

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 28/2023 OF 11TH MAY 2023

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED APPLICANT

AND

SECRETARY TO INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION RESPONDENT

ZAMARA RISK AND INSURANCE BROKERS

LIMITED INTERESTED PARTY

Review against the decision of the Secretary, Independent Electoral and Boundaries Commission in relation to Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. QS Hussein Were | - | Member |
| 3. Mrs. Irene Kashindi | - | Member |

IN ATTENDANCE

Mr. James Kilaka

- Acting Board Secretary

PRESENT BY INVITATION

APPLICANT

TRIDENT INSURANCE COMPANY LIMITED

Mr. Mwaniki Gachuba

-Advocate, Mwaniki Gachuba Advocates

RESPONDENT

SECRETARY, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

Mr. Githinji

- Advocate, Abdullahi, Gitari & Odhiambo
Advocates LLP

INTERESTED PARTY

ZAMARA RISK AND INSURANCE BROKERS LIMITED

Mr. Ochieng

-Advocate, Ochieng Teddy Advocates

BACKGROUND OF THE DECISION

The Tendering Process

The Independent Electoral and Boundaries Commission (hereinafter referred to as "the Procuring Entity") invited sealed tenders from interested and eligible tenderers in response to Tender No. IEBC/OT/23/03/2022-2023 for

Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement in the Daily Nation on 3rd March 2023 and the blank tender document for the subject tender issued to tenderers by the Procuring Entity and the Respondent herein (hereinafter referred to as the 'Tender Document') was available for download from the Procuring Entity's website www.iebc.or.ke and on the Public Procurement Information Portal (PIIP) (www.tenders.go.ke). The subject tender was in three Lots being (a) Lot 1: Medical Insurance, (b) Lot 2: Group Life Assurance (GLA), and (c) Lot 3: Group Personal Accident (GPA). The subject tender's submission deadline was scheduled for 24th March 2023 at 11.00 a.m.

Addenda

The Respondent issued two Addenda namely: (a) Addendum No.1 dated 13th March 2023 (hereinafter referred to as "Addendum No. 1") which issued several clarifications on various provisions of the Tender Document; and (b) Addendum No. 2 dated 15th March 2022 (*perhaps meant to be 2023*) (hereinafter referred to as "Addendum No. 2") which revised the Instructions to Tenderers provisions on Business Operational Capacity and Financial Capacity of the Technical Evaluation of Section III- Evaluation and Qualification Criteria at pages 29 to 31 of the Tender Document.

Submission of Tenders and Tender Opening

According to the Minutes of the subject tender’s opening held on 24th March 2023 signed by members of the Tender Opening Committee on 29th March 2023 (hereinafter referred to as the ‘Tender Opening Minutes’) and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the ‘Board’) by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the ‘Act’), a total of forty-six (46) tenders were submitted in response to the subject tender. The said forty-six (46) tenders were opened in the presence of tenderers’ representatives present at the tender opening session, allocated identification numbers, and were recorded as follows:

SN	Bidder No.	Name of Tenderer	Tender Sum in Kshs.
1.	12	CIC General Insurance Limited	Lot 1 491,822,145.69
2.	17	Trident Insurance Company Ltd	Lot 1 416,615,062
3.	18	AAR Insurance Kenya Ltd	Lot 1 495,197,122
4.	19	Minet Kenya Insurance Brokers Ltd.	Lot 1 464,076,431
5.	20	APA Insurance Limited	Lot 1 466,841,615
6.	24	Zamara Risk and Insurance Brokers Ltd	Lot 1 235,785,705

7.	28	Liaison Group (Insurance Brokers) Ltd	Lot 1 443,499,646
8.	31	Gold Field Insurance Brokers Ltd	Lot 1 239,027,448
9.	32	First Assurance Co. Ltd	Lot 1 476,871,819 (Discount Inclusive)
10.	34	The Kenyan Alliance Insurance Company Ltd	Lot 1 420,159,735
11.	35	Old Mutual General Insurance Kenya Ltd	Lot 1 242,027,447
12.	37	Madison General Insurance Kenya Ltd	Lot 1 450,022,234
13.	45	Trust Mark Insurance Brokers Ltd	Lot 1 235,817,868
14.	1	CIC Life Assurance Ltd	Lot 2 22,033,699
15.	2	Madison Life Assurance Kenya Ltd	Lot 2 22,033,699
16.	3	Sanlam Life Insurance Ltd	Lot 2 39,844,088.15
17.	4	Kenya Oriental Life Assurance Ltd	Lot 2 29,339,874
18.	7	Acentria Insurance Brokers Ltd	Lot 2 23,275,598
19.	9	Four M Insurance Brokers Ltd	Lot 2 24,033,699

20.	11	APA Life Assurance Ltd	Lot 2 17,626,956
21.	13	Liberty Life Assurance Kenya Ltd	Lot 2 35,253,918
22.	23	<i>Zamara Risk and Insurance Brokers Ltd</i>	Lot 2 14,582,445
23.	26	Liaison Group (Insurance Brokers) Ltd	Lot 2 35,253,918
24.	30	Trust Mark Insurance Brokers Ltd	Lot 2 16,033,699
25.	33	Britam Life Assurance Co. Kenya Ltd	Lot 2 23,437,699
26.	40	Sapon Insurance Brokers Ltd	Lot 2 38,846,630
27.	42	Pioneer Assurance Co. Ltd	Lot 2 20,831,860
28.	43	Minet Kenya Insurance Brokers Limited	Lot 2 30,685,234
29.	5	Kenya Orient Insurance Ltd	Lot 3 9,389,774
30.	6	Acentria Insurance Brokers Ltd	Lot 3 4,201,478
31.	8	Four M Insurance Brokers Ltd	Lot 3 3,943,712
32.	10	Occidental Insurance Company Ltd	Lot 3 10,668,650
33.	14	APA Insurance Limited	Lot 3

			11,737,160 (Discount Inclusive)
34.	15	<i>Zamara Risk & Insurance Brokers Limited</i>	Lot 3 3,961,357
35.	16	Jubilee Allianz General Insurance (K)Ltd	Lot 3 26,095,290
36.	22	First Assurance Co. Ltd	Lot 3 24,644,004
37.	27	Liaison Group (Insurance Brokers) Ltd	Lot 3 10,668,648
38.	36	Madison General Insurance	Lot 3 5,365,580
39.	38	The Kenyan Alliance Insurance Company Ltd	Lot 3 26,827,778
40.	41	Minet Kenya Insurance Brokers Limited	Lot 3 7,686,048
41.	44	Trust Mark Insurance Brokers limited	Lot 3 1,869,064
42.	46	Sapon Insurance Brokers Limited	Lot 3 6,704,282
43.	21	Britam Life Assurance Co. Kenya Ltd	Lot 1 497,469,906 Lot 3 8,450,804
44.	39	Plan & Place Insurance Brokers Ltd	Lot 1 230,100,894

			(Discount Inclusive) Lot 2 24,299,242 Lot 3 6,706,964
45.	25	Cannon General Insurance Kenya Limited	Lot 2 25,895,668 Lot 3 13,950,443
46.	29	Geminia Insurance Co. Ltd	Lot 2 19,499,824 Lot 3 10,551,313

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the forty-six (46) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 21st April 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- i Preliminary Evaluation (Eligibility Mandatory Requirements);

- ii Preliminary Evaluation (Administrative/Formal Mandatory Requirements);
- iii Technical Evaluation; and
- iv Financial Evaluation.

Preliminary Evaluation (Eligibility Mandatory Requirements)

The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Clause i. Preliminary Evaluation (Eligibility Mandatory Requirements) of Section III – Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document. Tenders needed to meet all the mandatory requirements at this stage to proceed to the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage.

At the end of evaluation at this stage, twenty-six (26) tenders were determined non-responsive including the Applicant's tender while twenty (20) tenders including the Interested Party's tenders were determined responsive. The twenty (20) tenders that were determined responsive proceeded for evaluation at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage.

Preliminary Evaluation (Administrative/ Formal Mandatory Requirements)

The Evaluation Committee was required to carry out a further preliminary evaluation of tenders in the subject tender using the criteria provided under Clause ii. Preliminary Evaluation (Administrative/ Formal Mandatory

Requirements) of Section III – Evaluation and Qualification Criteria at page 28 to 29 of the Tender Document. 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, twelve (12) tenders were determined non-responsive while eight (8) tenders including the Interested Party's tenders were determined responsive. The eight (8) tenders that were determined responsive proceeded for evaluation per lot in the subject tender 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 Lot-1 Medical Insurance Cover, Lot-2 Group Life Assurance (GLA), and Lot -3 Group Personal Accident (GPA) of Section III – Evaluation and Qualification Criteria at page 29 to 32 of the Tender Document read with Addendum No. 1 and 2. Tenders were required to pass the technical requirements of the specific lot tendered for to proceed for financial evaluation.

At the end of evaluation at this stage, five (5) tenders were determined non-responsive while three (3) tenders, being the Interested Party's tenders in Lot 1, Lot 2, and Lot 3 of the subject tender, were determined responsive and 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 Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 32 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 tender price for each lot.

At the end of evaluation at this stage, the Interested Party’s tenders were determined to have the lowest evaluated tender price in Lot 1, Lot 2, and Lot 3 of the subject tender as indicated at page 60 of the Evaluation Report which reads:

6.1 FINANCIAL EVALUATION STAGE – LOT (Medical)

BIDDER NO	24
Total Amount indicated on the Form of Tender	
Year 1	235,785,705
Year 2	235,785,705
Variance/Discount	-

6.2 FINANCIAL EVALUATION STAGE – LOT 2 (GLA)

BIDDER NO	23
Total Amount indicated on the Form of Tender	
Year 1	14,582,445
Year 2	14,582,445
Variance/Discount	-

6.3 FINANCIAL EVALUATION STAGE – LOT 3 (GPA)

BIDDER NO	15
Total Amount indicated on the Form of Tender	
Year 1	3,961,357
Year 2	3,961,357
Variance/Discount	-

Evaluation Committee's Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party as the lowest responsive evaluated tenderer in Lot 1, Lot 2, and Lot 3 as can be discerned at page 60 to 61 of the Evaluation Report as follows:

"Lot 1- Medical Insurance

M/S Zamara Risk & Insurance Brokers with Jubilee Health Insurance Limited as the underwriter at a total cost of Kenya Shillings Four Hundred Seventy-One Million Five Hundred Seventy-One Thousand Four Hundred and Ten (471,571,410) for two (2) years broken down as follows; Year 1- Kshs. 235,785,705 and Year 2- Kshs. 235,785,705.

Lot 2- Group Life Assurance (GLA)

M/S Zamara Risk & Insurance Brokers with Jubilee Health Insurance Limited as the underwriter at a total cost of Kenya Shillings Twenty-Nine Million One Hundred Sixty-Four Thousand, Eight Hundred and Ninety (29,164,890) for

two (2) years broken down as follow; Year 1- Kshs. 14,582,445 and Year 2- Kshs. 14,582,445.

Lot 3- Group Personal Accident (GPA)

M/S Zamara Risk & Insurance Brokers with Jubilee Health Insurance Limited as the underwriter at a total cost of Kenya Shillings Seven Million Nine Hundred Twenty-Two Thousand, Seven Hundred and Fourteen (7,922,714) for two (2) years broken down as follows; Year 1- Kshs. 3,961,357 and Year 2- Kshs. 3,961,357. "

Professional Opinion

In a Professional Opinion dated 28th April 2023 (hereinafter referred to as the "Professional Opinion"), the Director Supply Chain Management, Dr. Harley Mutisya, 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. He thus requested the Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

Thereafter, Mr. Marjan Hussein Marjan, MBS, the Respondent herein, approved the award of the subject tender to the Interested Party on 28th April 2023 by signing, dating and ticking by hand the word 'Approve' at the

approval section reserved for the Accounting Officer's decision at page 5 of the Professional Opinion. The duly approved Professional Opinion was furnished to the Board by the Respondent 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 Award dated 3rd May 2023.

