respondents was not honored and this meant the Respondents had something to hide. He further submitted that his issue was on the disqualification of ACE Pharmaceutical's tender since it is evident that the reasons given by the 2<sup>nd</sup> Respondent were false which demonstrates the Respondents were sourcing for reasons to disqualify tenderers.

The Board further notes that the Doctor Pharma Kenya Ltd's letter dated 20<sup>th</sup> January 2020 complained of unfair disqualification of Doctor Pharma Kenya Ltd's tender stating that the reason advanced by the 2<sup>nd</sup> Respondent on why its tender was unsuccessful was that it did not provide the curriculum vitae (CV) of its registered pharmacist with evidence of the professional body despite it having provided the said requirements.

The Board notes that the letter dated 23<sup>rd</sup> January 2023 sent via email dated 24<sup>th</sup> January 2023 to the Board by Phillips Therapeutics Limited in response to the notification of appeal dated 18<sup>th</sup> January 2023 stated that their tender

quotation had not quoted for the items listed in the said notification and had not been awarded any of the listed items.

The Board further notes that the letter dated 24<sup>th</sup> January 2023 sent via email dated 24<sup>th</sup> January 2023 to the Board by Phillips HealthCare Technologies Limited in response to the notification of appeal dated 18<sup>th</sup> January 2023 stated that their tender quotation had not quoted for the items listed in the said notification and had not been awarded any of the listed items.

The Board considered the provision of section 167 (1) of the Act which provides as follows:

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed". [Emphasis ours]***

From the above provision, tenderers such as ACE Pharmaceuticals, Doctor Pharma Kenya Ltd, Phillips Therapeutics Ltd and Philips HealthCare

Technologies Limited that are aggrieved by a decision of a procuring entity on its tender ought to 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 as in such manner as may be prescribed. The manner for seeking such an administrative review is by way of a Request for Review filed with the Review Board Secretary and is prescribed in Regulation 203 (1), (2), (3), & (4) of Regulations 2020 as follows:

***"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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***
  - (b) be accompanied by such statements as the applicant considers necessary in support of its request;***
  - (c) be made within fourteen days of —***
    - (i) the occurrence of the breach complained of, where the request is made before the making of an award;***

- (ii) the notification under section 87 of the Act; or***
- (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***
- (d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.***
- (3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***
- (4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.”***

Regulation 203 of Regulations 2020 guides an aggrieved candidate or tenderer on the applicable Form for filing a Request for Review (i.e. Form set out in the Fourteenth Schedule of Regulations 2020) which is an application that should state the reasons for the complaint, including any alleged breach of the Act or the Regulations 2020. ACE Pharmaceuticals Ltd 's letter dated 19<sup>th</sup> January 2023 complained of the 2<sup>nd</sup> Respondent unfairly evaluating its tender with respect to clause 3 (a)(iii) Tender Evaluation (ITT 34) of Section III- Evaluation and Qualification Criteria at page 37 of the

Tender Document. Additionally, Doctor Pharma Kenya Ltd's letter dated 20<sup>th</sup> January 2023 complains of the 2<sup>nd</sup> Respondent unfairly evaluating its tender with respect to clause 3 (a)(iii) Tender Evaluation (ITT 34) of Section III-Evaluation and Qualification Criteria at page 37 of the Tender Document. Phillips Therapeutics Ltd and Philips HealthCare Technologies Limited communicated that their tender quotation did not include the items in the subject tender and neither were they awarded any of the items in the subject tender referred to in the instant Request for Review. This shows that Ace Pharmaceuticals Ltd and Doctor Pharma Kenya Ltd were introducing a request for review through the backdoor having failed to file a request for review application in the manner prescribed under Regulation 203 of Regulations 2020 in exercise of the right to administrative review under section 167 (1) of the Act and without paying the requisite filing fees for such request for review application.

