

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 22/2023 OF 11TH APRIL 2023

BETWEEN

JUBILEE HEALTH INSURANCE LIMITED APPLICANT

AND

AG. DIRECTOR GENERAL,

KENYA WILDLIFE SERVICE 1ST RESPONDENT

KENYA WILDLIFE SERVICE 2ND RESPONDENT

BRITAM GENERAL INSURANCE

COMPANY (K) LTD INTERESTED PARTY

Review against the decision of the Ag. Director General, Kenya Wildlife Service in relation to Tender No. KWS/ONT/HRA/038/2022-2023 for Provision of Comprehensive Group Medical Insurance Cover (Board and Staff) (Policies For Year-2023/2024, 2024/2025)

BOARD MEMBERS PRESENT

- | | | |
|----------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Mr. Jackson Awele | - | Member |
| 3. Dr. Paul Jilani | - | Member |

IN ATTENDANCE

Ms. Sarah Ayoo

- Secretariat

PRESENT BY INVITATION

APPLICANT

JUBILEE HEALTH INSURANCE LIMITED

Mr. Benson Nzakyo

-Advocate, Musyoki Benson & Associates
Advocates

RESPONDENTS

AG. DIRECTOR GENERAL, KENYA WILDLIFE SERVICE AND KENYA WILDLIFE SERVICE

1. Mr. Edward Momanyi

- Advocate

2. Ms. Esther Andisi

- Legal Officer, Kenya Wildlife Service

INTERESTED PARTY

BRITAM GENERAL INSURANCE COMPANY (K) LTD

Mr. Nyamumbo

-Advocate, ROM LAW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Wildlife Service, the Procuring Entity and who is the 2nd Respondent herein, through its Ag. Director General, the 1st Respondent herein, invited sealed tenders from interested and eligible candidates in response to KWS/ONT/HRA/038/2022-2023 for Provision of Comprehensive Group Medical Insurance Cover (Board and Staff) (Policies For Year-2023/2024, 2024/2025) (hereinafter referred to as the "subject tender") using an open national tendering method. The invitation was by way of an advertisement in MyGov Newspaper on 21st February 2023 and the blank tender document for the subject tender issued to candidates by the Respondents (hereinafter referred to as the 'Tender Document') was available for download from the 2nd Respondent's website www.kws.go.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke). The subject tender's submission deadline was scheduled for Thursday, 9th March 2023 at 11.00 a.m.

Addendum

The 1st Respondent issued Addendum No.1 dated 28th February 2023 which revised Section III-Evaluation and Qualification Criteria and Section V-Schedule of Requirements of the Tender Document.

Submission of Tenders and Tender Opening

According to the Minutes of the subject tender held on 9th March 2023 signed by members of the Tender Opening Committee on 9th March 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender

Opening Minutes were furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenderers submitted their tenders in response to the subject tender. The said eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session and were recorded as having been submitted by the following tenderers at the tender submission deadline:

No.	Name of Tenderer
1.	GA Insurance Ltd
2.	APA Insurance Ltd
3.	Jubilee Health Insurance Ltd
4.	AAR Insurance Kenya Ltd
5.	First Assurance Company Ltd
6.	CIC General Insurance Ltd
7.	Old Mutual General Insurance Ltd
8.	Britam General Insurance Company (K) Ltd

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the eight (8) tenders as captured in a Tender Evaluation Report and Recommendation for Award of Contract for the subject tender signed by

members of the Evaluation Committee on 27th March 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondents pursuant to Section 67(3)(e) of the Act), in the following stages:

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

Mandatory Requirements and Evaluation

The Evaluation Committee was required to carry out preliminary evaluation using the criteria provided under Clause 1. Stage One Mandatory Requirements for the Insurance Service Provider of Section III – Evaluation and Qualification Criteria at page 35 to 38 of the Tender Document read with Addendum No. 1 dated 28th February 2023. Tenders needed to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

At the end of evaluation at this stage, two (2) tenders were determined non-responsive while six (6) tenders including the Applicant's tender and the Interested Party's tender were determined responsive. The six (6) tenders that were determined responsive proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2. Stage Two:

Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 38 to 44 of the Tender Document read with Addendum No. 1 dated 28th February 2023. Tenders needed to attain a minimum pass mark of 80% to proceed to Financial Evaluation.

At the end of evaluation at this stage, all the six (6) tenders that were determined responsive at the Mandatory Requirements and Evaluation stage, which included the Applicant's tender and the Interested Party's tender, scored above the minimum pass mark, thus proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3. Stage Three: Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 44 of the Tender Document. A comparison of the evaluated costs was to be conducted at this stage to determine the tender that had the lowest evaluated cost.

At the end of evaluation at this stage, the Interested Party's tender was ranked number 1 and was determined to have the lowest evaluated cost of Kshs.505,000,005.00.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party as the lowest responsive evaluated tenderer at a total cost of Kshs.505,000,005.00 (Kenya Shillings Five Hundred and Five Million Five Shillings) only.

The Evaluation Committee did not subject the Interested Party to post qualification on the basis that the Interested Party submitted certified financial statements and is a regulated firm in the insurance industry. This can be discerned at page 20 of 21 of the Evaluation Report.

Professional Opinion

In a Professional Opinion dated 27th March 2023 (hereinafter referred to as the "Professional Opinion"), the Deputy Director-Supply Chain Management, Mr. George M. Wambua, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. Mr. Wambua opined that the award price/tender amount was within indicative market prices as guided by the budget amount and known market rate within the insurance industry. He thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

Thereafter, Dr. Erustus Kanga, approved the award of the subject tender to the Interested Party on 28th March 2023 by signing, dating and writing by hand the word 'Approved' at the comments section reserved for the Director General's decision at page 4 of 4 of the Professional Opinion. The duly approved Professional Opinion was furnished to the Board by the Respondents as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 28th March 2023.