REQUEST FOR REVIEW NO. 28 OF 2023

On 11th May 2023, Trident Insurance Company Limited, the Applicant herein, filed a Request for Review No.28 of 2023 dated 9th May 2023 together with a Supporting Affidavit sworn on 9th May 2023 by Mercy Kamau, the Applicant's Chief Accountant, with respect to the subject tender (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

a) The Respondent's decision to disqualify the Applicant's tender at the preliminary examination stage as non-responsive be substituted with the Board's decision that the Applicant's tender is substantially responsive.

b) The Respondent's disqualification of the Applicant's tender be annulled and set aside.

- c) The Respondent's decision that the Interested Party's tender is responsive at the preliminary stage be substituted with the Board's decision that the Interested Party's tender is disqualified as non-responsive.***
- d) The award of Lot 1 of the Tender for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff (Tender No. IEBC/OT/23/03/2022-2023) to the Interested Party be annulled and set aside.***
- e) The notification of award of Lot 1 of the Tender for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff (Tender No. IEBC/OT/23/03/2022-2023) dated 3rd May, 2023 be annulled and set aside.***
- f) The Respondent be directed to proceed with the Applicant's tender in accordance with Section 79(2) of the Public Procurement and Asset Disposal Act, 2015 and ITT 31.2 and ITT 31.3 of the tender document and to its logical conclusion.***
- g) Costs of the application be awarded to the Applicant.***

In a Notification of Appeal and a letter dated 11th May 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent and the Procuring Entity of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 11th May 2023.

On 16th May 2023, the Interested Party through the firm of Ochieng Teddy Advocates filed a Notice of Appointment dated 16th May 2023.

On 17th May 2023, the Respondent through the firm of Abdullahi Gitari & Odhiambo Advocates LLP filed a Notice of Appointment dated 17th May 2023. On 18th May 2023, in response to the Request for Review, the Respondent through the firm of Abdullahi Gitari & Odhiambo Advocates LLP filed a Respondent's Memorandum of Response dated 18th May 2023, a Verifying Affidavit sworn on 18th May 2023 by Dr. Harley Mutisya together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 19th May 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 19th May 2023.

On 23rd May 2023, in opposition to the Request for Review, the Interested Party through the firm of Ochieng Teddy Advocates filed, an Interested Party's Response sworn on 21st May 2023 by Francis Omanyala (hereinafter referred to as "the Interested Party's Response").

On 24th May 2023, the Applicant through the firm of Mwaniki Gachuba Advocates filed an Applicant's Rejoinder to the Respondent's Memorandum of Response dated 23rd May 2023 and an Applicant's Rejoinder to the Interested Party's Response dated 23rd May 2023.

Vide a Hearing Notice dated 22nd May 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 25th May 2023 at 12:00 noon, through a link availed in the said Hearing Notice.

On 25th May 2023, the Applicant through the firm of Mwaniki Gachuba Advocates sent via email to the Board Secretariat, an Applicant's List & Bundle of Authorities dated 25th May 2023.

None of the parties filed written submissions.

On 25th May 2023 when the instant Request for Review came up for hearing the Chairperson of the Board who also chaired the panel constituted to hear and determine the instant Request for Review disclosed to Counsel and parties present at the hearing that she was the Managing Partner of NOW Advocates LLP which firm was in the panel of Advocates for the Procuring Entity, though she had no direct or indirect interest in the instant Request for Review and that her firm was currently not handling any matters for the Procuring Entity. Further, Mrs. Kashindi, a Board Member and a member of the panel constituted to hear and determine the instant Request for Review (hereinafter referred to as the 'Board Member') disclosed to Counsel and parties present at the hearing that her firm of Advocates was also on the panel of Advocates for the Procuring Entity though she had no direct or indirect interest in the instant Request for Review. Thereafter, the Chairperson of the Board invited reaction from all parties to the instant Request for Review with respect to the said disclosures and allowed counsel to seek further instructions from their respective clients on the same. All counsel to parties to the instant Request for Review sought further instructions from their respective clients and reacted to the aforesaid disclosures as outlined hereinafter.

Mr. Gachuba, counsel for the Applicant applied for recusal of the Chairperson and the Board Member from hearing and determining the instant Request for Review and sought for the panel to be reconstituted on the grounds that their law firms being on the panel of Advocates for the Procuring Entity presented a conflict of interest.

On the Respondent's part, Counsel for the Respondent, Mr. Githinji, submitted that in light of the disclosures, the Respondent was of the view that there was no conflict of interest and that it was not opposed to the panel hearing and determining the instant Request for Review but Mr. Githinji still opted not to oppose the Applicant's application.

On the Interested Party's part, Counsel for the Interested Party, Mr. Ochieng, submitted that in light of the disclosures, there was no conflict of interest and opposed the Applicant's application for the Chairperson's and Board Member's recusal and reconstitution of the panel on the grounds that (a) Counsel for the Applicant had not shown how there would be conflict with the panel determining the instant Request for Review, (b) the disclosure revealed that the Chairperson and the Board Member were currently not representing the Procuring Entity and had no direct or indirect interest in the instant Request for Review, (c) the Applicant's application was a delaying tactic considering that by the 14th June 2023, most of the members of the Procuring Entity would not be under cover, and (d) no evidence had been placed to suggest or purport any bias by the Chairperson and the Board Member in the instant Request for Review.

In a rejoinder, Counsel for the Applicant, Mr. Gachuba, submitted that it is trite that the issue of bias is a perception and the Applicant perceived there would be a conflict of interest since the Chairperson and the Board Member were too many for its comfort and in consideration of the number of Board members, the Applicant felt it would be fair for the Chairperson and the Board Member to recuse themselves and any other Board members taking the position in the panel.

On enquiry by the Board on whether it was a perception that there might be and not that there was any conflict of interest, Mr. Gachuba submitted that in his client's words, being on the panel of the Procuring Entity presents a point of conflict for the Chairperson and the Board Member in the instant Request for Review as the danger it foresaw was that it did not know the relationship of the Chairperson and the board Member and the Procuring Entity in the past and in the future and it would not be fair for them to sit in the instant Request for Review while the Board had other members who could constitute the panel.

Upon hearing parties, the Board dismissed the Applicant's application for recusal of the Chairperson and the Board Member from hearing and determining the instant Request for Review and for reconstitution of the panel constituted to hear the instant Request for Review while reserving its reasons for dismissal of the aforesaid application to be availed in the Board's main Decision in the substantive instant Request for Review. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Gachuba, relied on the Applicant's Request for Review dated 9th May 2023, Supporting Affidavit sworn by Mercy Kamau on 9th May 2023, Applicant's Rejoinder to the Respondent's Memorandum of Response dated 23rd May 2023, Applicant's Rejoinder to the Interested Party's Response dated 23rd May 2023 and List and Bundle of Authorities dated 25th May 2023 that were filed before the Board.

Mr. Gachuba submitted that one of the issues in contention in the instant Request for Review was the capacity of the Interested Party to execute the services required by the Respondent. He referred the Board to Section 55(1) of the Act which prescribes eligibility requirements of a tenderer, one of which was capacity of a tenderer to enter into a contract in respect to the subject tender. Counsel submitted that this capacity is not limited to the Certificate of Incorporation or Registration by the Registrar of Companies but goes to the heart of the Insurance Act since any tenderer awarded the subject tender must be able to provide insurance policies required by the Respondent.

According to the Applicant, it was not in dispute that the Interested Party was a brokerage firm and not an insurance company. Mr. Gachuba referred the Board to ITT 4.10 of the Tender Document and submitted that it was

unequivocal that the Respondent was looking for insurance companies and not insurance brokers. He further submitted that no evidence had been provided to prove that the Interested Party had been registered as an insurance company as at the point of award as required under ITT 4.10 of the Tender Document and Section 2(1) and 19(1)(a) of the Insurance Act which prescribes who can provide insurance policies. Counsel argued that provisions of insurance policies was the purview of insurance companies and not insurance brokers and referred the Board to paragraphs 36, 37, 43, and 44 in the case of *Lappeman Diamaon Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd & Glenrand MIB Ltd Case No. 312/2002* on the functions of an insurance broker. He further referred the Board to an Article published by Cardiff Law School titled *The Duties of Insurance Brokers: Development in the Law*.

Mr. Gachuba submitted that the Interested Party wrongly indicated in its submission that the Applicant was disqualified because it did not submit Form SD2 in the subject tender yet the Applicant's tender at page 14 and 66 included the Applicant's Form SD2 filled by the Chief Accountant who had been given the Power of Attorney by the Applicant. He argued that it was an incorrect assertion that the Applicant did not submit a filled Form SD2 noting that it submitted several copies of the same. Counsel further submitted that the Respondent did not indicate nor disclose in the notification letter why in his opinion Form SD2 was not duly filled and as a result of such non-disclosure, the Respondent failed in its duty to ensure that before

disqualifying the Applicant's tender, it had made a determination on whether the Applicant's tender was responsive or non-responsive.

According to Mr. Gachuba, ITT 30.2 of the Tender Document provided that where a determination was made that a tender was substantially responsive, then there are rights which the Respondent undertook to extend to such a party. He argued that the Respondent and Procuring Entity needed to explain to the Applicant how Form SD2 would have affected the scope of the tender, how it would have limited the rights of the Respondent or the obligations of the Applicant. Counsel further argued that the Respondent did not state what would be the effect of the Applicant's tender if Form SD2 was rectified as provided for in ITT 32.2(b) of the Tender Document.

Mr. Gachuba referred the Board to ITT 31.2 of the Tender Document and submitted that the Respondent undertook that where a tender is substantially responsive, he would waive non-conformities in such a tender and would request such a tenderer to submit the necessary information or to rectify the non-conformities. Counsel submitted that these provisions when read with Section 79(2) of the Act, Regulation 74(2) and 75(2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") reveal that the Respondent had a duty to waive any non-conformities found in the Applicant's tender.

Mr. Gachuba submitted that Form SD2 was not a material document that would lead to disqualification of the Applicant's tender and did not constitute the tender and as such, it was not a document that would lead to the disqualification of the Applicant's tender as evidenced by ITT 12 of the Tender Document which states what constitutes a tender. He further submitted that the Respondent had an opportunity under ITT 12.1 (j) to include Form SD2 as part of the documents comprising the tender. Counsel referred the Board to ITT 12.1(j) of Section II- Tender Data Sheet (TDS) at page 24 of the Tender Document and submitted that the Respondent did not include Form SD2 as a document constituting the tender. He relied on the case of *R v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR* at paragraphs 38 to 50 and the case of *R v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR* at paragraphs 37 to 48 in support of his argument that a responsive tender cannot be disqualified on a document that is not a material document.

Mr. Gachuba also referred the Board to the case of *R v Public Procurement Administrative Review Board & 2 others Ex parte Industrial & Commercial Development Corporation [2017] eKLR* in support of his submission that the tender sum read at the opening had been confirmed to be Kshs. 235 Million but from the notification letter, the amount awarded was Kshs. 471 M which contravened Section 82 of the Act, Regulation 74(2) of Regulations 2020 and

various ITTs in the Tender Document. Counsel submitted that the tender sum read out at the tender opening cannot be altered under whatever circumstance.

Upon enquiry by the Board on whether the requirement of an insurance company or an insurance brokerage was part of the evaluation criteria, Mr. Gachuba submitted that from the Tender Document it was not clear but since the Tender Document was drawn by the Respondent and if any conflicts exist in the Tender Document, the same cannot be visited upon the Applicant or on any other tenderer. He reiterated that ITT 4.10 of the Tender Document was very specific as it was neither amended nor denied. Counsel further confirmed that Form SD2 was part of the blank Tender Document.