Had ACE Pharmaceuticals, Doctor Pharma Kenya Ltd, Phillips Therapeutics Ltd and Phillips Technologies Limited lodged a request for review application, perhaps the Board would have exercised its discretion to consolidated the instant Request for Review together with those of ACE Pharmaceuticals, Doctor Pharma Kenya Ltd, Phillips Therapeutics Ltd and Phillips Technologies Limited, once the Board addressed its mind on the question of whether the tender in dispute is the same and whether the procuring entity in all the request for review applications is the same. This discretion is provided for in Regulation 215 of the Regulations 2020 which reads as follows:

***Where two or more requests for review are instituted arising from the same tender or procurement proceedings, the Review Board may consolidate the requests and hear them as if they were one request for review.***

In the absence of any request for review applications filed by ACE Pharmaceuticals, Doctor Pharma Kenya Ltd, Phillips Therapeutics Ltd and Philli[s Technologies Limited, the Board finds that the complains by ACE Pharmaceuticals and Doctor Pharma Kenya Ltd, with respect to the 2<sup>nd</sup> Respondent's decision in the subject tender touching on their disqualification, cannot be entertained by the Board in the instant proceedings for having not been brought before the Board in accordance with Section 167(1) of the Act read with Regulation 203 of Regulations 2020.

Despite the foregoing, the Board makes an observation that ACE Pharmaceuticals in paragraph 2 of its email dated 19<sup>th</sup> January 2023 supports the Applicant's contention raised at paragraph 2 of the Applicant's Request for Review, in that the Respondents breached section 87(3) of the Act read with Regulation 82(3) of the Act by failing to disclose particulars of the successful tenderer(s), and the tender price. ACE Pharmaceuticals also intimated at paragraph 3 of its email dated 19<sup>th</sup> January 2023 that it was not the first time that the 2<sup>nd</sup> Respondent has locked out tenders on flimsy or untrue reasons. Further to this, Doctor Pharma Kenya Ltd at paragraph 4 of its letter dated 20<sup>th</sup> January 2023 contends that the Applicant raises valid

points of concern regarding the manner in which the 2<sup>nd</sup> Respondent conducted the procurement proceedings in the subject tender and alleges that the principle of fairness which has been disregarded by the 2<sup>nd</sup> Respondent requires the whole procurement process be cancelled and commenced afresh with clear, unambiguous instructions to prospective tenderers as to the procurement process. We however note that cancellation of the procurement proceedings in the subject tender was not prayed for by the Applicant and the same cannot be entertained.

The Board finds that the issues raised by the Applicant and supported by ACE Pharmaceuticals Ltd and Doctor Pharma Kenya Ltd will require this Board to determine whether the 2<sup>nd</sup> Respondent complied with the provisions of the Tender Documents, the Act and the Constitution in carrying out its procurement process in the subject tender. Accordingly, the Board shall address them when addressing the substantive issues framed for determination.

Secondly, during and towards the end of online hearing, Counsel for the Respondents, Mr. Cheruiyot, before making his submissions, sought a clarification from the Board on whether parties were granted leave to file supplementary affidavits or supplementary submissions in view of the fact that Mr. Omollo had alluded that the Applicant will file a supplementary affidavit. The Chairperson of the Board made it clear that parties were granted leave to only file supplementary submissions on matters arising from

the cross examination of Mr. Daniel Amuyunzu and emphasized the same when the online hearing came to an end while at the same time directing that no further pleadings were to be filed. This was in tandem with the directions on online hearing dated 25<sup>th</sup> January 2023 issued to all parties.

Contrary to the Board's directions communicated during the online hearing, the Applicant, on 31<sup>st</sup> January 2023 at., filed a Supplementary Affidavit sworn by Nishil Haria on even date and served the same via email. The Respondents on 31<sup>st</sup> January 2023 acknowledged receipt of the same under protest, via email dated 31<sup>st</sup> January 2023 on ground that the Board issued succinct orders that parties were to file only supplementary submissions and that no further pleadings were to be filed. As such, the Respondents contend that they do not have leave to respond to all the allegations made therein and that the Applicant's Supplementary Affidavit should be expunged.

Further to this, the Interested Party on 31<sup>st</sup> January 2023 acknowledged receipt of the Applicant's Supplementary Affidavit under protest, via a letter dated 31<sup>st</sup> January 2023 advanced via email and filed on 1<sup>st</sup> February 2023, on grounds that the Board's directions were clear that the parties were to file supplementary submissions limited to cross-examination and that the Respondents and the Interested Party cannot respond to the Applicant's Supplementary Affidavit and the same can only be expunged from record.