REQUEST FOR REVIEW NO. 22 OF 2023

On 11th April 2023, Jubilee Health Insurance Limited, the Applicant herein, filed a Request for Review No.22 of 2023 dated 11th April 2023 together with a Supporting Affidavit sworn on 11th April 2023 by Beth Njeri Jomo, the Applicant's Chief Executive Office/Principal Officer, with respect to the subject tender (hereinafter referred to as the 'Request for Review') seeking the following orders:

- a) The notification of award of the subject Tender No. ITT No_KWS/ONT/HRA/038/2022-2023 MS PROVISION OF COMPREHENSIVE GROUP MEDICAL INSURANCE COVER FOR KWS STAFF AND BOARD MEMBERS; POLICIES FOR THE YEAR***

2023/2024, 2024/2025 to Britam General Insurance Company (K) Limited be and is hereby annulled and set aside.

b) The notification of intention to award dated 28th March 2023 and delivered which was addressed to the Applicant in the Tender No. ITT No_KWS/ONT/HRA/038/2022-2023 MS PROVISION OF COMPREHENSIVE GROUP MEDICAL INSURANCE COVER FOR KWS STAFF AND BOARD MEMBERS; POLICIES FOR THE YEAR 2023/2024, 2024/2025 be annulled and the tender be awarded to the Applicant.

c) A declaration that the action by the Procuring Entity's Evaluation committee to modify, change and/or alter the bid price by Britam General Insurance (K) Ltd during and/or after the tender opening was irregular, illegal, unlawful and therefore null and void.

d) A declaration that Britam General Insurance Company (K) Limited be and is hereby barred from participating in future tenders involving the procuring entity.

e) Any other relief the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.

f) Costs of the Review.

In a Notification of Appeal and a letter dated 11th April 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd Respondents of the filing of the instant 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 11th April 2023.

On 17th April 2023, in opposition to the Request for Review, the Interested Party through the firm of ROM Law Advocates LLP filed a Notice of Appointment of Advocates dated 16th April 2023, an Interested Party's Response to Request for Review dated 16th April 2023 (hereinafter referred to as "the Interested Party's Response") and Interested Party's List & Bundle of Documents dated 16th April 2023.

On 18th April 2023, in opposition to the Request for Review, the Respondents, through the 2nd Respondent's Legal Officer, Esther Andisi, filed a 1st and 2nd Respondents' Response to Request for Review dated 16th April 2023 (hereinafter referred to as "the Respondents' Response") together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 18th April 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 18th April 2023.

AAR Insurance (K) Limited vide a letter dated 18th April 2023 and addressed to the Ag. Board Secretary indicated, *inter alia*, that the notification of intention to award the subject tender to the Interested Party was Kshs.5 million higher than the premium quoted at the time of tender opening.

Vide a Hearing Notice dated 18th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 26th April 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

On 26th April 2023 when the instant Request for Review came for hearing for the first time, Counsel for the Applicant applied for an adjournment on the basis that he was not aware of that the matter was coming up for hearing and the Applicant wished to file a Further Affidavit together with its written submissions. Even though the application for adjournment was opposed by Counsel for the Respondents and the Interested Party, the Board nevertheless, allowed the same and granted leave for the Applicant to file and serve on all parties with its Further Affidavit and written Submissions on or before 17:00hrs on 26th April 2023 and to pay the adjournment fees of Kshs.10,000.00 before the next hearing. The Board equally directed the Respondents and Interested Party to file and serve their Written Submissions by 12:00noon on 27th April 2023, if they wished to do so. The hearing of the instant Request for Review was stood over to 28th April 2023 at 12:00noon.

On 26th April 2023, the Applicant filed a Further Affidavit sworn on 24th April 2023 by Beth Njeri Jomo, its Chief Executive Officer/Principal Officer (hereinafter referred to as the 'Applicant's Further Affidavit') and bound to the Applicant's Further Affidavit was a Supplementary Affidavit sworn on 24th April 2023 by Eddy Khavakali and Teresa Ndungu, who deponed therein that they were Applicant's employees, and a Supplementary Affidavit sworn on 24th April 2023 by Collins Adhaya, who deponed therein to be an official representative of OLD Mutual General Insurance Ltd. The Applicant also filed the Applicant's Submissions dated 26th April 2023.

Vide a Hearing Notice dated 26th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 28th April 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

AAR Insurance (K) Limited Vide a letter dated 27th April 2023 and addressed to the Ag. Board Secretary once again indicated, *inter alia*, that the notification of intention to award the subject tender to the Interested Party was Kshs.5 million higher than the premium quoted at the time of tender opening.

The Respondents filed Respondents Skeleton Submissions dated 27th April 2023. The Interested Party did not file any written submissions.

First Assurance Company Limited, vide an email dated 28th April 2023 addressed to the Board's Secretariat, indicated the figures for each tenderer it wrote down at the tender opening.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Benson Nzakyo, commenced by submitting that he will only deal with a singular issue on

whether the provision of Section 82 of the Act was breached by the Procuring Entity during the tendering process.

Mr. Nzakyo submitted that the Applicant had demonstrated beyond doubt via two (2) affidavits sworn on 24th April 2023 by Eddy Khavakali and Teresa Ndungu and another affidavit sworn on 24th April 2023 by Collins Andaya who were present during the tender opening that there were discrepancies on the read out tender price for the Interested Party as opposed to the indicated tender price in the Notification of Intention To Award. According to the Applicant, the responses filed by other parties did not dispute the affidavits sworn by the aforementioned three (3) people who attended the tender opening on 9th March 2023.