Respondents' submissions

Counsel for the Respondents, Mr. Githinji submitted on (a) whether the Applicant met all the mandatory requirements, (b) whether the Interested Party was eligible to participate in the subject tender, (c) whether the Interested Party's tender sum was irregularly amended, and (d) whether the Interested Party's tender was the lowest evaluated tender in the subject tender.

Mr. Githinji submitted that Section III- Evaluation and Qualification Criteria of the Tender Document provided for the Preliminary Evaluation Mandatory Requirements part which included the submission of a duly filled Form SD2 which was also a requirement at Section 62 of the Act for all tenders to be

accompanied with declaration that tenders would not engage in corrupt or fraudulent practices.

Mr. Githinji further referred to the evaluation criteria in Section III-Evaluation and Qualification Criteria of the Tender Document which stated under Clause i. Preliminary Evaluation (Eligibility Mandatory Requirements) that at this stage the Evaluation Committee would consider as ineligible a person for submitting false, inaccurate or incomplete information about its qualifications. Counsel submitted that Form SD2 submitted by the Applicant in its tender was rendered by the Evaluation Committee as not duly filled and argued that the Applicant's Form SD2 did not meet the provisions of ITT 21.3 of the Tender Document. He invited the Board to interrogate the Applicant's Form SD2 and make the conclusion that the same was not duly filled as per the provisions of the Tender Document since this was a mandatory requirement and cannot be considered a minor deviation under Section 79(2) of the Act and Regulation 75(2) of Regulations 2020. Mr. Githinji relied on the holding in *PPARB Application No. 29 of 2022*, where the Board was faced with a similar situation of a duly unfilled Form SD2 hence not unfairly disqualified. He further relied on the holding by Justice Mativo in *Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR* where the court held that a bid only qualifies as a responsive bid if it meets all the requirements set out in the Tender Document, bid requirements usually relate to compliance with regulatory prescripts, bid formalities, for functionality, technical pricing and

empowerment requirements. At this juncture, Counsel for the Applicant, Mr. Gachuba, objected to reliance of the said authorities by Mr. Githinji on the ground that the said authorities had not been filed and served upon him and considered this to be an ambush as he would not be able to respond to the said authority. He however indicated he was not opposed to the Board looking at the said authority.

Mr. Githinji proceeded to submit that waiving the mandatory requirement for the Applicant would be tantamount to rewriting the Tender Document which expressly required filling of Form SD2 as a mandatory requirement and would be against the principles of fairness under Article 227(1) of the Constitution given that all tenderers in the subject tender were subjected to the same evaluation criteria. Counsel referred the Board to the holding in *Judicial Review Misc. Application No. 60 of 2021* where Justice Mativo reiterated the same.

On the second issue concerning eligibility of the Interested Party to participate in the subject tender, Mr. Githinji referred the Board to page 3 of the Tender Document under Clause 3 which provided for any other party which is not an insurance underwriter and indicated that *'where a tenderer is not an underwriter, they will provide the following in their bid documents (a) price quotation from their preferred underwriter, (b) a written authorization letter from the underwriter as confirmation that they have allowed the tenderer to bid using their quotation, (c) an agreement with the underwriter that payments shall be made to the person with whom the contract shall be entered.'*

Counsel referred to page 9 and 10 of the Interested Party's tender submitted in the subject tender which included a letter from Jubilee Health Insurance Limited dated 15th March 2023 containing the authorization and agreement that payments would be made to the Interested Party and page 376 of the Interested Party's tender containing the price quotation from Jubilee Health Insurance Limited. It was Mr. Githinji's submission that this issue came up during the pre-bid meeting and was captured in the pre-bid minutes under clarification no. 8 where provisions of Clause 3 at page 3 of the Tender Document were read out. He noted that the Applicant did not have a representative at the pre-bid meeting.

On the issue of whether the Interested Party's tender sum was irregularly amended, Counsel referred to Section 107 of the Evidence Act and submitted that the Applicant had not adduced any evidence to show that the tender sum was irregularly amended. He referred to ITT 15.1 of the Tender Document and submitted that the price contained in the Form of Tender and the Price Schedule was what was used in the eligibility criteria.

Mr. Githinji noted that the Applicant made the assertion that during the tender opening, the Interested Party's tender sum as read out was Kshs. 235,785,705/= and referred the Board to column seven of the Interested Party's Form of Tender which indicated the total tender price for Insurance Service per annum. He noted that the Insurance Premium per annum for Year 1 was Kshs. 235, 785,705/= and similarly in Year 2 it was Kshs. 235, 785,705/= and hence in column 7 the total tender price for Insurance Service

per annum was Kshs. 235, 785,705/= . Counsel further submitted that according to the Interested Party's Price Schedule, the quotes for Year 1 and Year 2 do correspond to what was given in the Form of Tender but the total tender price for Insurance Service was Kshs. 471,571,410/= and as such the amounts quoted by the Respondents in the notification for award are sums quoted in the Interested Party's tender documents which were relied on during the evaluation process and this was a matter of simple arithmetic given that it was a combination of the Year 1 and 2 sums noting that the contract period in the subject tender was two years.

Mr. Githinji submitted that the Respondent was guided by provisions of Section 87 of the Act and Regulation 82 of Regulations 2020 in issuing the notification of award to tenderers. He further submitted that the Applicant was addressed, given the reason for the award and name of the successful tenderer and that there was no corresponding regulation mandating the Respondent to add the reasons why the Applicant's tender was disqualified other than what led to such disqualification as equally ascertained in the instant Request for Review, there was no additional corresponding mandate to give reasons why the subject tender was awarded to the Interested Party. Counsel submitted that the Respondent carried out its due diligence and fulfilled its mandatory requirement when it issued the notification letter dated 3rd May 2023 to the Applicant and all tenderers.

On the issue of the question of the lowest evaluated tenderer raised in the Request for Review, Counsel submitted that the Applicant's tender was rendered non-responsive at the Preliminary Evaluation stage and since the

lowest evaluated tenderer is determined at the Financial Evaluation stage as provided under Financial Evaluation at page 32 of the Tender Document and ITT 36.1 of the Tender Document, the Applicant did not make it to this stage and only the Interested Party's tender made it to the Financial Evaluation stage in all three lots as indicated in the Evaluation Report and its bid considered as the lowest evaluated tender.

Upon enquiry by the Board on whether Form of Tender contained the figures for Year 1 and Year 2, Mr. Githinji submitted that it contained the figures for both Year 1 and Year 2 and that this was a requirement for all tenderers in the subject tender.

Upon enquiry by the Board on whether or not the Applicant was informed as to the flaws in their Form SD2, Mr. Githinji submitted that the notification of award issued to the Applicant informed it that Form SD2 was not duly filled and though there was no stated reason as to what constituted what was not duly filled the Applicant did not seek any clarification from the Respondent for any further clarification to be given.

When asked to expound by the Board on what the Respondent meant by stating that the Applicant's Form SD 2 was not duly filled, Mr. Githinji submitted that the person signing the Form SD 2 is only listed as Chief Accountant and there was no indication as to the person making and signing the declaration which was a violation of provisions of ITT 21.3 of the Tender Document which was the reason why the Evaluation Committee considered that the Form SD2 was not duly filled.

Upon enquiry by the Board on whose obligation it was to give the reasons for disqualification through a transparent manner, Counsel submitted that a cogent reason was given on why the Applicant's tender was disqualified and if the Applicant had any interest in pursuing the matter further, it ought to have sought clarification on the same.

Upon further enquiry on whether the Interested Party's Form of Tender had the total sum of the two years amounting to Kshs. 471,571,410/= or whether it just had a provision for the total sum per annum, Counsel submitted that the fifth column of the Form of Tender had the sum for Year 1 and Year 2 and column seven of the Form of Tender indicated the total tender price for Insurance Service per annum hence ideally speaking, only one year's sum was supposed to be indicated on column seven and not the combined total sum. He further clarified that there was no combined figure in the Form of Tender though the total sum was included in the Interested Party's Price Schedule as was also indicated in the notification of award.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Ochieng, submitted the subject tender not only required underwriters to participate in the tender but also allowed for brokers to participate in the subject tender as evidenced by Clause 3 at page 3 of the Tender Document. He further submitted that the question of whether the Interested party was an underwriter or not was not material and that the Interested Party had complied with the provisions of Clause 3 at page 3 of the Tender Document since it had provided the price quotation,

the written authority and an agreement from the underwriter as clarified under paragraph 5 of the Interested Party's response and annexure thereto.

Mr. Ochieng further submitted that failure to fill Form SD2 was not a minor deviation to allow for application of Section 76(2) of the Act since Form SD2 as provided under the Tender Document is regulated by Section 62 of the Act which mandates all tenderers and procuring entities to ensure that there is no corruption or fraudulent practice that takes place by any tenderer or procuring entity and failure to conclusively fill that form deviates from a provision of the Act. Counsel further submitted that there had been clarification that the person who signed was not known by the Respondent and if the said Form was signed by a different person, who was unknown, it materially deviates from this provision and no liability can be attached to the person who signed that form.

Counsel submitted that Clause 5 at page 28 of the Tender Document stipulated in mandatory terms that the Self- Declaration form must be signed to ensure that no party engages in any corrupt or fraudulent practice hence this was a material and substantive requirement for any bidder to sign that form.

Counsel addressed the question of whether it was mandatory to provide all the registration documents by IRA and submitted that Clause 4.10 at page 8 of the Tender Document clearly stipulated that the registration of an insurance business shall not be a condition for the tender but it shall be condition for the contract hence the only time a tenderer was required to

provide that registration was at the contract award and signature and not at the tender and therefore the Interested Party was eligible to tender.

On the issue of whether there was any amendment on the Form of Tender by the Interested Party, Counsel submitted that the Interested Party did not amend its Form of Tender but clearly provided for Year 1 and Year 2 of the price qualification. He further submitted that at page 49 of the Tender Document on the Schedule of Price Form, it clearly stipulated Year 1 and 2 prices and provided insurance period yearly premium for two years and this form was duly filled by the Interested Party hence there was no amendment. Counsel submitted that the Applicant had not proved that there was any non-compliance with the provisions of the Act and the Tender Document and prayed that the Application be dismissed.

Upon enquiry by the Board on the sum read out at tender opening, counsel submitted that at tender opening the sum read out was Kshs. 235,785,705/= and this was not indicated to either be Year 1 or Year 2.

Applicant's Rejoinder

In a rejoinder, Counsel for the Applicant, Mr. Gachuba, submitted that this was the first time that the Applicant was learning that the reason as to why Form SD2 was determined as not duly filled was that it was indicated to have been signed by the Chief Account. He referred the Board to ITT21.3 of the Tender Document which required a tenderer to submit a Power of Attorney stating the name and rank of the person to sign documents and this was at page 348 of the Applicant's tender. Counsel submitted that the Power of

Attorney identified the person signing the subject tender as Mercy Kamau, the Chief Accountant and as such, the person who signed Form SD2 was known and was not a stranger.

Mr. Gachuba referred the Board to ITT 41 (c) of the Tender Document and submitted that the Respondent undertook at the point of notification to issue a statement of the reasons for the unsuccessful tenderer yet the reason as to why the Applicant was unsuccessful was not given.

Counsel further referred the Board to the Interested Party's annexure marked as FO1 and submitted that the said document did not state the tender number or the tender name that the letter relates to hence no one knows what tender Jubilee was referring to.

With respect to the issue of amendment of the tender sum, Mr. Gachuba submitted that the Applicant's issue was that the tender sum that was read at the tender opening is different from the tender sum awarded to the Interested Party and referred the Board to Regulation 74(2) of Regulations 2020 that any error in arithmetic lead to disqualification and it was admitted that the figure read out at the tender opening was Kshs. 235 Million and the amount awarded was Kshs. 471 Million.

Mr. Gachuba referred the Board to ITT 4.10 which was referred to and admitted by Mr. Ochieng that the person participating in the subject tender must be registered as an insurance company at the point of award and

signature and no evidence was given that the Interested Party submitted that registration at the point of award and that ITT 4.10 had not been amended and Clause 3 at page 3 of the Tender Document did not negate ITT 4.10 of the Tender Document.