The Board is cognizant of provisions of Article 50(1) of the Constitution on fair hearing with regard to any dispute that has to be resolved in accordance with the law. Article 50 provides as follows:

***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

The Supreme Court of India, in **Indru Ramchand Bharvani & others v Union of India & others, 1988 SCR Supl (1) 544, 555** found that a fair hearing has two justiciable elements namely (a) an opportunity of hearing must be given; and (b) that opportunity must be reasonable. In essence for parties to have a fair hearing, a reasonable opportunity for hearing must be given.

In the instant Request for Review, parties were afforded an opportunity to be heard and directions issued to all parties pertaining to filing of supplementary submissions after the hearing. The Applicant resorted to filing a supplementary affidavit the next day after conclusion of the hearing of the instant Request for Review contrary to the express directions of the Board. This act by the Applicant is akin to filing pleadings after a hearing has been concluded and in defiance of the directions of the Board noting that directions on online hearings dated 25<sup>th</sup> January 2023 given to all parties herein were prescriptive that the timelines stipulated in the Board's Circular

No.02/2020 dated 24<sup>th</sup> March 2020 were to be adhered to by all parties save for filing of supplementary submissions on matters arising from the cross examination of Daniel Amuyunzu. The Respondents and the Interested Party protested, rightfully so, on the filing of the Applicant's Supplementary Affidavit.

We say the protest by the Respondents and Interested Party is justified because, the Applicant's Supplementary Affidavit was filed after the hearing of the instant Request for Review had closed contrary to directions communicated by the Board in the letter dated 25<sup>th</sup> January 2023 and reiterated by the Chairperson of the Board on conclusion of the online hearing on 30<sup>th</sup> January 2023 and without leave of the Board. The Respondents and Interested Party cannot respond to averments made by the Applicant in its Supplementary Affidavit which include, inter alia, averments under paragraph 12 of the Supplementary Affidavit which lists the number of pages comprised of the Applicant's original tender which were not pleaded in the Request for Review.

Consequently, the Applicant's Supplementary Affidavit cannot form part of the records of the instant Request for Review and the Board shall proceed to make a determination on the substantive issues framed for determination in disregard of the Applicant's Supplementary Affidavit sworn by Nishil Haria on 31<sup>st</sup> January 2023 and filed on even date.

The Board notes that during the hearing of the instant Request for Review, Mr. Amuyunzu adopted his Affidavit in Support of the Respondents' Memorandum of Response sworn on 19<sup>th</sup> January 2023. The said affidavit was sworn at Mombasa before Sarah Apolot Advocate and Commissioner for Oaths who signed and stamped and this confirmed the deposition made therein by Mr. Amuyunzu were sworn before her under oath.

During cross-examination, Mr. Amuyunzu conceded to have no knowledge of who Sarah Apolot, Advocate and Commissioner for Oaths was and indicated to the Board that he didn't recall meeting her on 19<sup>th</sup> January 2023 since he attends and interacts with many people at the offices of the 2<sup>nd</sup> Respondent. From the foregoing, the question that needs to be answered is whether the Affidavit in Support of the Respondent's Memorandum of Response sworn by Mr. Amuyunzu was properly commissioned noting that Mr. Amuyunzo conceded to not knowing Sarah Apolot Advocate and Commissioner for Oaths and could not have taken oath before a person he admittedly did not meet on 19<sup>th</sup> January 2023.

The law on commissioning of affidavits is the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which, at section 5, states as follows:

*'Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'*

In essence, any oath or affidavit must be taken or made in the presence of a Commissioner of Oaths who shall honestly state the place and date the oath or affidavit was taken. From Mr. Amuyunzu's testimony, it is evident to the Board that he did not appear before Sarah Apolot on 19<sup>th</sup> January 2023 to swear the Affidavit in Support of the Respondent's Memorandum of Response filed on 20<sup>th</sup> January 2023. As such, the said Affidavit was not properly commissioned and having not been properly commissioned, the depositions therein were not sworn under oath pursuant to section 5 of the Oaths and Statutory Declarations Act.