Mr. Nzakyo submitted that there was a discrepancy in the modification of the tender price allegedly submitted by the Interested Party. He submitted that the Applicant had also seen a letter written by AAR Insurance company limited dated 27th April 2023, which supported the Applicant's contention that the figures which were clearly written tallied with the one the Applicant gave in support of the instant Request for Review. According to the Applicant, there was a difference in what the Respondents and Interested Party averred before the Board and what was indicated at the tender opening. It was Mr. Nzakyo's submission that this was proof that there was collusion between the Procuring Entity and the Interested Party and that there was open bias and gross irregularity on the part of the Procuring Entity in favour of the Interested Party in the subject tender.

Mr. Nzakyo reiterated that Section 82 of the Act and Clause 26 of the Tender Document provides for the procedure to be used in case there is need for a modification of the tender or alteration of a bid price. He submitted that the tender sum which was read out at the tender opening according to the law was absolute and final and should not be subjected to any modification by any entity including the Procuring Entity. According to Mr. Nzakyo, the law was never followed in effecting the modification of the bid price tendered by the Interested Party in accordance with Section 52 of the Act.

It was Mr. Nzakyo's submission that Section 98 of the Act gives the Board a wide range of powers to check whether the Procuring Entity followed the laid down procedure in procurement process. He submitted that there were flaws in the process and prayed for the Board to nullify the process which led to the award of the subject tender to the Interested Party.

Mr. Nzakyo submitted that the 1st and 2nd Respondents in their submissions referred to some table of contents which the Applicant was not aware of and that the Applicant was prejudiced because it was unable to reply conclusively on the same thus the Applicant was in disagreement as it did not have those table of contents or those documents.

Respondents' submissions

Counsel for the Respondents, Mr. Edward Momanyi, relied on the 1st and 2nd Respondents' Response and the 1st and 2nd Respondents' Skeleton Submissions in opposition to the Request for Review.

Mr. Momanyi submitted that the Procuring Entity together with the 1st Respondent complied with Sections 68(3)(d), 78(8), 83(3) and 92 of the Act. He submitted that the subject tender was an open tender where eight (8) tenderers submitted their tenders on 9th March 2023 at the Procuring Entity's quarters. Pursuant to the provisions of Clause 26 the Tender Document which provides for tender opening, the Procuring Entity opened tenders and read out the tender price of the tenderers' tenders at the specified time and date where the tenderers representatives were present. According to the Respondents, the amount read at tender opening are in the tender opening minutes and the tender price of the Interested Party was Kshs.505,000,005.00. It was Mr. Momanyi's submission that the same amount was in the Tender Opening Minutes and is the same amount before the Board as can be discerned from the confidential documents. Mr. Momanyi submitted that the Tender Opening Minutes were signed by the representative of the Interested Party one Mr. Rufus Kirimi, two representatives from CIC, two representatives from AAR and three representatives from the Applicant.

Mr. Momanyi submitted that the affidavits sworn by Mr. Collins Andaya, Eddy Kavakali and Teresa Ndungu and the purported evidence set out in the said affidavits was unacceptable as there was no evidence presented before the Board in support of the inference being made. According to Mr. Momanyi, the said affidavits border on what he referred to as misleading evidence and falsehood being sworn before judicial proceedings and that they border on

Section 114 of the Penal Code that illegalises them as misdemeanour or perjury.

Mr. Momanyi submitted that during the preliminary evaluation, two tenderers were unsuccessful being AAR Insurance Company & First Assurance Company Ltd, yet part of the documents that the Applicant is relying on is a letter by AAR Insurance who was an unsuccessful tenderer that not only failed at the preliminary stage but could not proceed to the technical stage. Six tenderers proceeded to the technical evaluation and all of them were successful. At the financial evaluation, all six tenderers were evaluated and the Interested Party was successful at Kshs.505,000,005.00. Mr. Momanyi submitted that the same figure the Applicant is contesting is evident from the preliminary, technical and financial stage and it is in the evaluation report which has been submitted before the Board and which was above board and the successful tenderer was the lowest evaluated tenderer.

The Legal Officer of the 2nd Respondent, Ms. Esther Andisi, submitted that Article 227 (1) of the Constitution provides for a fair, competitive, transparent and equitable process whereas Clause 37.5 (i) of the Tender Document provides for abnormally low tender. She submitted that the process was fair, equitable and transparent and in line with Section 83(1) of the Act. Ms. Andisi submitted that the Evaluation Committee recommended the lowest evaluated tenderer, the Interested Party herein. Further, that Section 84 of the Act on professional opinion was relied on and shows the Interested Party also met the market rate.

Ms. Andisi submitted that with respect to Clause 37.5 of the Tender Document, the onus of establishing abnormally low tenders rests with the Evaluation Committee. The professional opinion having noted that the tender price was within the market rate confirmed that there was no breach of Clause 37.5 of the Tender Document. Ms. Andisi took issue with the Applicant having knowledge of the Procuring Entity's budget of Kshs.520,000,00.00 which was confidential information as per the Act, demanding that the Applicant provides evidence on the knowledge of the budget. In totality, Ms. Andisi submitted that the procurement process was above board and in line with Article 227 of the Constitution.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Nyamumbo, relied on the Interested Party's Response and associated himself with both the 1st and 2nd Respondents' Response and the 1st and 2nd Respondents' oral submissions and written skeleton submissions.