Mr. Gachuba submitted that Section 62 required a tenderer to undertake that it would not engage in corrupt activities and the Applicant submitted an SD2 form and that according to ITT 29, 30, and 31 of the Tender Document, the Respondent had undertaken to correct and to seek clarification from the Applicant on any omissions found in that document. He further submitted that the Applicant was not treated fairly since the Respondent amended the tender sum read out but disqualified the Applicant on an issue that out to have been corrected. Mr. Gachuba reiterated that Form SD2 was not a material document that ought to have led to the Applicant's disqualification.

Upon enquiry by the Board on what figures were read out with respect to the Applicant's tender, Mr. Gachuba indicated that this was captured at page 5 of the Applicant's tender and the total sum was Kshs. 459,181,918/= and for Year 1 was Kshs. 229, 580,959/= and for Year 2 was Kshs. 229,590,959/=.

Upon further enquiry by the Board on the Applicant's position with regard to the Respondent's and Interested Party's submissions on Clause 3 at page 3 of the Tender Document, Mr. Gachuba submitted that he stood by his

submissions since the Instructions to Tenderers under ITT 4.10 overrides the Invitation to Tenderers and it clearly stated that at the point of award and signature, one must be an insurance company and there was no evidence that the Interested Party has since been registered as an insurance company.

When asked to clarify which provision of the Tender Document provides that the Instructions to Tenderers overrides the Invitation to Tenderers, Mr. Gachuba submitted that Section II – Tender Data Sheet refers to the ITT and not the Invitation to Tenderers and unless amended in the TDS, the Instruction to Tenderers are binding.

At this Juncture, Mr. Ochieng sought to make a clarification on this enquiry and submitted that the Invitation to Tender is part and parcel of the tender and cannot be separated from the Tender Document. Upon enquiry by the Board on when the current policy was due to lapse, Mr. Ochieng indicated that it was due to lapse on 14th June 2023 and confirmed that the Interested Party was the current service provider.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 11th May 2023 was required to be determined by 1st June 2023 and 1st June 2023, being a public holiday, the Board would communicate its decision in the instant Request for Review on or before 2nd June 2023 to all parties to the Request for Review via email

having been guided by the provisions of Section 57 of the Interpretation and General Provisions Act in computing the 21 days from the date of filing the instant Request for Review within which the same ought to be completed.

BOARD'S DECISION

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

- 1. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Mandatory Requirement No. 5 of Clause i Preliminary Evaluation (Eligibility Mandatory Requirements) of Section III- Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution;**
- 2. Whether the Interested Party, as an insurance broker as opposed to an insurance company/underwriter, was eligible to tender in the subject tender;**
- 3. Whether the Respondent amended and/or modified the Interested Party's tender sum to what was captured in the letter of Notification of Award dated 3rd May 2023 from the amount**

read out at the Tender Opening contrary to Section 82 of the Act and ITT 32.1 of Section I- Instructions to Tenderers at page 18 of the Tender Document;

4. Whether the Respondent's Letter of Notification of Award dated 3rd May 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020;

5. What orders should the Board grant in the circumstances?

During the hearing of the instant Request for Review, Counsel for the Applicant, Mr.Gachuba, made an application for recusal of the Chairperson and the Board Member while praying for a new panel to be constituted to hear and determine the instant Request for Review following the Chairperson's and the Board Member's disclosures, made before the hearing commenced, that their respective law firms were in the panel of Advocates for the Procuring Entity and that the Chairperson and the Board Member had no direct or indirect interest in the instant Request for Review. We have hereinbefore captured in detail the oral submissions of all parties with respect to the said application and confirmed that the said application was dismissed but the reasons for dismissal were reserved to be contained in this decision. We shall now give our reasons for dismissing the Applicant's oral application for recusal of the Chairperson and the Board Member and the oral prayer by the Applicant for reconstitution of the panel to hear and determine the instant Request for Review.

In determining the application for recusal of the Chairperson and the Board Member from hearing and determining the instant Request for Review and reconstitution of a new panel to hear and determine the instant Request for Review, the Board notes that the genesis of this application emanates from the disclosure by the Chairperson and the Board Member to all present at the hearing of the instant Request for Review which revealed that (a) the Chairperson and the Board Member were both legal professionals and Managing Partner, NOW Advocates LLP, and Partner, Munyao Muthama & Kashindi Advocates respectively, (b) their respective law firms were in the panel of Advocates for the Procuring Entity, (c) their respective law firms were currently not handling any matters for the Procuring Entity, and (d) the Chairperson and the Board Member had no direct or indirect interest in the instant Request for Review.

Article 50(1) of the Constitution guarantees every person the right to have a dispute determined by an impartial court and provides:

"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."

Further, Article 47(1) of the Constitution provides:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

In essence, every person has a right to have any dispute that can be resolved by the application of law decided in an expeditious, efficient, lawful, reasonable, and procedurally fair manner by an impartial court, tribunal or administrative body.

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

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

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

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

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The composition of the Board is provided under section 29 of the Act as:

"(1) The Review Board shall comprise of the following 15 members who shall be appointed by the Cabinet Secretary taking into account regional and gender balance –

(a) a chairperson whose qualifications and experience shall be as that of a Judge of the High Court;

(b) seven other members whose qualifications and experience shall be as prescribed in the regulations; and

(c) seven other persons appointed by the Cabinet Secretary.

(2) A person appointed as a member under subsection

(1) shall be nominated by the following professional bodies from amongst their members as follows –

(a) two persons nominated by the Law Society of Kenya;

(b) one person nominated by the Chartered Institute of Arbitrators, Kenya Chapter;

(c) one person nominated by the Kenya Institute of Supplies Management; (d) one person nominated by the Institute of Certified Public Accountants of Kenya;

(e) one person nominated by the Institute of Engineers of Kenya; and

(f) one person nominated by the Architectural Association of Kenya.

(3) The procedure for nominating the persons mention under subsection (2) shall be as prescribed."

Section 30 further sets out the qualifications of members of the Review Board as follows:

"(1) A person shall not be appointed as a member of the Review Board under section 29 unless that person –

(a) possesses a university degree from a university recognised in Kenya;

(b) has knowledge and experience of not less than seven years in the relevant field;

(c) is a professional of good standing in his or her respective professional body; and

(d) meets the requirements of Chapter Six of the Constitution.

(2) The Chairperson appointed under this Act shall be a person who qualifies to be a judge of the High Court and shall meet the requirements of Chapter Six of the Constitution."

Regulation 207 of Regulations 2020 provides for constitution of a panel to hear and determine a request for review filed before the Board and reads:

"(1) The Review Board Secretary, in consultation with the chairperson of the Review Board, may constitute a panel of at least three members to hear and determine a request for review and the Review Board chairperson shall chair the panel.

(2)

(3) The quorum of a Review Board panel established under paragraph (1), shall be chairperson and at least two other member.

....."

Further, Section 171 of the Act provides strict timelines within which the Board ought to hear and determine a request for review application filed before it and reads:

"(1) The Review Board shall complete its review within twenty-one days after receiving the request for review.

"(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder."

In essence, once a panel has been constituted to hear and determine a request for review filed before the Board, that panel is required to complete its review of the request for review within 21 days from the date of filing of the request for review application. This goes to the constitutional requirement of expeditious and efficient disposal of public procurement and asset disposal disputes noting that public procurement processes are time sensitive as each tender has a provision for a tender validity period within which the tendering process ought to have been completed.

In addition, this Board has a mandate to ensure procedural fairness as stipulated under Article 47(1) of the Constitution hereinabove while making its determination and rendering its decision in a request for review application. In **Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR** the Justice Odunga, as he then was, while

addressing the elements of procedural fairness referred to the case by the Supreme Court of Canada in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.
[Emphasis ours]

It is not lost to us that we have a duty to discharge our constitutional mandate independently and impartially. The application by the Applicant for recusal of the Chairperson and the Board Member in the instant Request for Review questions the suitability of the constituted panel members to hear and determine the instant Request for Review.

Black Laws Dictionary, 8th Edition, defines the term recusal to mean *'the removal of oneself as a judge or a policy maker in a particular matter because of a conflict of interest.*

In the case of **Joyce N. Simitu v Stephen O. Mollowah & 2 others [2013] eKLR**, the court observed that the term recusal is often used interchangeably with disqualification of a judge and that recusal in its strict sense is voluntary in nature while disqualification is initiated by a party seeking the removal of a judge. The Supreme Court of Kenya in the case of **Jasbir Singh Rai and 3 Others versus Tarlochan Singh and 4 Others, petition No. 4 of 2012 (2013) eKLR**, (hereinafter referred to as "the Jasbir Singh Rai case") was confronted with the question of recusal of Justice Tunoi from decision making and considered how the Court should guide itself on the issues of recusal and stated:

"...it is evident that the circumstances calling for recusal, for a judge are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer was called for. The objective view in the recusal of a judicial officer is that justice as between the parties be uncompromised; that the due process of law be realized and be seen to have had its role and lastly; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised....."

It is a well-established principle that justice must not only be done, but should always be seen to be done. The question of recusal and disqualification is a weighty matter which should not be trivialized. In the case of **Alliance Media Kenya Limited –vs- Monier 2000 Limited & Njoroge Regeru HCCC No. 370 of 2007 (eklr)** Warsarme J stated that:

"In my understanding, the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice.....justice is deeply rooted in the public having confidence and trust in the determination of disputes before the court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made"

We note that the **Judicial Service (Code of Conduct and Ethics) Regulations, 2020** (hereinafter referred to as "**the Code**") has indicted in statute the circumstances warranting recusal of a Judge which have long been based on judicial precedents and provides that a judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the Judge, *inter alia*, is a party to the proceedings and has actual bias or prejudice concerning a party. Though the members of the Board are not judicial officers, as a quasi-judicial body, we are cognizant of the provisions of Regulations of the Code while reviewing public procurement disputes.

In the instant Request for Review, conflict of interest and bias have been alleged on the basis of the Chairperson's and the Board Member's law firms being on the panel of Advocates of the Procuring Entity and by this reason, the Applicant perceives a conflict of interest and bias as it is unaware of the relationship between the Chairperson, the Board Member and the Procuring Entity in the past and in the future. In essence, the Applicant's application is anchored on perceived relationships in support of its prayer for recusal and reconstitution of a new panel.

The Court of Appeal in **Republic v Mwalulu & Others [2005] 1KLR** (hereinafter referred to as "the Mwalulu case") when addressing the question of disqualification of a judge stated:

"i. When the courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must specifically be alleged and established.

ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.

iii. The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself.”

From the Mwalulu case it is quite clear that the test to be applied as to whether a judge should recuse himself or disqualify himself from sitting in a particular case must be objective and facts constituting bias must be specifically alleged and established. Additionally, a court dealing with the issue of disqualification should not go into questioning whether the Judge is or will actually be biased since all it can do is carefully examine any facts evidencing bias and from those facts, draw an inference as any reasonable and fair-minded person would do that the Judge is biased or is likely to be biased. The import of this holding in the instant Request for Review is that the Applicant bore an obligation to specifically allege and establish cogent facts constituting bias by the Chairperson and the Board Member, whose recusal it sought from hearing and determining the instant Request for Review, from the disclosure that their law firms are on the panel of Advocates of the Procuring Entity. It is our considered view that mere

perception of bias is not sufficient factual evidence to prove bias by the Chairperson and the Board Member in the instant Request for Review.

We note that the Constitutional Court of South Africa in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147; 1999 (7) BCLR 725 (CC)** articulated the proper approach on recusal of judicial officers as follows:

"... The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

In essence, in considering an application for recusal, (a) the court first presumes that judicial officers are impartial in adjudicating disputes, (b) the applicant bears the onus of rebutting the presumption of judicial impartiality, and (c) the presumption of judicial impartiality requires cogent or convincing evidence to be rebutted.