Having disposed of the above preliminary aspects, the Board now proceeds to address the substantive issues framed for determination in the instant Request for Review.

**Whether the Applicant has substantiated its allegations that its original tender was tampered with by the Respondents.**

The Applicant alleges that its original tender submitted to the Respondents in the subject tender was tampered with by the Respondents since its original tender submitted in the subject tender was properly and firmly bound. The Applicant submitted that its tender was firmly bound by (a) being sewn together using a thread and duct tape on the left edge of the tender and (b) the top part had a clear binding cover and the bottom part had an embossed paper all of which firmly held the said tender. The Applicant further

submitted that its tender was not spiral bound and neither was it submitted in a spring file or box file.

During the online hearing, Ms. Sarah Ayoo on behalf of the Board's Secretary displayed the original copy of the Applicant's tender submitted by the 1<sup>st</sup> Respondent in the confidential file pursuant to section 67(3)(e) of the Act and parties could see that the original tender displayed bore the Applicant's name, address, stamp and signature and was spiral bound.

The Applicant submitted that since the Letter of Notification dated 22<sup>nd</sup> November 2022 indicated that its tender was unsuccessful because it was not firmly bound, it was left to speculate on whether some pages of its tender were loose. The Applicant further submitted that it was during the proceedings of the instant Request for Review and on cross-examination of Mr. Daniel Amuyunzu that it came to learn that its tender was rendered unsuccessful because it was spiral bound and this was an indication that its tender had been tampered with. The Applicant demonstrated to the Board how one could have removed the duct tape on the left side of a copy of a book bound document by removing the duct tape from the left side of the document and claimed that the document had a row of holes in the same format as a spiral bound document and if the thread holding the pages through the row of holes was removed, it would not be visible and there would be no thread markings and the plastic spiral would be inserted through the row of holes, transforming the document to a spiral bound document.

The Applicant further submitted that the front and back pages were easily replaceable and any remains of glue from the duct tape could not be identified since these pages were replaced in the Applicant's original tender.

We note that the Applicant submitted that if at all its tender was spiral bound, (a) the Tender Opening Committee would have made an observation that the Applicant's tender was spiral bound and recorded this in its Tender Opening Minutes; and (b) the Letter of Notification dated 22<sup>nd</sup> December 2022 would have indicated that its tender was not firmly bound because it was spiral bound. In any case, the Applicant contends that from the display of its original tender, nothing appeared loose and the pages were firmly held together.

In response, the Respondents submits that the Applicant's allegation that its original tender was tampered with is far-reaching and uncorroborated by evidence. In support of the Respondents' argument, the Interested Party submitted that the Applicant's allegations that its tender was tampered with are without merit and that the Applicant did not provide any evidence in support of the serious allegations which insinuate that the Respondents have no integrity.

The Board having carefully perused the Applicant's original tender submitted by the Respondents as part of the confidential documents and having considered the Applicant's demonstration speculating how its tender could

have been tampered with observes that the Applicant's original tender bears no evidence of removal of tape or any traces of glue left, from the left edge of the top or bottom cover or the left side of the pages of the Applicant's original tender. The Board further observes that the Applicant's original tender's papers are not ripped, torn, or cut at the spaces where the Applicant alleges the thread that had sewn the tender was removed.

It is the Board's considered view that even if the Applicant's original tender's holes on the left edge of the said tender were similar to those made during spiral binding as submitted by the Counsel for the Applicant, evidence of where the alleged sewn thread rested when passing through such holes would be seen at face value of the said tender if such thread firmly bound the papers of the subject tender together. Further to this, the cardinal rule of evidence is that he who alleges must prove. The Applicant has not availed any evidence in support of its allegations that its original tender as submitted was book bound and not spiral. Such evidence in form of a photograph taken when submitting the Applicant's tender document within the subject tender's submission deadline and a photograph taken by the Applicant's representative at the opening of tenders of the document read out as its tender during the opening of tenders would have gone along way in supporting the Applicants allegation but this was not tendered as evidence.