Mr. Nyamumbo submitted that the tender amount submitted by the Interested Party was Kshs.505,000,005.00 and the same had not been changed as can be discerned from confidential documents being the Interested Party's tender document and the Tender Opening Minutes. According to Mr. Nyamumbo, the Applicant's agents were not paying attention when the sum was being read out. It was Mr. Nyamumbo that the allegation of amendment of the Interested Party's tender had been made in bad faith and was a calculated attempt to deny the Interested Party an award which was competitive.

Mr. Nyamumbo submitted that the Respondents did not breach Sections 68(3)(d), (3) & 78(8) of the Act and Clause 26(9) of the Tender Document. He submitted that Section 64(1) of the Act provides for all communication to be in writing but the affidavits sworn by representatives of tenderers relied upon by the Applicant did not provide a written document where they requested for the Tender Opening Minutes, thus any such request was contra statute. Section 64(2) of the Act allows for ICT to be used to disseminate information and the 2nd Respondent uploaded the information that the Applicant sought on the 2nd Respondent's website so the Applicant cannot now state that it had been denied this information.

Mr. Nyamumbo submitted that the Applicant had through collusion procured confidential information in regards to the Procuring Entity's budget which information was not available to other tenderers and which was tantamount to committing an offence as provided for in Section 66 of the Act. On this, Mr. Nyamumbo prayed for the Board to bar the Applicant from participating in future tenders involving the 2nd Respondent and to dismiss the Request for Review with costs for lacking in merit.

Applicant's Rejoinder

In a rejoinder, counsel for the Applicant, Mr. Benson Nzakyo, submitted that the Applicant had supplied enough information to the Board which raised reasonable doubt on the tender process and raised doubt on the tender prices read out during the tender opening. Mr. Nzakyo submitted that the annexed two (2) affidavits which clearly demonstrated the tender's prices

were read out during the tender opening before everyone were not the same as what the Respondents and Interested Party were alluding to. The said affidavits had not been challenged, apart from the submissions being made before the Board, nothing had been presented to reiterate the same.

Mr. Nzakyo submitted that there were two (2) witnesses, that is, Mr. Collins Andaya and the letter forwarded to the Board by one of the tenderers that is AAR Insurance Company Limited which shows there were discrepancies in the tender opening on the tender price. According to Mr. Nzakyo, there was no further proof needed because the two (2) affidavits submitted, met the threshold of admissibility and were sworn, unless there was sworn evidence to the contrary.

Mr. Nzakyo reiterated that it is only the Applicant who did not have a copy of the Tender Opening Minutes and for Mr Nyamumbo to refer to the Tender Opening Minutes, it seems the Interested Party was supplied with the same but the Applicant was denied.

BOARD'S DECISION

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

- 1. Whether the Respondents breached Clauses 26.9 & 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) & (11) of the Act for failing to provide the Applicant with a copy of a summary of the proceedings of the opening of tenders, a copy of the tender opening register and a copy of the signed tender opening minutes?**

- 2. Whether the Respondents unlawfully amended and/or modified the Interested Party's tender sum from Kshs.500,000,005.00 to Kshs.505,000,005.00 in breach of Clauses 26.4, 26.6, 32.1 & 32.3 of the Tender Document and Section 82 of the Act;**

- 3. Whether the Respondents acted unfairly and in breach of Clause 37.5(i) of the Tender Document and Article 227(1) of the Constitution by disqualifying the Applicant's tender;**

- 4. What orders should the Board grant in the circumstances?**

Whether the Respondents breached Clauses 26.9 & 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) & (11) of the Act for failing to provide the Applicant with a copy of a summary of the proceedings of the opening of tenders, a copy of the tender opening register and a copy of the signed tender opening minutes?

We understand the Applicant's allegation to be that it requested from the Respondents for a copy of the summary of proceedings of the opening of tenders, the tender opening register and the signed tender opening minutes with respect to the opening of tenders in the subject tender that took place on 9th March 2023 but the Respondents did not provide it with the same. With this, the Applicant alleges that the Respondents breached Clauses 26.9 and 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) & (11) of the Act.

On their part, the Respondents denied breaching Clauses 26.9 and 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) & (11) of the Act and instead contended that minutes of the tender opening which they also refer to as the summary of the proceedings of the opening of tenders were prepared and posted on the 2nd Respondent's website on 9th March 2023 pursuant to Clause 7.5 of the Tender Document.

The Interested Party, through its counsel, submitted during the hearing of the instant Request for Review that Section 64(1) of the Act provides for all communication to be in writing but the Applicant had failed to provide evidence of requesting for the summary of proceedings of opening of tenders and the tender opening register, in writing, thus any other mode of request made by the Applicant was contra-statute. Further, the Interested Party submitted that Section 64(2) of the Act allows for the use of Information and Communication Technology to disseminate information which the 2nd

Respondent used by uploading the information that the Applicant sought on the 2nd Respondent's website. With this, the Interested Party submitted that the Applicant cannot now allege that it had been denied this information.

Clause 26.9 of Section I – Instructions To Tenderers at page 21 of the Tender Document reads as follows:-

"The Tenderers' representatives who are present shall be requested to sign the record. The omission of a Tenderer's signature on the record shall not invalidate the contents and effect of the record. A copy of the tender opening register shall be issued to a tenderer upon request." [Emphasis by the Board]

Clause 44.3 of Section I – Instructions To Tenderers at page 29 of the Tender Document reads as follows-

"The Procuring Entity shall prepare minutes of negotiations that are signed by the Procuring Entity and the Tenderers' authorized representative."

Section 64 of the Act on form of communication reads as follows-

"(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing.