In **Gladys Boss Shollei v Judicial Service Commission & another [2018] Eklr**, the Supreme Court was considering an application by the Judicial Service Commission for recusal of various judges, on grounds that the judges had participated in related deliberations before it, i.e. Justice Ojwang' had pending disciplinary cases, while Justice Njoki Ndung'u had pending litigation against it. The Court, however, took the opportunity to make some relevant pronouncements relating to recusal as per the following excerpts:

"We have considered the above rival submissions. The Supreme Court has a special constitutional mandate which cannot be delegated to any other forum in the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment:

"[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How they made the Common Law* (Cambridge: University Press, 2012), p.156"

Further, Justice Ibrahim concurred as follows:

"Another truth, which is a reality now, is that among the Supreme Court Judges, we shall/may have former JSC Commissioners. It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of cause, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously.

Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties'

right to have their cases heard and determined before a court of law.

In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason"

....

From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism. I will invoke that doctrine in this matter and hold that all Judges of the Supreme Court of Kenya, members of the Judicial Service Commission or former members, have a duty to sit in this matter so as to affirm Constitutionalism."

Justice Njoki Ndung'u similarly opined:

"Additionally, to find that membership of a Judge in the 1st respondent, automatically disqualifies him or her on the basis of perceived bias from hearing and determining any matter relating to the 1st respondent would be to stretch the perception of bias too far.

...

It must always be remembered that there is a presumption of impartiality of a Judge. In *The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others*, (CCT16/98) [1999] the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters."

From the above case, we note that there is a hard balance between the duty to sit and recusal of oneself from hearing and determining a matter. On one hand, as an adjudicator, one must consider that recusal aims at maintaining the appearance of impartiality and on the other hand, one has a constitutional duty to sit in cases assigned to him or her and can only refuse to hear a case where an extremely good reason is presented.

In **Petition No. 295 of 2018 Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) [2018] eKLR**, the Court held that:

"In our view, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party."

This Board is cognizant of provisions of Regulation 212 of Regulations 2020 which require disclosure of interest by members of the Board members which reads:

"(1) Where any member of the Review Board has a direct or indirect interest in any matter before the Review Board, he or she shall declare his or her interest in the matter and shall not participate in the hearing or decision-making process of the Review Board in relation to that particular matter.

(2) Such a disclosure shall be recorded in a conflict of interest disclosure register."

Our interpretation of the above provision of Regulations 2020 is that where any member of the Board has a direct or indirect interest in any request for review application filed for review, hearing, and determination by the Board, he or she has an obligation to declare his or her interest in such request for review application, and ought not to participate in the review, hearing or

determination of such request for review application. This is basically in line with the principles of natural justice. In **R –vs- Bow Street Metropolitan Stipendiary magistrate ex parte Pinochet Ugarte (No.2) 1999 I ALL ER 577** Browne Wilkinson LJ held that the rule of natural justice, *nemo judex in causa sua*, (meaning no person can judge a case in which they have an interest) has two implications. It would be applied literally if the judge is a party to the litigation or has financial or proprietary interest in the outcome of the case. Secondly, a person may indirectly be a judge in his own cause if his conduct or behavior gives rise to a real suspicion that he is not impartial.

Turning to the circumstances in the instant Request for Review, the matter before the Board concerns Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff. The Chairperson and the Board Member, before commencement of the hearing of the instant Request for Review, disclosed to all parties to the Request for Review that their respective law firms were in the panel of Advocates of the Procuring Entity though they were currently not handling any briefs for the Procuring Entity. This means that they have no involvement, through their respective law firms, with the subject tender before the Board. Additionally, the Chairperson and the Board Member categorically disclosed that they had no direct or indirect interest in the instant Request for Review or the subject tender in question. The Applicant bears the burden of presenting clear evidence that the Chairperson and Board Member is biased against it for

them to recuse themselves from to hearing and determining the instant Request for Review.

It is important to note that Section 31(1) of the Act provides for the tenure of office of the chairperson and members of the Board and reads:

"(1) The Chairperson and members of the Review Board shall hold office for a term of three years and shall be eligible for a further term of three years."

Section 32 provides for the terms and conditions of the members of the Board and reads:

"(1) The terms and conditions of service of the Review Board shall be determined by the Cabinet Secretary and the Salaries and Remuneration Commission.

"(2) The members of the Review Board shall serve on a part time basis. "

In essence, members of the Board are part-timers who hold office for a term of three years and are eligible for a further term of three years. We note from the provisions of Section 29 and 30 of the Act that members of the Board are professionals who may be running their own professional firms TO earn a living independently from their duties at the Board. It is against this

background that the Chairperson and other members of the Board are required to disclose any direct or indirect interest in any matter before the Board and refrain from participating in the hearing or decision making process of that particular matter and for such disclosure to be recorded in a conflict of interest disclosure register.

In the instant Request for Review, the Chairperson and the Board Member in their respective disclosures, categorically informed all parties to the instant Request for Review that they have no direct or indirect interest in the instant Request for Review. We are cognizant of the holding in the case of **Charles John Macharia Mbutia v Standard Chartered Bank Kenya Limited [2021] eKLR** which referred to the case of **Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017]eKLR** where Justice Odunga held that:

"We, Judges are made of flesh and bones. We are not created in a lab and incubated until our rise to the bench. We were all members of the bar and have studied, practiced, trained and worked with others and more often other members of the Bar. If every Judge were to recuse themselves from matters where they are acquainted with an Advocate appearing before them or even worked with or for them, then we would see no end to recusals. The overriding objective of the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes pursuant to Article 159 of the Constitution and reiterated in Section 3 of the Employment and Labour Relations Court Act would be rendered academic."

Further, in **Dari Limited & 5 others v East African Development Bank (Civil Appeal 70 of 2020) [2023] KECA 454 (KLR)**, (hereinafter referred to as “the Dari Limited case”) the Appellants challenged the recognition of a foreign judgment from England on the basis that, among others, the judge in the English court had been biased due to sharing chambers with the Respondent’s counsel. The Court of Appeal declined to find a bias in this instance. The relevant excerpt is as follows:

"Having found that the question of Judge Toledano’s alleged bias was to be determined by the lex fori, and applying the above principles, the issue becomes, could a reasonable, fair-minded and informed person, aware of all the circumstances and knowledge of the practice of English chambers as well as the impartiality obligations of a judge, apprehend that Judge Toledano would be biased merely because of sharing chambers with counsel for the respondent? We would not think so, and this much is confirmed by the fact that when the appellants applied for leave to appeal citing that ground, the English Court of Appeal found that particular contention to be utterly without merit."

The Court of Appeal in the Dari Limited case also cited with approval the Supreme Court of Canada case, *R. v S. (R.D.)* [1997] 3 SCR 484, which held as follows:

"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the

question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.”

This establishes that a mere association between the adjudicator and the parties or their counsel is not a good ground for declaring bias.

We also note that in the Jasbir Singh Rai case cited hereinbefore, the Supreme Court of Kenya dismissed the application for recusal of Justice Tunoi and applied the doctrine of necessity in view of its constitutional limit of seven (7) members in total and a minimum of five (5) members required to make a decision. In that regard, the court cited and followed the US case of **Laird vs Tatum 409 U.S. 824 (1972)** in which Justice Rehnquist declined to recuse himself in a case that came before him as judge in which he had testified as an expert witness at Senate hearing before joining the bench. The case was decided 5-4 in the U. S. Supreme Court, and a motion for recusal and rehearing was filed. Justice Rehnquist found that he had a duty to sit, particularly because there was no replacement for a recused Justice, which could lead to an equally divided Court. This could be said to have been out of necessity to ensure that the quorum of the court was maintained.

Being guided by the holdings in the cases cited above, while invoking the doctrine of necessity, the Board in its deliberations on the Applicant's application for recusal and prayer for constitution of a new panel to hear and determine the instant Request for Review considered the fact that (a) it is mandated pursuant to Section 171 of the Act to hear and determine the instant Request for Review within 21 days from the 11th May 2023, being the date when the said matter was filed, (b) the instant Request for Review had been scheduled for hearing on 25th May 2023 which was six (6) days before the expiry of the statutory period of twenty-one (21) days (c) an adjournment of the instant Request for Review would lead to delay and

would not be in the interest of just and expeditious disposal of the matter, and (d) the current composition of the Board noting that seven of its members' terms expired leaving a lean team.

From the foregoing, it is our considered view that the Applicant has not shown in their application for recusal of the Chairperson and the Board Member and re-constitution of a new panel that either the Chairperson or the Board Member have any financial or proprietary interest in the outcome of the instant Request for Review to prove or establish a conflict of interest or bias to warrant allowing of such an application. We are guided by the case of: **Nathan Obwana v Robert Bisakaya Wanyera & 2 others (2013) eKLR**, where the Court stated as follows:

"I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased, then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing, then parties will be able to make their own predictions and make conclusions as to how the court is likely to decide a matter."

It is important to note that this Board is not the only administrative body or tribunal comprised of part time members. We have specialized tribunals and administrative bodies established by various statutes such as the Public Private Partnership Petition Committee. The implication of a member of this Board recusing himself especially where conflict of interest and bias has not been substantiated would without doubt have repercussions on members operating on part time basis in other specialized tribunal. In the circumstances, we find that the Applicant has failed to prove the allegation of conflict of interest and bias to warrant the recusal of the Chairperson and the Board Member from hearing and determining the instant Request for Review.

Whether the Applicant's tender in response to the subject tender was evaluated in accordance with Mandatory Requirement No. 5 of Clause i Preliminary Evaluation (Eligibility Mandatory Requirements) of Section III- Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution

We understand the Applicant's case, as seen at paragraphs 6 to 20 of the Supporting Affidavit sworn on 9th May 2023 by Mercy Kamau, the Applicant's Chief Accountant, to be that the reason for disqualification of its tender in response to the subject tender at the Preliminary Evaluation (Eligibility Mandatory Requirement) Stage was unfair since it had submitted a properly filled and signed self-declaration not to engage in any corrupt or fraudulent practice (Form SD2). During the hearing, Mr. Gachuba, Counsel for the

Applicant, submitted that the self-declaration not to engage in any corrupt or fraudulent practice (Form SD2) was not a material document that would lead to disqualification of the Applicant's tender as evidenced by ITT 12 at page 10 of Section I- Instructions to Tenderers of the Tender Document.

Mr. Gachuba further submitted that the Applicant's tender was substantially responsive and the Respondent ought to have granted the Applicant an opportunity to submit any necessary information to rectify any non-conformities or omissions in the self-declaration not to engage in any corrupt or fraudulent practice (Form SD2) since the Respondent had a duty to waive minor deviations or non-conformities found in the Applicant's tender pursuant to Section 79(2) of the Act, Regulation 74(2) and 75(2) of Regulations 2020, and ITT 31.2 and ITT 31.3 at page 17 to 18 of Section I- Instructions to Tenderers of the Tender Document.

We understand the Respondent's response on this issue to be that the reason for disqualification of the Applicant's tender in the subject tender as seen at paragraph 6 to 10 of the Respondent's Memorandum of Response was that the Applicant submitted a self-declaration not to engage in any corrupt or fraudulent practice (Form SD2) that did not comply with mandatory requirement number 5 of Clause (i) Preliminary Evaluation (Eligibility Mandatory Requirements) at page 27 to 28 of Section III- Evaluation and Qualification Criteria of the Tender Document and hence materially deviated from the mandatory requirements set out in the Tender Document and the

provisions of Section 55 and 79(1) of the Act and Regulation 74 and 75 of Regulations 2020.

On its part, the Interested Party as seen at paragraph 4 of the Interested Party's Response sworn on 21st May 2023 by Francis Omanyala aligned itself with the arguments of the Respondent on this issue in its entirety and contends that the requirement to fill in Form SD2 was mandatory in its nature as it required any tenderer to declare not to engage in corrupt or fraudulent practice and as such, non-filling and execution of the said form was not a minor deviation contemplated under Section 79(2) of the Act.

Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).***

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the***

relevant professional associations regarding regulation of fees chargeable for services rendered.”

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders using the procedures and criteria set out in the Tender Document.

The Board has carefully studied the Tender Document submitted by the 2nd Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act and notes that mandatory requirement number 5 of Clause (i) Preliminary Evaluation (Eligibility Mandatory Requirements) at page 27 to 28 of Section III- Evaluation and Qualification Criteria of the Tender Document provides as follows:

i. Preliminary Evaluation (Eligibility Mandatory Requirements)

<i>No.</i>	<i>Subject</i>	<i>Criteria</i>	<i>Mandatory Requirements</i>	<i>Pass or Fail</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>5.</i>	<i>Ethical and Legal</i>	<i>To determine that the procuring</i>	<i>Must Complete and Sign</i>	

	Compliance History	entity is not precluded from entering into the contract with the person under investigations for breach of procurement laws	Certificate of Independent Tender Determination and the Self Declaration Forms of the Tenderer	
		To determine that the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings	Must submit a dully filled Self-Declaration Form - FORM SD1	
		To determine that the	Must Submit Self	

		<i>person has not been convicted of corrupt or fraudulent practices</i>	<i>declaration that the tenderer will not engage in any corrupt or fraudulent practice – FORM SD2</i>	
*****	*****	*****	*****	*****

From the above mandatory requirement No. 5, a tenderer was required to complete and sign (a) a certificate of independent tender determination and self-declaration forms of the tenderer, (b) dully filled self-declaration form - Form SD1, and (c) self-declaration that the tenderer would not engage in any corrupt or fraudulent practice – Form SD2 and these would enable the Evaluation Committee of the Procuring Entity to determine that the tenderer was not under investigations for breach of procurement laws, was not debarred from participating in the procurement proceedings and had not been convicted of corrupt or fraudulent practices.

We note that according to the Evaluation Report signed by members of the Evaluation Committee on 21st April 2023 and submitted to the Board pursuant to Section 67(3)(e) of the Act, the Applicant was determined non-responsive at the Preliminary Evaluation (Eligibility Mandatory Requirements) stage because its SD2 form submitted was not dully filled.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender and note that FORM SD2 submitted by the Applicant is found at page 0066 and 0242 of the Applicant's tender and reads as follows:

"FORM SD2

SELF DECLARATION THAT THE TENDERER WILL NOT ENGAGE IN ANY CORRUPT OR FRAUDULENT PRACTICE.

I, Chief Accountant of P.O. Box 55651-00100 being a resident of Nairobi in the Republic of Kenya do hereby make a statement as follows:

1. THAT I am the Chief Executive/Managing Director/Principal Officer/Director of Trident Insurance Company Limited (insert name of Company) who is a bidder in respect to Tender No. IEBC/OT/23/03/2022-2023 for provision of medical insurance cover (insert tender title/description) for IEBC (insert name of the Procuring entity) and duly authorized to make this statement.

2. THAT the aforesaid Bidder, its servants and or agents/subcontractors will not engage in any corrupt or fraudulent practice and has not been requested to pay any inducement to any member of the Board, Management, Staff and/or employees and or agents of IEBC (insert name of the Procuring entity) which is the procuring entity.

3. THAT the aforesaid Bidder, its servants and/or agents/subcontractors have not offered any inducement to any member of the Board, Management, Staff and/or employees and/or agents of IEBC (Name of the procuring entity).

4. THAT the aforesaid Bidder will not engage/has not engaged in any corrosive practice with other bidders participating in the subject tender.

5. THAT what is deponed to herein above is true to the best of my knowledge, information and belief.

<u>Chief Accountant</u>	<u>Signed</u>	<u>24/03/2023</u>
(Title)	(Signature)	(Date)

Bidder Official Stamp (Stamped)

We note that it was during the hearing of the instant Request for Review that Counsel for the Respondent offered an explanation on why the Evaluation Committee considered the above Form SD2 submitted by the Applicant as having not been duly filled and the reason given was that the person signing the Form SD 2 on behalf of the Applicant was only listed as Chief Accountant with no indication as to the name of the person making and signing the declaration.

From our observation of the Applicant's tender, we note that the above Form SD2 was signed by the Applicant's Chief Accountant on 24th March 2023. However, the Applicant's Chief Accountant failed to indicate her name as the person making the statement as seen from the first paragraph of the Form SD2 but instead filled in her title, Chief Accountant. Indication of a title and not the name of the bearer of the title is what we gather to be the reason that led the Evaluation Committee to conclude in its evaluation of the Applicant's tender that form SD2 was not duly filled.

The Board is cognizant of provisions of section 79(1) of the Act on responsiveness of tenders which provides that:

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets 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. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. 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....."

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are in essence the

first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, tenderers found to be non-responsive are excluded from the bid process regardless of the merits of their tenders.

Following the definition of a responsive tender as provided hereinabove, Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(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 document; 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."

The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The High Court in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows:

"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

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."

It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

Turning to the instant Request for Review, we note that ITT 21 at page 14 of Section I- Instructions to Tenderers of the Tender Document provides for the Format and Signing of the Tender Document. ITT 21.3 at page 14 of Section I- Instructions to Tenderers of the Tender Document provides:

"21.3 The original and all copies of the Tender shall be typed or written in indelible ink and shall be signed by a person or persons duly authorized to sign on behalf of the Tenderer. This authorization shall consist of a written confirmation as specified in

the TDS and shall be attached to the Tender. The name and position held by each person signing the authorization must be typed or printed below the signature. All pages of the Tender where entries or amendments have been made shall be signed or initialed by the person signing the Tender.

ITT 21.1 at page 24 of Section II- Tender Data Sheet (TDS) of the Tender Document provided for the authorization of the person signing on behalf of a tenderer as follows:

<i>ITT Reference</i>	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS</i>
<i>.....</i>	<i>.....</i>
<i>ITT 21.3</i>	<i>The written confirmation of authorization to sign on behalf of the Tenderer shall consist of the name and description of the documentation required to demonstrate the authority of the signatory to sign the Tender.</i>
<i>.....</i>	<i>.....</i>

We further note that ITT 12 at page 10 of Section I- Instructions to Tenderers of the Tender Document provided for documents comprising the tender part of which was the authorization provided under ITT 12 (e) at page 10 of Section I- Instructions to Tenderers of the Tender Document which reads:

"(e) Authorization: written conformation authorizing the signatory of the Tender to commit the Tenderer, in accordance with ITT21.3;"

In essence, a tenderer was required to accompany its tender with a written authorization confirming that the person signing the tender on behalf of the tenderer was authorized to do so. It is this written authorization that required to provide the name of the person authorized to sign a tender on behalf of a tenderer. Further, all pages of a tenderer's tender where entries were made were required to be signed or initialed by the person authorized to sign the tender. There was no requirement for the name of the person signing or initialing all pages of a tenderer's tender where entries were made.

We note that the Applicant submitted at page 348 of its tender a Power of Attorney sworn on 21st March 2023 by Diamond Lalji, Chairman of the Applicant authorizing Mercy Kamau to sign the Applicant's tender on its behalf and reads as follows in part:

".....

2. THAT I, do hereby ordain, nominate and appoint Mercy Kamau of ID Number 21720010 the Chief Accountant – General Insurance Business of the Company and of Post Office Box Number 55651-00200, Nairobi aforesaid, to be an Agent of the Company, with full power and authority, for the Company, to deal with Tender IEBC/OT/23/03/2022-2023 to provide services to INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) and take all

necessary steps to fulfill the Tender requirements; to represent the Company and appear on its behalf, before any meeting of members of the Tender Committee for, and before any Members and Staff of INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) other administrative officers or before any other authority in all matters pertaining to or connected with the Tender and to sign and execute all certificates, documents, contracts and declarations before such authorities or offices and to perform all actions and matters which may be required by law in connection with this power of attorney; to receive notices for any purpose relating to the Tender; to make any payment which is necessary or incidental to the performance of its functions under this power of attorney; and for me and in my name to sign all such documents and to do all such acts, matters and things as may be necessary or expedient for the carrying out of the powers conferred hereby.

.....”

It is our considered view that since the Applicant’s tender comprised of the above Power of Attorney which duly authorized its Chief Accountant, Mercy Kamau, to sign the subject tender on its behalf, failure by the said Mercy Kamau not to fill in her name but instead to fill in her title on the self-declaration that the tenderer would not engage in any corrupt or fraudulent practice – Form SD2 was not against the requirements of the Tender Document. We say so because the mandatory requirement of the Tender Document was for a tenderer to submit a self declaration that such a tenderer will not engage in any corrupt or fraudulent practice-FORM SD2

which the Applicant submitted. This is slightly different from the mandatory requirement to submit a **duly filled** self declaration form-FORM SD1. In essence, FORM SD1 was to be submitted having been duly filled whilst FORM SD2 did not have the express words of being submitted having been duly filled. However, any reasonable tenderer would definitely not submit FORM SD2 that has not been filled.

The format and signing of the Applicant's tender was to be done by Mercy Kamau pursuant to a written authorization in form of a power of attorney. This written authorization appointed Mercy Kamau, indicating that she is the Chief Accountant of the Applicant, as the Agent of the Applicant with powers to, *inter alia*, take all necessary steps to fulfil the tender requirements and to sign all documents with respect to the subject tender. This information in the written authorization was sufficient to inform and confirm to the Evaluation Committee during its evaluation and comparison of tenders in the subject tender of the name and description of the person who signed the self-declaration that the tenderer would not engage in any corrupt or fraudulent practice – Form SD2 despite the same having only disclosed the title of the person signing being the Chief Accountant instead of the name Mercy Kamau. Notably, the signature of the Chief Accountant, Mercy Kamau was consistent throughout the Applicant's submitted tender and is the same in the self-declaration that the tenderer would not engage in any corrupt or fraudulent practice – Form SD2.

Consequently, the Board finds that the Applicant's tender in the subject tender was not evaluated in accordance with Mandatory Requirement No. 5 of Clause i Preliminary Evaluation (Eligibility Mandatory Requirements) of Section III- Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution

Whether the Interested Party, as an insurance broker as opposed to an insurance company/underwriter, was eligible to tender in response to the subject tender.

It is the Applicant's case that the Interested Party was ineligible to tender in response to the subject tender since it is neither an insurance company nor an underwriter. The Applicant contends at paragraphs 2, 3, and 4 of the Request for Review that the Interested Party is ineligible to tender in the subject tender in its own name by virtue of Section 55(1)(c) of the Act, ITT 4.1 and 4.10 at page 8 of Section I- Instruction to Tenderers of the Tender Document, paragraph (k) of the Form of Tender, Clause 3.2.1 of the Conditions of Contract in the Tender Document and Section 2(1) and 19(1)(a) of the Insurance Act. The Applicant submitted that any tenderer awarded the subject tender must be able to provide insurance policies required by the Respondent.

The Respondent contends that insurance intermediaries such as the Interested Party were permitted to participate as tenderers in the subject

tender provided that they complied with the provisions under Clause 3 of the Invitation to Tender at page 3 of the Tender Document. The Respondent further contends at paragraph 15 of the Respondent's Memorandum of Response that this issue was raised and discussed during the Supplier's Pre-Bidding Meeting held on 10th March 2023 and recorded as clarification 8 of the Minutes of Supplier's Pre-Bidding Meeting held on 10th March 2023 and that the Interested Party complied with the provisions under Clause 3 of the Invitation to Tender at page 3 of the Tender Document. The Respondent further contends that the Applicant failed to attend the Supplier's Pre-Bidding Meeting held on 10th March 2023.

On its part, Counsel for the Interested Party submitted that the issue of whether the Interested Party was an underwriter or not was not material since the Procuring Entity not only required underwriters to participate in the subject tender but also allowed for brokers to participate in the tendering process. Counsel further submitted that the Interested Party had complied with the provisions of Clause 3 at page 3 of the Invitation to Tender of the Tender Document since it had provided a price quotation, a written authority and an agreement from its underwriter as clarified under paragraph 5 of the Interested Party's Response and annexure thereto.