Having considered the Applicant's submission that the Respondents' Tender Opening Committee ought to have made an observation in the Tender

Opening Minutes that the Applicant's tender was spiral bound, this Board is cognizant of the provisions of section 78 of the Act on opening of tenders and notes that section 78 (6) of the Act provides:

***"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register-***

***(a) the name of the person submitting the tender;***

***(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and***

***(c) if applicable, what has been given as tender security."***

Section 78 (10) of the Act further provides:

***"The Tender opening committee shall prepare tender opening minutes which shall set out-***

***(a) a record of the procedure followed in opening the tender; and***

***(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of tenders."***

Additionally, pursuant to Section 78(7) of the Act a tenderer cannot be disqualified at the opening of tenders. Section 78(7) of the Act reads as follows:

***"(7) No tenderer shall be disqualified by the procuring entity during opening of tenders."***

In essence, Section 78 (6) and (10) of the Act sets out the procedure to be followed by members of a tender opening committee and stipulates that what is to be read out and recorded in a tender opening register is the name of the tenderer, the total price tendered where applicable including any modifications or discounts received before the tender submission deadline unless otherwise prescribed and if applicable what has been given as tender security. Additionally, the tender opening minutes sets out a record of the procedure followed at the opening of tenders and particulars of those persons submitting tenders, or representatives present at the tender opening.

The import of the above provisions is that a Tender Opening Committee is restricted to follow the procedure stipulated in section 78 (6) of the Act during opening of tenders and is required to record in the tender opening minutes the specific requirements set out section 78(10) of the Act. We are of the considered view that if the legislatures intended for a tender opening committee to act otherwise by recording information and observations outside what has been prescribed under section 78 of the Act pertaining to

submitted, then such provisions would have been included under the section 78 of the Act on opening of tenders.

Turning to the circumstances of the instant Request for Review, we have carefully perused the Respondents' Tender Opening Minutes and note that no observations were recorded pertaining to the spiral binding of the Applicant's tender and further note that pursuant to section 78 of the Act, the Respondent's Tender Opening Committee was not under any statutory obligation to read out loud or record in the Tender Opening Minutes observations pertaining to spiral binding of the Applicant's original tender. In absence of any evidence proving that there was tampering of the Applicant's original tender by the Respondents, we are not convinced that the Respondents tampered with the Applicant's original tender document as alleged. The allegations that the Applicant's tender was tampered with by the Respondents is a grave allegation akin to fraud and the standard of proof for fraud is quite high in which the Applicant has failed to discharge.

The Board is guided by the Court of Appeal decision in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** where the court held:

***"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must***

***be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not."***

Further, the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:

***"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is

more than a balance of probability. As such, it is not enough for the Applicant in the instant Request for Review to infer fraud through speculation of how its tender was tampered with by the Respondents. The Applicant is required to make further steps in proving its allegations to the Board.

In the circumstances, we find that the Applicant has not substantiated its allegation that the Respondents tampered with its original tender submitted in the subject tender.

**Whether the Applicant's tender satisfied the Mandatory Requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document to proceed for evaluation at the Tender Evaluation stage;**

We understand the Respondents case on this issue to be that the Applicant's tender did not satisfy the mandatory requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document. The Respondents contend in their Memorandum of Response that the Applicant's tender breached section 79 of the Act read with Article 227(1) of the Act and submitted that the stipulated evaluation criteria was express and specific.

The Applicant submitted that its tender was compliant with the mandatory requirements set out in the Tender Document and the Respondents breached the principles of fairness and competitiveness stipulated in Article 227(1) of the Act. The Applicant further submitted that its tender was firmly bound in compliance with section III (2)(3) of the Tender Document and that the Respondents failed to take account of and give effect to relevant considerations under ITT 28, 29, and 30 of the Tender Document under which the Applicant's tender ought to have been determined to be substantially responsive because the reason cited by the Respondents on why its tender was unsuccessful did not constitute material deviations.