(2) Information and Communication Technologies (ICT) may be used in procurement and asset disposal proceedings as prescribed with respect to-

(a) publication of notices;

- (b) submission and opening of tenders;**
- (c) tender evaluation;**
- (d) requesting for information on the tender or disposal process;**
- (e) dissemination of laws, regulations and directives;**
- (f) digital signatures; or**
- (g) as may be prescribed by regulations.”** [Emphasis by the Board]

Section 68(2)(d)(iii) of the Act on the records of procurement should be read with Section 67(1), (3) and (4) of the Act on confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law.

Section 67 of the Act on confidentiality reads as follows -

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;**
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;**
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or**
- (d) The contents of tenders, proposals or quotations.**

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.”[Emphasis by the Board]

Section 78(5), (6), (8), (10) & (11) of the Act on opening of tenders reads as follows-

"(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) 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.

(7)

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9)

(10) The tender opening committee shall prepare tender opening minutes which shall set out-

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

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

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall-

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.” [Emphasis by the Board]

Our interpretation of the aforementioned provisions of the Tender Document and the Act is as outlined hereinafter.

First, a person submitting a tender is entitled to be furnished with a copy of a tender opening register by an accounting officer of a procuring entity. However, this entitlement only crystalizes when such a person submitting a tender makes a request to be furnished with a copy of the tender opening register. Noting that all communications and enquiries between parties on procurement proceedings must be in writing, it follows that a person submitting a tender must request an accounting officer, in writing, to be furnished with a copy of the tender opening register.

Second, a tender opening committee prepares tender opening minutes which each member of the tender opening committee initials on each page of the minutes and append his or her signature to the final page of the minutes. There is no express provision of the Act that entitles a candidate, a tenderer or an applicant seeking a review by the Board to be furnished with the tender opening minutes by a procuring entity.

Third, a summary of the proceedings of the opening of tenders, *inter alia*, are records of procurement which can be disclosed by a procuring entity to an applicant seeking administrative review of procurement proceedings by the Board. This means that a candidate or tenderer (a person submitting a tender), unless he or she has filed a request for review before the Board, he or she is not entitled to disclosure by the procuring entity of a summary of the proceedings of the opening of tenders.

Fourth, information and communication technologies (ICT) may be used in procurement proceedings. This refers to all communication technologies, including the internet, wireless networks, computers, software, middleware et cetera.

Fifth, Clause 44.3 of the Tender Document provides for preparation of minutes of negotiations by the Procuring Entity and the signing of the minutes of negotiations by the Procuring Entity and the Tenderers'

authorized representatives. To this end, this clause has no bearing on the tender opening minutes.

Turning to the circumstances of the instant Request for Review, the Applicant was represented by Eddy Khavakali and Teresa Ndungu during the opening of tenders on 9th March 2023 as can be discerned in the Bidder Listing Form dated 9th March 2023, which forms part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act. The said Eddy Khavakali and Teresa Ndungu are captured therein as having signed the Bidder Listing Form dated 9th March 2023 under number 6 and 7 respectively. The said Bidders Listing Form captured details of a tenderer's representative at the opening of tenders, the name of a tenderer, the mobile number of a tenderer's representative, the email of a tenderer's representative and the signature of a tenderer's representative.

We note that Eddy Khavakali is also captured as having further signed the Tender Opening Listing Form dated 9th March 2023 as the Applicant's representative. This Tender Opening Listing Form captured details of each tenderers' name, number of pages of each tender submitted, bid bond and its respective issuer for each tender submitted and the total price of each tender submitted on the first and second page thereof. The third page, and which was the last page, of the Tender Opening Listing Form captured the names of each of the five members of the Tender Opening Committee

together with their respective designation and signatures appended therein. This last page also captured only four of the tenderers' representatives in attendance during the opening of tenders, their respective tenderer's name, mobile telephone numbers and signatures. This Tender Opening Listing Form seems to have captured all the details required to be captured in a tender opening register.

We observe, as part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act, that the Tender Opening Minutes were prepared capturing the procedure followed in opening of the tenders on 9th March 2023 and the particulars of persons submitting tenders. Further, the Tender Opening Minutes were initialed on each page by the each member of the Tender Opening Committee who also appended their signature to the final page of the minutes.

We note that the Applicant did not exhibit any evidence confirming that it requested the Respondents, in writing, to be furnished with a copy of the tender opening register pursuant to Section 78(8) read with Section 64(1) of the Act. In the absence of such a request in writing, the Applicant was not entitled to be furnished with a tender opening register.

We also note that the Applicant did not exhibit any evidence confirming that upon filing the instant Request for Review, as an applicant seeking a review, it sought disclosure from the Respondents of a summary of the proceedings

of the opening of tenders and that the Respondents declined to make such disclosure. Notably, at Clause 1 of the Applicant's Request for Review, one can decipher that the Applicant might have sought from the Respondents, a copy of a summary of the proceedings of the opening of tenders before filing the instant Request for Review. This being the case, the Applicant was not entitled to disclosure by the Respondents of the summary of the proceedings of the opening of tenders because the Applicant, prior to filing the instant Request for Review, was not an applicant seeking a review before the Board as required under Section 67(4) read with Section 68(2)(d)(iii) of the Act.

The Applicant did not exhibit any evidence confirming that it requested the Respondents, in writing, to be furnished with a copy of Tender Opening Minutes. We note the Applicant was not automatically entitled to a copy of the Tender Opening Minutes. There is no express provision of the Act requiring the Respondents to furnish the Applicant with a copy of the Tender Opening Minutes. What the Act provides is for the Respondents to disclose to the Applicant, upon filing a request for review, a summary of the proceedings of opening of tenders. We interpret this to mean that the Respondents, could only disclose a summary of the Tender Opening Minutes to the Applicant, upon the Applicant filing the instant Request for Review.