We note that the bone of contention is on eligibility of the Interested Party to participate in the tendering process of the subject tender. Section 55 of the Act provides for eligibility of a person to tender and sets out the criteria required to be satisfied for a person to be considered eligible to tender for a

contract in procurement or an asset being disposed under Section 55(1) of the Act as follows:

"(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;

(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;

(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act; (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;

(f) the person has fulfilled tax obligations;

(g) the person has not been convicted of corrupt or fraudulent practices; and

(h) is not guilty of any serious violation of fair employment laws and practices."

In essence, to be considered eligible to tender it is necessary to satisfy that (a) you have the legal capacity to enter into a procurement or asset disposal contract, (b) you are not insolvent, bankrupt, in receivership or in the process of being wound up, (c) if a member of a regulated profession, have satisfied all professional requirements, (d) the procuring entity is not precluded from entering into a contract with you pursuant to Section 38 of the Act, (e) you or your sub-contractor are not debarred, (f) you have fulfilled your tax obligations, (g) you have not been convicted of corrupt or fraudulent practices, and (h) you are not guilty of any serious violation of fair employment laws and practices.

The Applicant relied on provisions of Section 55(1) (c) of the Act as read with Section 2(1) and 19(1)(a) of the Insurance Act in support of its allegations that the Interested Party was ineligible to tender in the subject tender. This connotes that the Interested Party being an insurance broker has not satisfied all professional requirements in its profession to be considered eligible to tender in the subject tender. Additionally, the Applicant alleges that by virtue of ITT 4.1 and 4.10 at page 6 to 8 of Section I- Instruction to Tenderers of the Tender Document, only insurance companies were eligible to tender in the subject tender.

Having carefully studied the Tender Document submitted to the Board pursuant to Section 67(3)(e) of the Act, we note that:

The Invitation to Tender at page 3 of the Tender Document provides under Clause 3 as follows:

"3. Where a tenderer is not an underwriter, they will provide the following in their bid documents:

a) Price quotation from their preferred underwriter

b) A written authorization letter from the underwriter as confirmation that they have allowed the tenderer to bid using their quotation

c) An agreement with the underwriter that payments shall be made to the person with whom the contract shall be entered."

Query No. 7 at page 3 of 4 of Addendum No. 1 sought clarification as to whether insurance brokers were considered and reads:

".....

NO	BIDDER QUERY/QUESTION OR COMMISSION ADDITIONAL INFORMATION	REFERENCE	RESPONSE/CLARIFICATION
.....
7.	The bidders sought clarification whether Insurance brokers, Agencies etc are considered since the	Page 3 Item No. 2 and 3	Bidders are advised to read tender documents. ITT on page 3 item 2 and 3 which states:

	<p><i>tender is conducted under open competitive tendering method.</i></p>		<p><i>Tendering will be conducted under open competitive tendering method using a standardized tender document and is open to all qualified and interested Tenderers. Tenderers will be allowed to tender for one or more items.</i></p>
<p>....</p>	<p>.....</p>	<p>.....</p>	<p>.....</p>

ITT 4 of Section I- Instruction to Tenderers at page 6 to 8 of the Tender Document provides for eligible tenderers. ITT 4.1 of Section I- Instruction to Tenderers at page 6 to 7 of the Tender Document reads:

"A Tenderer may be a firm that is a private entity, a state-owned enterprise or institution subject to ITT 4.7 or any combination of such entities in the form of a joint venture (JV) under an existing agree mentor with the intent to enter into such an agreement supported by a letter of intent. Only Insurance service providers registered by Insurance Regulatory Authority are eligible to tender and sign contracts. In the case of a joint venture....."

ITT 4.7 of Section I- Instructions to Tenderers at page 7 of the Tender Document reads:

"Tenderers that are state-owned enterprises or institutions in Kenya may be eligible to compete and be awarded a Contract(s) if they can establish that they are registered as insurance businesses."

Further, ITT 4.10 of Section I- Instruction to Tenderers at page 8 of the Tender Document reads:

"The insurance Act of Kenya (Revised 2017) requires that insurance companies that wish to offer insurance services in Kenya should be registered with the Insurance Regulatory Authority (IRA) of Kenya to allow them undertake insurance business in Kenya. Registration shall not be a condition for tender, but it shall be a condition of contract award and signature. A selected tenderer shall be given an opportunity to register before contract award and signature of contract. Details on application for registration with Insurance Regulatory Authority may be accessed from the website www.ira.go.ke"

We also note that Section 2 (1) of the Insurance Act defines a broker as:

"an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer,

policyholder or proposer for insurance or reinsurance and includes a medical insurance provider.”

Section 19(1)(a) of the Insurance Act provides:

“(1) Except as otherwise provided in or under this Act, only a person registered under this Act may carry on insurance business — (a) in Kenya (whether in respect of Kenya insurance or reinsurance business or otherwise);”

Section 2(1) of the Insurance Act defines insurance business as:

“the business of undertaking liability by way of insurance (including reinsurance) in respect of any loss of life and personal injury and any loss or damage, including liability to pay damage or compensation, contingent upon the happening of a specified event, and includes—

(a)the effecting and carrying out by a person not carrying on a banking business, of contracts for fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee, being contracts effected by way of business (and not merely incidental to some other business carried out by the person effecting them) in return for the payment of one or more premiums;

(b)the effecting and carrying out, by a body (not being a body carrying on a banking business) that carries on business which is

insurance business apart from this paragraph, of capital redemption contracts;

(c)the effecting and carrying out of contracts to pay annuities on human life;

(d)takaful insurance business based on group participation guaranteeing each of the members against defined loss or damage;

(e)micro-insurance business;

(f)social insurance schemes;

and any business incidental to insurance business as so defined but does not include—

(i)business in relation to the benefits provided by a friendly society or trade union for its members or their dependants;

(ii)business in relation to the benefits provided for its members or their dependants by an association of employees;

(iii)deleted by Act No. 9 of 2003, s. 2;

(iv)business in relation to a scheme or arrangement for the provision of benefits consisting of—

and no other benefits, except benefits incidental to the scheme or arrangement;

(v)business consisting of the effecting and carrying out, by a person carrying on no other insurance business, of contracts of such description as may be prescribed, being contracts under which the benefits provided are exclusively or primarily benefits in kind;

(vi)business declared by the Minister by notice in the Gazette not to be insurance business for the purposes of this Act;”

Section 150 of the Insurance Act provides that only registered brokers, agents, risk managers, motor assessors, insurance investigator, loss adjusters, surveyors, medical insurance provider and claims setting agents are to carry on business and reads:

"(1) No person shall, after the expiry of three months from the appointed date, commence, transact or carry on in Kenya the business of a broker, agent, risk manager, motor assessor, insurance investigator, loss adjuster, insurance surveyor, medical insurance provider, or claims settling agent unless he is registered under this Act."

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

First, to undertake insurance business in Kenya, one must be registered with the Insurance Regulatory Authority, be it an insurance broker or an insurance company. Having established that an insurance broker is involved with placing insurance business with an insurer, they are required to be registered with the Insurance Regulatory Authority. This means that for a tenderer engaged in the insurance business to be considered as an eligible tenderer in the subject tender, they must be registered by Insurance Regulatory Authority. However, we note that in the subject tender, registration by the Insurance Regulatory Authority was not a condition for tendering, but would be considered a condition on contract award and signature.

Secondly, Clause 3 of the Invitation to Tender at page 3 of the Tender Document paved way for a tenderer who was not an underwriter to submit its tender in the subject tender provided that the said tenderer submitted in their tender (a) a price quotation from their preferred underwriter, (b) a written authorization letter from their underwriter as confirmation that the underwriter has allowed the tenderer to tender using its quotation, and (c) an agreement with the underwriter that payments shall be made to the person with whom the contract in the subject tender shall be entered.

In our considered view, neither does the provisions in the Invitation to Tender of the Tender Document supersede the provisions in the Instructions to Tenderers of the Tender Document nor do the provisions in the Instructions to Tenderers of the Tender Document supersede the provisions in the Invitation to Tender of the Tender Document. Notably, only the provisions in Section II- Tender Data Sheet (TDS) would prevail over the provisions in the Instructions to Tenderers whenever there is a conflict as stipulated at page 23 of the Tender Document.

We are of the opinion that there is no conflict between the provisions of Clause 3 of the Invitation to Tender at page 3 of the Tender Document and Clause 4.1, 4.7, and Clause 4.10 of Section I-Instructions to Tenderers at pages 6 to 8 of the Tender Document with respect to who is eligible to tender in the subject tender. We say so because Clause 3 of the Invitation to Tender at page 3 of the Tender Document recognized that a tenderer may not

necessarily be an underwriter and as such, made provisions on what such a tenderer who was not an underwriter would be required to avail in their tender to be considered eligible to tender in the subject tender.

Further, Clause 4.1, 4.7 and 4.10 of Section I-Instructions to Tenderers at pages 6 to 8 of the Tender Document recognized that a tenderer may be a firm that is a private entity, a state-owned enterprise or institution in Kenya or an insurance company and provided that for them to be eligible to compete (that is for the state-owned enterprises or institutions) and to be awarded and sign contract in the subject tender, it would be mandatory for them to be registered as insurance businesses with the Insurance Regulatory Authority. This therefore means that the Tender Document considered tenderers such as the Interested Party who were insurance brokers, tenderers who were insurance companies such as the Applicant and those who may have been state-owned enterprises and institutions in Kenya registered as insurance businesses. Even if we are wrong and it is said that there is any inconsistency or conflict between these provisions then such conflict or inconsistencies cannot be visited upon the tenderers and should be interpreted against the drafter of the Tender Document pursuant to the contra-proferentem rule. Notably, only the provisions in Section II- Tender Data Sheet (TDS) would prevail over the provisions in the Instructions to Tenderers whenever there is a conflict as stipulated at page 23 of the Tender Document.

Turning to the circumstances of the instant Request for Review, the Interested Party at paragraph 5 of the Interested Party's Response sworn on 21st May 2023 by Francis Omanyala depones that the Interested Party is duly registered by the Insurance Regulatory Authority. We have established that registration by the Insurance Regulatory Authority was not a condition for tendering in the subject tender, but would be a necessary condition that required to be fulfilled by the successful tenderer at the point of contract award and signature. Nevertheless, we note from the Interested Party's tender submitted to the Board pursuant to Section 67(3)(e) of the Act that the Interested Party at page 403 attached to its tender a Medical Insurance Provider License Registration No. IRA/12/039/2023 issued by the Insurance Regulatory Authority depicting that it was registered to operate as a medical insurance provider in Kenya and the license was due to expire on 31st December 2023. Further, the Interested Party submitted in its tender at page 410 a license Registration No. IRA/06/452/2023 issued by Insurance Regulatory Authority evidencing its registration as a broker and the license was due to expire on 31st December 2023. In view of this, it is our considered opinion that it is the obligation of the Procuring Entity to ensure and confirm that at the point of signing the contract in the subject tender, the successful tenderer in the subject tender is registered by the Insurance Regulatory Authority.

We observe that as part of the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act, the Applicant submitted with its tender at pages 10, and 377 to 390 a price

quotation, and a written authorization dated 15th March 2023 addressed to the Respondent depicting an agreement between Jubilee Health Insurance Limited and the Interested Party confirming that it was allowed to tender in the subject tender using the underwriter's quotation and that payments would be remitted to the person with whom the contract would be entered. The authorization letter from Jubilee Health Insurance provided, *inter alia*, that (a) the Interested Party was in business with Jubilee Health Insurance and had the authority to use its technical documentation as submitted, (b) Jubilee Health Insurance Limited was well able to perform the services requested in conjunction with the Interested Party, (c) the contract would be awarded on the basis of the terms and conditions indicated in its medical quotation, (d) the insurance broker awarded the tender honors its commitment and (e) the full premium payments for the medical insurance cover is remitted to the person with whom the contract would be entered.