The Board has carefully studied the Tender Document submitted by the 1<sup>st</sup> Respondent as part of the confidential documents pursuant to section 67(3)(e) of the Act and notes that the mandatory requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document provides as follows:

"

***2. Preliminary examination for Determination of Responsiveness***

***1.1 The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory***

*requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.*

***The bid submission***

***1 .....***

***2. ....***

***3. Shall be firmly bound and should not have any loose pages. Spiral binding and files (spring and box) are not acceptable (Mandatory)***

***4. ....***

***5. ....”***

The Board carefully studied the Evaluation Report and observed that upon evaluation, the Applicant’s tender was found to have not been firmly bound as required in under clause 2 (2.1) (3) Preliminary Examination for

Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document as discerned at clause 3.2 (7) at page 3 of 18 of the Evaluation Report.

We have studied the Applicant's original tender submitted by the 1<sup>st</sup> Respondent to the Board which forms part of the confidential documents and note that the mandatory requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document required that (a) a tender should be firmly bound; (b) a tender should not have any loose pages; (c) spiral binding would not be accepted; (d) spring files would not be accepted and (e) box files would not be accepted.

We note that the outcome of evaluation of the Applicant's original tender as captured in the Evaluation Report is that the Applicant's tender was non-responsive having failed to meet mandatory requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document. We further note from the Evaluation Report that other tenderers in the subject tender were rendered non-responsive at the Preliminary Examination and Tender Evaluation stage for having submitted tenders which were not firmly bound as can be discerned at page 3 of 18 to page 4 of 18 of the Evaluation Report and upon perusal of the submitted confidential

documents, the Board observes and confirms that tenders submitted by Medox Pharmaceuticals Ltd and Science Scope Limited were spiral bound.

The Board observes that the Applicant's original tender failed to adhere to the mandatory requirement dictating that spiral binding would not be acceptable since its tender was spiral bound with a plastic spiral coil which was inserted and twisted through small holes punched along the left edge of the tender.

Upon enquiry by the Board on what the Applicant understood by the term mandatory requirement and if a mandatory requirement allows for minor deviation, the Applicant submitted that section 79 of the Act contemplated circumstances where a substantially responsive tender shall not be affected by minor deviations which do not materially depart from the requirements set out in the Tender Documents.

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.” [Emphasis ours]*

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**, relied on by the Respondents in their submissions, the High 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].

Further, in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021]** eKLR Justice E.K. Ogola, held that;

**"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."**  
[Emphasis ours]

Responsiveness serves as an important first hurdle for tenderers to overcome. Section 80(2) of the Act provides for evaluation of tenders as follows:

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."***

Further Section 80(3) provides:

***"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"***

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance therefore, the Evaluation Committee had no option but to find the Applicant's tender non-responsive at the Preliminary Examination and Tender Evaluation stage for having failed to comply with

the mandatory requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document.

It is trite law that a tenderer's failure to meet a mandatory requirement is not excusable as a minor deviation within the meaning of section 79 of the Act. In **PPARB Application No. 115/2020 of BOC Kenya Plc vs Kenyatta National Hospital**, the Board held as follows when addressing a similar issue:

*"From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation."*

To put the foregoing provisions into perspective, the Board takes the liberty to reproduce in extensor the following exposition as rendered by Mativo J (as he then was) in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS security Services Limited [2018] eKLR**. The Learned Judge held:

*"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be*

*regarded as non-responsive and rejected without further consideration. [9] Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.*

***20. 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."***

In the same vein, the Board finds that the Applicant's failed to satisfy the Mandatory Requirement under clause 2 (2.1) (3) Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document to proceed for evaluation at the Tender Evaluation stage.

**Whether the Letter of Notification dated 22<sup>nd</sup> December 2022 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.**

It is the Applicant's case that the Respondent breached section 87 of the Act read with Regulation 82(3) of Regulations 2020 and Article 227 (1) of the Constitution by (a) failing to disclose particulars of successful tenderer(s) in the subject tender; (b) failing to disclose the successful tenderer(s) tender price; (c) failing to disclose reasons why the tenders were successful in accordance with section 86 (1) of the Act;(d) dispatching the letter of notification of intention to award contract through an email address that did not belong to the 1<sup>st</sup> Respondent; and (e) failing to disclose that the specific reason why their tender was disqualified.