The Board is cognizant of the holding by the High Court in **Misc. Civil Application 60 of 2020 Republic v Public Procurement Administrative Review Board & another; Premier Verification**

Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR with regard to provisions of section 67(3)(e) of the Act where it held that:

"....."

63. The applicant was at all material times aware of the case mounted by the Respondent and the Interested Party having been served with their pleadings. The applicant was ably represented by an advocate. The applicant is carefully selectively citing the provisions of the law and avoiding subsection (3) cited above which entitled him to request for the information. He never invoked the said provision Having failed to utilize such a clear provision of the law, the applicant cannot now turn around to blame the Board....."

From the foregoing, the Applicant cannot allege that the Respondents breached Clauses 26.9 and 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) &(11) of the Act when it failed to demonstrate that it requested the Respondents, in writing, to furnish it with the tender opening register and that it also, while as an applicant seeking a review before the Board, sought for disclosure by the Respondents of a summary of the proceedings of the opening of tenders. In any event, the Respondents contended that the minutes of the tender opening which they also refer to as the summary of the proceedings of the opening of tenders were prepared

and posted on the 2nd Respondent's website on 9th March 2023 and which contention, the Applicant did not controvert.

In the circumstances, we find that the Respondents **did not** breach Clauses 26.9 & 44.3 of the Tender Document and Sections 68(2)(d)(iii) and 78(8), (10) & (11) of the Act.

Whether the Respondents unlawfully amended and/or modified the Interested Party's tender sum from Kshs.500,000,005.00 to Kshs.505,000,005.00 in breach of Clauses 26.4, 26.6, 32.1 & 32.3 of the Tender Document and Section 82 of the Act?

We understand the Applicant's allegation to be that the Interested Party's tender sum read during opening of tenders on 9th March 2023 was Kshs.500,000,005.00 and not Kshs.505,000,005.00 that the Interested Party was determined to be the successful tenderer. With this, the Applicant alleges that the Respondents fraudulently and illegally exaggerated the Interested Party's tender sum by an extra Kshs.5,000,000.00 which in effect amended and/or modified the Interested Party's tender sum from kshs.500,000,005.00 to Kshs.505,000,005.00 thus breaching clauses 26.4, 26.6, 32.1 & 32.3 of the Tender Document and Section 82 of the Act. To support this allegation, the Applicant in its Further Affidavit alleged that its official representatives at the opening of tenders, Teresa Ndungu and Eddy Khavakali, recorded the Interested Party's tender sum read out at the opening of tenders as Kshs.500,000,005.00. Eddy Khavakali and Teresa

Ndungu swore a Supplementary Affidavit dated 24th April 2023 wherein they deponed to being employees of the Applicant who were present at the opening of tenders on 9th March 2023 and that the Interested Party's tender sum that was read out at the opening of tenders was Kshs.500,000,005.00. Further, the Applicant filed another Supplementary Affidavit sworn on 24th April 2023 by Collins Adhaya who deponed that he was the representative of Old Mutual General Insurance Ltd at the opening of tenders on 9th March 2023 and the figure that was read out as the Interested Party's tender sum was Kshs.500,000,005.00.

On their part, the Respondents denied amending or modifying the Interested Party's tender sum and contended that the Interested Party's tender sum read out at the opening of tenders on 9th March 2023 was Kshs.505,000,005.00 as can be discerned from the tender opening register and which tender sum is the same as the one provided in the Interested Party's tender. According to the Respondents, the Interested Party was awarded the subject tender at Kshs.505,000,005.00 which was the amount provided in the Interested Party's tender.

According to the Interested Party, it provided a tender sum of Kshs.505,000,005.00 as can be discerned in its tender. The Interested Party denies that its tender sum was changed and alleges that the Applicant's representatives were not attentive during opening of tenders.

Clause 26.4 and 26.6 of Section I – Instructions To Tenderers at page 20 of the Tender Document on opening of tenders read as follows-

"26.4 *Next, envelopes marked "MODIFICATION" shall be opened and read out with the corresponding Tender. No Tender modification shall be permitted unless the corresponding modification notice contains a valid authorization to request the modification and is read out at Tender opening.*

26.5

26.6 *Only Tenders, alternative Tenders and discounts that are opened and read out at Tender opening shall be considered further. The Form of Tender and the priced Activity Schedule are to be initialed by representatives of the Procuring Entity attending Tender opening in the manner specified in the TDS."*

Clause 32.1 and 32.3 of Section I – Instructions To Tenderers at page 23 of the Tender Document on arithmetic errors read as follows-

"32.1 *The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.*

32.2

32.3 *Tenderers shall be notified of any error detected in their bid during the notification of award.*

Section 82 of the Act on correction, revision, adjustment or amendment of tender provides as follows-

- "(1) *Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.***
- (2) *For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.*"**

Our interpretation of the aforementioned provisions of the Tender Document and the Act is as outlined hereinafter.

First, a tender modification is only permitted where there is a corresponding modification notice that contains a valid authorization requesting the modification at tender opening. Second, the tenderers' forms of tender and priced schedules were to be initialed by the Tender Opening Committee. Third, the tender sum as submitted by a tenderer in its form of tender and read out by the Tender Opening Committee at the opening of tenders was absolute and final and not subject to correction, adjustment or amendment

other than in instances where the method of tendering is direct procurement (Section 103 of the Act), competitive negotiations (Section 131 of the Act) and framework contracting and multiple awards (Section 141 of the Act).