From the foregoing, the Interested Party being an insurance broker and being duly authorized by Jubilee Health Insurance Limited to tender in the subject tender with it as its underwriter fulfilled the provisions of Clause 3 of the Invitation to Tender at page 3 of the Tender Document. In the circumstances, we find that the Interested Party was eligible to tender in the subject tender.

Whether the Respondent amended and/or modified the Interested Party's tender sum to what was captured in the letter of Notification of Award dated 3rd May 2023 from the amount read out

at the Tender Opening contrary to Section 82 of the Act and ITT 32.1 of Section I- Instructions to Tenderers at page 18 of the Tender Document

We understand the Applicant's allegation to be that the Interested Party's tender sum read during opening of tenders on 24th March 2023 for Lot 1 was Kshs. 235,785,705/= and not Kshs. 471,571,410/= as indicated in the letter of Notification of Award dated 3rd May 2023 that the Respondent notified the Applicant of successfulness of the Interested Party in the subject tender, being the lowest evaluated responsive tenderer in Lot 1. With this, the Applicant alleges that the Respondent breached Section 82(1) of the Act since the tender sum awarded is not based on the tender sum that was read out during the tender opening, which was an amendment of the Interested Party's tender sum after the tender submission deadline and as such, the Respondent usurped the Interested Party's power to amend its tender.

On the other hand, the Respondent denied amending or modifying the Interested Party's tender sum and contended that the Interested Party's tender sum of Kshs. 235,785,705/= captured at page 5 of the Tender Opening Minutes is a one (1) year quote and therefore a two (2) year grand total would aggregate to Kshs. 471,571,410/=. According to the Respondent, the Applicant's Year 1 quote as indicated in the Form of Tender was Kshs. 235,785,705 and Year 2 quote was Kshs. 235,785,705/= with the tender sum per annum being Kshs. 235,785,705/=. The Respondent at paragraph 5 of the Respondent's Memorandum of Response contend that the tender sum as listed in the Tender Opening Minutes reflected erroneously

as a one year quote as opposed to the aggregate amount of Kshs. 471,571,410/=.

On its part, the Interested Party at paragraph 6 of the Interested Party's Response sworn on 21st May 2023 by Francis Omanyala fully associates itself with the Respondent's argument on this issue and denies amending its tender sum. The Interested Party contends that its tender sum per annum was Kshs. 235,785,705/= resulting to an aggregate amount of Kshs. 471,571,410 for the two (2) years.

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."**

In essence, 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 is 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 Form of Tender that the Schedule of Tendered Items and Prices under Lot 1 was provided as follows:

Lot 1:

1	2	3	4	5		6	7
No. of item to be insured	Brief description of item to be insured	Value of item to be insured	Insurance period	Insurance Premium per annum (Tender Price)		Price discount (if any)	Total Tender Price for Insurance Service per annum
				Year 1	Year 2		
No 1							
No 2							
No 3							

<i>Other s</i>							
<i>Grand Total</i>							

We note from the Applicant’s original tender submitted to the Board pursuant to Section 67(3)(e) of the Act that it submitted a Form of Tender at page 36 of its tender as follows:

SCHEDULE OF TENDERED ITEMS AND PRICES

Lot 1

1	2	3	4	5		6	7
No. of item to be insured	Brief description of item to be insured	Value of item to be insured	Insurance period	Insurance Premium per annum (Tender Price)		Price discount (if any)	Total Tender Price for Insurance Service per annum
				Year 1	Year 2		
No 1	<i>Medical Insurance for commissioners and staff</i>	<i>As per schedule of Requirements</i>	<i>2022-2023</i>	<i>235,785,705</i>	<i>235,785,705</i>	<i>-</i>	<i>Kes 235,785,705</i>
No 2							
No 3							
Others							
Grand Total							<i>Kes 235,785,705</i>

We have also noted from the Tender Opening Minutes dated and signed by the Tender Opening Committee on 29th March 2023 indicates that the tender sum recorded at the opening of tenders with respect to the Interested Party was Kshs. 235,785,705/=.

Finally, we have studied the Letter of Notification of Award dated 3rd May 2023 and note that the Interested Party was awarded the subject tender being the successful tenderer and the lowest evaluated responsive tenderer under Lot 1 at a sum of Kshs.471,571,410/= being a grand total of the two (2) years.

Given the foregoing, it is clear to the Board that the tender sum as indicated in the Letter of Notification of Award dated 3rd May 2023 is inconsistent with (a) the tender sum as read out at the tender opening and recorded in the Tender Opening Minutes by the Tender Opening Committee on 29th March 2023 and (b) the grand total tender sum submitted by the Interested Party in its Form of Tender. We say so because the grand total sum of Kshs. 235,785,705/= which the Interested Party submitted in its Form of Tender was the Total Tender Price for Insurance Service **per annum**. This means that the total tender sum for each year of the two year contract in the subject tender was Kshs.235,785,705/=. In the same vein, the tender sum read out and recorded during the tender opening was the total tender sum for each year of the contract in the subject tender even though it was not specified that it was per annum. This therefore means that in issuing its Letter of

Notification of Award, the Respondent ought to have notified both the successful and unsuccessful tenderers that the Interested Party being the successful tenderer and the lowest evaluated responsive tenderer was awarded the subject tender for a contract period of 2 years at the tender sum of Kshs. 235,785,705/= per annum.

In the circumstances, we find that even though the Respondent did not amend and/or modify the Interested Party's tender sum in the Form of Tender, it nevertheless awarded the Interested Party the subject tender based on an amount different from what was provided in the Form of Tender contrary to the provisions of the Tender Document and Section 82 of the Act.

Whether the Respondent's Letter of Notification of Award dated 3rd May 2023 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 Notification of Award dated 3rd May 2023 was unfair and non-transparent as the Respondent failed to (a) explain the reason why its tender was determined as not duly filled and, (b) give reasons why the Interested Party was successful as required under Section 87(3) of the Act and ITT 41.1 (c) of the Tender Document. The Respondent contends that the Applicant was duly notified of the reason why its tender was

unsuccessful and also informed on the successful tenderer in the subject tender.

The Board is cognizant of Article 227 of the Constitution which requires a procuring entity 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 is the successful tenderer 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.

We note that the letter of Notification of Award dated 3rd May 2023 addressed to the Applicant informed it that its tender was unsuccessful at the Preliminary Evaluation stage 1 and reads as follows:

"....."

The Commission hereby regrets to inform you that your tender was not successful at the Preliminary Evaluation stage 1 due to the following reason:

(i) Self declaration not to engage in any corrupt or fraudulent practice was not duly filled.

The successful bidders, being the lowest evaluated responsive tenderers are as follows:

Lot 1 is M/S Zamara Risk & Insurance Brokers Ltd with a grand total of the two (2) years combined at Kshs: 471,571,410

Lot 2 is M/S Zamara Risk & Insurance Brokers Ltd with a grand total of the two (2) years combined at Kshs: 29,164,890

Lot 3 is M/S Zamara Risk & Insurance Brokers Ltd with a grand total of the two (2) years combined at Kshs: 7,922,714

The Commission takes this opportunity to thank you for having participated in the above mentioned tender.....”

We note that the above notification letter issued to the Applicant by the Respondent gives the reason as to why the Applicant’s tender was not successful at the Preliminary Evaluation (Eligibility Mandatory Requirements) stage being that the self-declaration not to engage in any corrupt or fraudulent practice was not duly filled. We also note that the notification letter disclosed that the Interested Party was the successful tenderer in Lot 1, Lot 2, and Lot 3 in the subject tender, reason being that it was the lowest evaluated responsive tenderer and the tender sum that the Interested tenderer was awarded in each lot.

During the hearing, Mr. Githinji, Counsel for the Respondent expounded on the reason for disqualification of the Applicant to be that the person who signed the Applicant’s self-declaration form was only listed as Chief Accountant and there was no indication as to who this person making and signing the self-declaration form was, and this was the reason why the Evaluation Committee considered the form SD2 as not duly filled. He submitted that the Applicant did not seek any clarification from the

Respondent on what was meant by 'not duly filled'. We note that disclosure of reasons why a tenderer was unsuccessful in a procurement process are central to the principle of transparency in public procurement. An accounting officer is obligated to comply with the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 when notifying tenderers of the outcome of the evaluation process of tenders.

In **Judicial Review No. 589 of 2017, Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** (hereinafter referred to as "the Lordship Case") and **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court articulated the importance of providing sufficient reasons for disqualification to tenderers. In the Lordship Case, the High Court held as follows:

"It must be emphasized that contracts that are pedigree of a flawed process must be rendered null and void ab initio. The right to file a request for review against the decision of the procuring entity accrues after an unsuccessful bidder is notified that its bid was not successful, and with reasons.

.....The letter simply states that the tenderer was not successful for incompleteness and for being nonresponsive. It does not state

what was incomplete and or what aspect of the bid was non responsive leading to the rejection.

Notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity.”

Further, in the Akamai Case, the High Court held as follows:

“In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid”

From the above authorities, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

In essence, the rules of natural justice as provided for in Article 47 of the Constitution, require that a procuring entity provides specific reasons to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. It is not enough to generally state that a tenderer was non-responsive. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with reasons leading to its disqualification in a tendering process.

Consequently, failure by the Respondent to issue a cogent reason and explanation in its notification letter dated 3rd May 2023 addressed to the Applicant on what it meant by 'not duly filled' amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020 since the Applicant was not issued with sufficient reason to understand why its tender in the subject tender was determined unsuccessful at the Preliminary Evaluation (Eligibility Mandatory Requirements) stage.

In the circumstances, we find that the Respondent failed to issue the Applicant with sufficient reason as to why its tender was unsuccessful at the Preliminary Evaluation stage 1 which was in breach of the provisions of Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and the principle of transparency in Article 227(1) of the Constitution. As such, the letter of Notification of Award dated 3rd May 2023 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 Applicant's tender was not evaluated in accordance with provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document. We have established that the Interested Party was eligible to tender in the subject tender and that the Respondent awarded the Interested Party tender based on an amount not in the Interested Party's form of tender. We have also found that the letter of Notification of Award dated 3rd May 2023 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

We therefore find it just and fair to nullify the letters of Notification of Award dated 3rd May 2023 issued to all unsuccessful tenderers and to also nullify and set aside the award of the subject tender to the Interested Party. We also deem it just and fit to order the Respondent to direct the Evaluation Committee to admit the Applicant's tender at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage and conduct a re-evaluation of tenders at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) being tenders that made it to the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage and that of the Applicant taking into consideration the findings of this Board and the provisions of the Tender Document, the Act and the Constitution.

The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

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 9th May 2023 and filed on 11th May 2023:

- 1. The Letter of Notification of Award to the Interested Party dated 3rd May 2023 with respect to Lot 1: Medical Insurance of Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff, be and is hereby nullified and set aside.**

- 2. The Letters of Notification of Award addressed to the unsuccessful tenderers including the Applicant dated 3rd May 2023 with respect to Lot 1: Medical Insurance of Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff, be and are hereby nullified and set aside.**

- 3. The Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage and conduct a re-evaluation of the**

tenders at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage (being all other tenders that made it to the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage including the Applicant's tender) with respect to Lot 1: Medical Insurance in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.

- 4. Further to Order No. 3 above, the Respondent is hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer with respect to Lot 1: Medical Insurance within seven (7) days from the date of this decision while taking into consideration the Board's findings in this Request for Review.**

- 5. For avoidance of doubt, the award of Lot 2: Group Life Assurance (GLA) and Lot 3: Group Personal Accident (GPA) of the subject tender is not affected by this decision.**

- 6. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 2nd Day of June 2023.



.....

CHAIRPERSON

PPARB



.....

SECRETARY

PPARB