The Respondents submit that the letters of notification of intention to award contract in the subject tender issued to the Applicant and all unsuccessful tenderers met the requirements of section 87(3) of the Act and that the Applicant and unsuccessful tenderers were notified of reasons why their tenders were unsuccessful and informed of the successful tenderers and reason why they were successful.

The Board is cognizant of Article 227 of the Constitution which requires the 2<sup>nd</sup> Respondent to have a procurement 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 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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.”***

Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

***"82. Notification of intention to enter into a contract***

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price the successful tenderer was awarded the tender. These reasons and disclosures

are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

The Board having carefully studied the Applicant's Request for Review dated 11<sup>th</sup> January 2023 and Supporting Affidavit sworn by Nishil Haria on even date notes that the Applicant at paragraph 12 of the said Supporting Affidavit annexed and marked as Exhibit " NH-03" an email sent by the Respondents on 29<sup>th</sup> December 2022 to the Applicant's email address [info@harleysltd.com](mailto:info@harleysltd.com) attaching a Letter of Notification of the subject tender dated 22<sup>nd</sup> December 2022, signed for the 1<sup>st</sup> Respondent. The said letter notified the Applicant that the 2<sup>nd</sup> Respondent had reached a decision to award the subject tender to tenderers whose details appeared in an attached schedule marked as Appendix I and informed the Applicant that its tender was not successful because its tender submission was not firmly bound as required under Section III 2(3) of the Tender Document. The said Letter of Notification reads in part:

".....

***You are hereby notified that the Authority has reached a decision to award this tender to the bidders whose details appear in the attached Schedule marked as Appendix I.***

***Further, we wish to inform you that Pursuant to section 87(3) of the Public Procurement & Asset Disposal Act, 2015, your bid was not successful because your bid submission of the firm was not firmly bound as required in Section III 2(3) of the tender document.***

***.....”***

In response to the Letter of Notification as evidenced by the Applicant’s email dated 4<sup>th</sup> January 2023 and marked as “NH-03”, the Applicant acknowledged receipt of the Letter of Notification dated 22<sup>nd</sup> December 2022 and informed the Respondents that the referred schedule indicating details of successful tenderers in the subject tender marked as Exhibit 1 was not attached and requested to be supplied with the same. The said email reads as follows:

***”.....***

***Good morning.***

***We have received the notification letter.***

***It is indicated on the letter "The Authority has awarded this Tender to the bidders whose details appear in the attached schedule marked as Appendix 1."***

***However, the schedule was not attached, kindly share the list of successful bidders.***

***We also request that you expound more on the reason for our unsuccessful bid as mentioned it was not firmly bound.***

.....//

The Board has perused the confidential documents submitted to it pursuant to section 67(3)(e) of the Act and notes that the Letter of Notification dated 22<sup>nd</sup> December 2022 addressed to the Applicant had an attached Schedule marked as Appendix 1 which listed (a) the names of successful tenderers in the subject tender (b) Item Code (c) Name of Molecule; and (d) Remarks on amount in Kenya Shillings being the tender price. The Board further notes that there is no evidence from the submitted confidential documents that the hard copy of the Letter of Notification dated 22<sup>nd</sup> December 2022 addressed to the Applicant was dispatched either by post, hand delivery, or collected by the Applicant at the 2<sup>nd</sup> Respondent's offices. Nor is there any evidence from the submitted confidential documents proving that the 1<sup>st</sup> Respondent made an approval in writing which was properly dated, documented and filed pursuant to section 69(1) of the Act approving signing of the letters of notification dated 22<sup>nd</sup> December 2022 on his behalf.

Further to this, having carefully studied the Respondent's pleadings and oral submissions, we note that the Respondents have not adduced evidence in support of their allegation that the attached Appendix 1 listing successful tenderers and their tender price was sent on 29<sup>th</sup> December 2022 to the Applicant via email together with the Letter of Notification dated 22<sup>nd</sup> December 2022 or that the hard copy of the Letter of Notification dated 22<sup>nd</sup>

December 2023 together with the attached Appendix 1 seen in the confidential documents was dispatched and received by the Applicant.