We have carefully studied the confidential documents submitted to us by the Respondents pursuant to Section 67(3)(e) of the Act and note from the Bidder's Listing Form dated 9th March 2023, the Applicant was represented by Eddy Khavakali and Teresa Ndungu at the opening of tenders who actually completed the Bidder Listing Form by jotting down their names, the company/tenderer they represent, their respective telephone numbers, their respective email addresses and signing the Bidder Listing Form. This form did not contain any details of what was read out as tenderers' tender sums at the opening of tenders on 9th March 2023.

In a Tender Opening Listing Form dated 9th March 2023 that captured all that is required to be captured in a tender opening register, Eddy Khavakali is noted as the representative of the Applicant. At the third page, which is also the last page of the Tender Opening Listing Form, Eddy Khavakali is noted to have indicated her name as the representative of the Applicant, jotted down a telephone number and signed the Tender Opening Listing Form. This form which can be equated to a tender opening register, contained, *inter alia*, tenderers' tender sum and the Interested Party's tender sum was captured as Kshs.505,000,005.00.

We have also noted from the Tender Opening Minutes dated and signed by the Tender Opening Committee on 9th March 2023 indicates that the tender amount recorded at the opening of tenders with respect to the Interested Party was Kshs.505,000,005.00.

Finally, we have studied the Interested Party's tender (original tender submitted to the Respondents in response to the subject tender) and note the Interested Party provided its duly filled Form of Tender and Price Schedule from page 305 to 315 of its tender. At page 307 of its tender, the Interested Party provided an amount of Kshs.505,000,005.00 as its total tender price per annum for the subject tender. We note that the Interested Party's tender is intact from the face value and there are no indications that the same was tampered with. The Interested Party's tender sum of Kshs.505,000,005.00 in its Form of Tender is not filled by hand but is typed with no traces of being tampered with.

Given the foregoing, there is consistency in every written document that the Interested Party's tender sum was Kshs.505,000,005.00 and not Kshs.500,000,005.00 as alleged by the Applicant.

Is there a possibility that a member of the Tender Opening Committee read out a wrong tender sum with respect to the Interested Party at the opening of tenders? This is a possibility. To err is human. In circumstances where such a mistake occurs, the documents to be relied upon would be the tender

opening minutes, the tender register and the tenderer's original tender submitted in response to a tender.

Turning to the circumstances of the instant Request for Review, we have established that the Tender Opening Minutes, the tender register (Tender Opening Listing Form) and the Interested Party's Form of Tender all had the Interested Party's tender sum indicated as Kshs.505,000,005.00 and not Kshs.500,000,005.00. In the absence of proof of unlawful amendment and/or modification of the Interested Party's tender sum, we are not convinced that the Respondents unlawfully or even lawfully amended and/or modified the Interested Party's tender sum.

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:

"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 view of the above, it is our considered view that the Applicant has failed to discharge the evidential burden by providing evidence proving that the Respondents unlawfully or even lawfully amended and/or modified the Interested Party’s tender sum.

In the circumstances, we find that the Respondents **did not**, whether unlawfully or lawfully, amend and/or modified the Interested Party’s tender sum and thus the Respondents **did not** breach Clauses 26.4, 26.6, 32.1 & 32.3 of the Tender Document and Section 82 of the Act.

Whether the Respondents acted unfairly and in breach of Clause 37.5(i) of the Tender Document and Article 227(1) of the Constitution by disqualifying the Applicant’s tender?

The Applicant alleges that it provided a tender sum of Kshs.505,100,203.00 against the 2nd Respondent’s budget of Kshs.520,000,000.00 for the subject tender. It is the Applicant’s allegation that the reason for disqualification of

its tender being *"your bid offer was higher than the recommended bidder's"* was not fair and was in breach of Clause 37.5 of the Tender Document and Article 227(1) of the Constitution. Further, that the reasons given for disqualification of the Applicant's tender were vague thus lacking in transparency required under Article 227(1) of the Constitution.

On their part, the Respondents contend that the Applicant's tender passed the Preliminary Mandatory Evaluation stage and Technical Evaluation stage thus proceeded for evaluation at the Financial Evaluation stage together with five (5) other tenderers' tenders including the Interested Party's tender. At the Financial Evaluation stage, the tenders were ranked based on the evaluated tender sum and the Applicant's tender (whose tender sum was Kshs.505,100,203.00) was ranked second, out of six tenders, after the Interested Party's tender (whose tender sum was Kshs.505,000,005.00) which was ranked first. It is on this basis that the Interested Party having provided the tender with the lowest evaluated responsive price was recommended for award of the subject tender as opposed to the Applicant.

It is the Interested Party's position that it was awarded the subject tender for being the lowest responsive evaluated tenderer at a total cost of Kshs.505,000,005.00.

Clause 37.5(i) of Section I – Instructions To Tenderers at page 26 of the Tender Document reads as follows:

"In case of an abnormally high price, the Procuring Entity shall make a survey of the market prices, check if the estimated cost of the contract is correct and review the tender Documents to check if the specifications, scope of work and conditions of contract are contributory to the abnormally high tenders. The Procuring Entity may also seek written clarification from the tenderer on the reason for the high tender price. The Procuring Entity shall proceed as follows:

- i) if the tender price is abnormally high based on wrong estimated cost of the contract, the Procuring Entity may accept or not accept the tender depending on the Procuring Entity's budget considerations.***

Article 227(1) of the Constitution provides as follows-

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

Section 86(1)(a) of the Act provides as follows-

"(1) The successful tender shall be the one who meets any of the following as specified in the tender document-

- (a) the tender with the lowest evaluated price;***

Our interpretation of the aforementioned provisions of the Tender Document, the Act and the Constitution is as outlined hereinafter.

First, a procuring entity whilst procuring for goods, works or services must do so in a system that espouses the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. Second, one of the criteria to determine a successful tenderer, is identifying a tenderer that submitted the lowest evaluated price. Third, Clause 37.5(i) of Section I – Instructions To Tenderers at page 26 of the Tender Document is with respect to abnormally high price as opposed and does not have a bearing in the instant Request for Review noting that a successful tenderer is one that has submitted the lowest evaluated price.

In **Misc. Application No. 402 & 405 of 2016 (Consolidated) Republic v Public Procurement Administrative Review Board & another Ex Parte: Athi Water Service Board & another [2017] eKLR** the High Court observed as follows with regard to the aspect of the lowest evaluated price:

"200. In other words, the spirit of the procurement legalization must of necessity reflect the Constitutional principles relating thereto hence the stipulation that the successful tender shall be the tender with the lowest evaluated price requires that an evaluation be first undertaken and only after the tender passes all the stages of

evaluation does the consideration of the lowest tender come into play...”

Turning to the circumstances of the instant Request for Review, both the Applicant’s tender and the Interested Party’s tender were determined responsive at the Mandatory Evaluation stage and the Technical Evaluation stage thus proceeded to the Financial Evaluation stage together with another four tenders. This means, both the Applicant’s tender sum and the Interested Party’s tender sum were evaluated at Mandatory Evaluation stage and the Technical Evaluation stage and proceeded to the Financial Evaluation stage. At the Financial Evaluation stage, as can be discerned at page 20 of 21 of the Evaluation Report, the Interested Party’s evaluated tender sum was ranked first and the Applicant’s evaluated tender sum was ranked second. The following is the table ranking the evaluated tender sums of the six tenderers who made it to the Financial Evaluation stage-

“

<i>Bid Ranks</i>	<i>Bid No.</i>	<i>Bidder Name</i>	<i>Evaluated Tender Sum</i>
<i>1</i>	<i>B8</i>	<i>BRITAM GENERAL INSURANCE COMPANY (K) LIMITED</i>	<i>505,000,005.00</i>
<i>2</i>	<i>B3</i>	<i>JUBILEE HEALTH INSURANCE LTD</i>	<i>505,100,203.00</i>
<i>3</i>	<i>B2</i>	<i>APA INSURANCE LTD</i>	<i>539,016,160.00</i>
<i>4</i>	<i>B1</i>	<i>GA INSURANCE LTD</i>	<i>594,948,513.00</i>

5	B6	CIC GENERAL INSURANCE LIMITED	601,831,155.00
6	B7	OLD MUTUAL GENERAL INSURANCE LTD	719,892,123.00

”

From the foregoing, it was proper for the Evaluation Committee to recommend award of the subject tender to the Interested Party for submitting the lowest evaluated tender sum/price. We cannot fault the Evaluation Committee on such a recommendation. This means, the Applicant’s tender could not be awarded the subject tender because its evaluated tender price/sum was higher than that of the Interested Party, who was recommended for award of the subject tender.

This was the holding by the High Court in **Judicial Review Application E024 of 2021 Republic v Public Procurement Administrative Review Board Ex-Parte Kotaa East African Limited; Kenya Ports Authority & 2 others (Interested Parties) [2021] eKLR** where it stated that:

"43. In my view, it would have been irrational and unreasonable for the procurement entity to encourage bidders to bid for the entire eight zones, then later on deny award of the tender to the lowest evaluated bidder in more than one zone. I also agree with the Respondent’s finding that pursuant to Article 232 (1) (b) and (c) of the Constitution, there is need for efficiency, effectiveness and economic use of

public funds and that the procuring entity would have gone against the principles of cost-effectiveness to deny award to the lowest bidder in all the zones and award the same to other bidders with higher quotes. Furthermore, If the Respondent was to implement the Ex-parte Applicant's argument of awarding the remaining 7 zones to bidders in the subject tender whose bids were not the lowest evaluated, then the Respondent action would have been discriminatory to the 3^d Interested Party who had submitted the lowest evaluated bid in all the eight zones....."

In a Notification of Intention to Award transmitted on 28th March 2023, the Applicant was informed that the Interested Party was the successful tenderer and was recommended for award of the subject tender at Kshs. 505,000,005.00. Further, the Applicant was informed that its tender offer was higher than the recommended tenderer's. The recommended tender was definitely known and this was the Interested Party. The Applicant's tender offer being high than the recommended tenderer's meant that the Applicant's evaluated tender sum was higher than the Interested Party's evaluated tender sum and thus the Applicant could not be recommended for award of the subject tender being guided by the principle of cost-effectiveness.

Given the foregoing, we find that the Respondents acted fairly and were not in breach of Clause 37.5(i) of the Tender Document and did not breach Article 227(1) of the Constitution.

What orders should the Board grant in the circumstances?

We have held that Respondents did not breach the provisions of (a) Clauses 26.4, 26.6, 26.9, 32.1, 32.3, 37.5(i) and 44.3 of the Tender Document (b) Sections 68(2)(d)(iii), 78(8),(10) & (11) and 82 of the Act; and (c) Article 227(1) of the Constitution which the Applicant had alleged had been breached. In the circumstances, the instant Request for Review lacks merit and is thus ripe for dismissal.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 172 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 11th April 2023:

- 1. The Applicant's Request for Review dated 11th April 2023 be and is hereby dismissed for lacking in merit.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 2nd Day of May 2023.



.....
CHAIRPERSON

PPARB



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SECRETARY

PPARB