Upon enquiry by the Board on when the hard copies of the Letters of Notification dated 22<sup>nd</sup> December 2022 were dispatched to the Applicant and unsuccessful tenderers, Counsel for the Respondents informed the Board that he was not sure when hard copies of the said letters were dispatched.

The rules of evidence require he who alleges must prove as provided for in Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

***"107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."***

The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response***

***to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”***

In the instant Request for Review the evidential burden of proof shifted to the Respondents to prove that indeed the Applicant received the Letter of Notification dated 22<sup>nd</sup> December 2022 together with the attached schedule marked as Appendix 1 referred to in the said letter and reasons as to why the tenderers were successful in the subject tender since the Applicant had discharged its legal burden of proof by providing an email it sent to the Respondents informing them that the Appendix 1 referred in the said letter had not been attached thereto. The Respondents have not discharged this evidentiary burden by providing evidence proving if and when the Applicant received the complete Letter of Notification dated 22<sup>nd</sup> December 2022 together with the attached Schedule of successful tenderers, their tender prices marked as Appendix 1, and reasons why the said tenderers were successful in accordance with section 86 of the Act and as provided in section 87(3) of the Act read with Regulation 82(3) of Regulations 2020. The Board notes that the letters of notification of intention to award contract in the subject tender were signed on behalf of the 1<sup>st</sup> Respondent by an unidentified individual. The Respondents have not availed as part of the confidential documents submitted to the Board a written approval by the 1<sup>st</sup> Respondent evidencing that the 1<sup>st</sup> Respondent delegated the role of signing

of the letters of notification addressed and sent out to tenderers in the subject tender on his behalf .

The Board having noted that there is no evidence of dispatch to and receipt by the Applicant of the complete Letter of Notification dated 22<sup>nd</sup> December 2022 together with the attached Schedule of successful tenderers, their tender prices marked as Appendix 1, reasons why the said tenderers were successful, and an approval in writing by the 1<sup>st</sup> Respondent delegating the role of signing of the Letters of Notification dated 22<sup>nd</sup> December 2022 is of the considered view that all the notification letters issued by the 1<sup>st</sup> Respondent do not satisfy the threshold of section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 for failure to disclose successful tenderer(s) in the subject tender, the successful tenderer(s) tender price, and reasons why the tenderer(s) were successful in the subject tender.

In the circumstances, the Board finds the Letter of Notification dated 22<sup>nd</sup> December 2022 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

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

We have found that the notification letters dated 22<sup>nd</sup> December 2022 failed to disclose the successful tenderers in the subject tender, the successful tenderers' tender price, and the reasons why the successful tenderers were

successful in the subject tender. Consequently, the Board deems it fit to nullify the Letters of Notification of Intention to Award Contract in the subject tender issued to all successful tenderers and unsuccessful tenderers dated 22<sup>nd</sup> December 2022, to enable all tenderers be notified of the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of regulations 2020.

The upshot of our findings is that the instant Request for Review dated 11<sup>th</sup> January 2023 and filed on 12<sup>th</sup> January 2023 succeeds only to the extent that the Letter of Notification dated 22<sup>nd</sup> December 2022 issued to the Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

### **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 11<sup>th</sup> January 2023 and filed on 12<sup>th</sup> January 2023:

- 1. The Letters of Notification of Intention to Award Contract to the successful tenderers dated 22<sup>nd</sup> December 2022 with respect to Tender No. KPA/025/2022-23/MS for Framework Agreement for Supply of Drugs (Supplementary), be and are hereby nullified and set aside.**

2. **The Letters of Notification of Intention to Award Contract to the Applicant and other unsuccessful tenderers dated 22<sup>nd</sup> December 2022 with respect to Tender No. KPA/025/2022-23/MS for Framework Agreement for Supply of Drugs (Supplementary), be and are hereby nullified and set aside.**
  
3. **The 1<sup>st</sup> Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KPA/025/2022-23/MS for Framework Agreement for Supply of Drugs (Supplementary) in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof taking into consideration the Board's findings herein.**
  
4. **Given our findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 2<sup>nd</sup> Day of February 2023.**

  
.....

**CHAIRPERSON**

**PPARB**

  
.....

**SECRETARY**

**PPARB**

