

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 44/2023 OF 16<sup>TH</sup> JUNE 2023**

**BETWEEN**

**TRIDENT INSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**SECRETARY TO INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**HEAD OF PROCUREMENT INDEPENDENT**

**ELECTORAL & BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**EVALUATION COMMITTEE INDEPENDENT**

**ELECTORAL & BOUNDARIES COMMISSION .....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION .....4<sup>TH</sup> 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. Mrs. Njeri Onyango FCIArb - Panel Chairperson
2. Mr. Joshua Kiptoo - Member
3. Eng. Lilian Atieno - Member
4. Ms. Alice Oeri - Member
5. Mr. Alexander Musau - Member

## **IN ATTENDANCE**

1. Ms. Sarah Ayoo - Secretariat
2. Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT**                      **TRIDENT INSURANCE COMPANY LIMITED**

Mr. MwanikiGachuba - Advocate, Mwaniki Gachuba Advocates

## **RESPONDENTS**

**SECRETARY, INDEPENDENT ELECTORAL  
&BOUNDARIES COMMISSION, HEAD OF  
PROCUREMENT INDEPENDENT  
ELECTORAL & BOUNDARIES  
COMMISSION, EVALUATION  
COMMITTEE INDEPENDENT ELECTORAL  
& BOUNDARIES COMMISSION,  
INDEPENDENT ELECTORAL  
&BOUNDARIES COMMISSION**

- |                  |   |
|------------------|---|
| 1. Dr. Mutubwa   | -Advocate, Dr. Mutubwa Law Advocates,<br>Arbitrators and Mediators  |
| 2. Ms. Joy Anami | - Advocate, Dr. Mutubwa Law Advocates,<br>Arbitrators and Mediators |

**INTERESTED PARTY      ZAMARA      RISK      AND      INSURANCE  
BROKERS LIMITED**

Mr. Ochieng	-Advocate, Ochieng Teddy Advocates
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## **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”) by way of open tender method. The invitation was by way of an advertisement in the Daily Nation on 3<sup>rd</sup> 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](http://www.iebc.or.ke) and on the Public Procurement Information Portal (PPIP) ([www.tenders.go.ke](http://www.tenders.go.ke)). The subject tender was in three Lots being (a) Lot1: 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 24<sup>th</sup>March 2023 at 11.00 a.m.

## **Addenda**

The Respondent issued two Addenda namely: (a) Addendum No.1 dated 13<sup>th</sup>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 15<sup>th</sup> 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 24<sup>th</sup> March 2023 signed by members of the Tender Opening Committee on 29<sup>th</sup> 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:

<b>SN</b>	<b>Bidder No.</b>	<b>Name of Tenderer</b>	<b>Tender Sum in Kshs.</b>
1.	12	CIC General Insurance Limited	<b>Lot 1</b> 491,822,145.69
<b>2.</b>	<b>17</b>	<b>Trident Insurance Company Ltd</b>	<b>Lot 1</b> <b>416,615,062</b>
3.	18	AAR Insurance Kenya Ltd	<b>Lot 1</b> 495,197,122
4.	19	Minet Kenya Insurance Brokers Ltd.	<b>Lot 1</b> 464,076,431
5.	20	APA Insurance Limited	<b>Lot 1</b> 466,841,615
<b>6.</b>	<b>24</b>	<b>Zamara Risk and Insurance Brokers Ltd</b>	<b>Lot 1</b> <b>235,785,705</b>
7.	28	Liaison Group (Insurance Brokers) Ltd	<b>Lot 1</b> 443,499,646
8.	31	Gold Field Insurance Brokers Ltd	<b>Lot 1</b> 239,027,448
9.	32	First Assurance Co. Ltd	<b>Lot 1</b> 476,871,819 (Discount Inclusive)
10.	34	The Kenyan Alliance Insurance Company Ltd	<b>Lot 1</b> 420,159,735

11.	35	Old Mutual General Insurance Kenya Ltd	<b>Lot1</b> 242,027,447
12.	37	Madison General Insurance Kenya Ltd	<b>Lot 1</b> 450,022,234
13.	45	Trust Mark Insurance Brokers Ltd	<b>Lot 1</b> 235,817,868
14.	1	CIC Life Assurance Ltd	<b>Lot 2</b> 22,033,699
15.	2	Madison Life Assurance Kenya Ltd	<b>Lot 2</b> 22,033,699
16.	3	Sanlam Life Insurance Ltd	<b>Lot 2</b> 39,844,088.15
17.	4	Kenya Oriental Life Assurance Ltd	<b>Lot 2</b> 29,339,874
18.	7	Acentria Insurance Brokers Ltd	<b>Lot 2</b> 23,275,598
19.	9	Four M Insurance Brokers Ltd	<b>Lot 2</b> 24,033,699
20.	11	APA Life Assurance Ltd	<b>Lot 2</b> 17,626,956
21.	13	Liberty Life Assurance Kenya Ltd	<b>Lot 2</b> 35,253,918
22.	23	<i>Zamara Risk and Insurance Brokers Ltd</i>	<b>Lot 2</b> 14,582,445
23.	26	Liaison Group (Insurance Brokers) Ltd	<b>Lot 2</b> 35,253,918
24.	30	Trust Mark Insurance Brokers Ltd	<b>Lot 2</b> 16,033,699

25.	33	Britam Life Assurance Co. Kenya Ltd	<b>Lot 2</b> 23,437,699
26.	40	Sapon Insurance Brokers Ltd	<b>Lot 2</b> 38,846,630
27.	42	Pioneer Assurance Co. Ltd	<b>Lot 2</b> 20,831,860
28.	43	Minet Kenya Insurance Brokers Limited	<b>Lot 2</b> 30,685,234
29.	5	Kenya Orient Insurance Ltd	<b>Lot 3</b> 9,389,774
30.	6	Acentria Insurance Brokers Ltd	<b>Lot 3</b> 4,201,478
31.	8	Four M Insurance Brokers Ltd	<b>Lot 3</b> 3,943,712
32.	10	Occidental Insurance Company Ltd	<b>Lot 3</b> 10,668,650
33.	14	APA Insurance Limited	<b>Lot 3</b> 11,737,160 (Discount Inclusive)
34.	15	<i>Zamara Risk &amp; Insurance Brokers Limited</i>	<b>Lot 3</b> <i>3,961,357</i>
35.	16	Jubilee Allianz General Insurance (K)Ltd	<b>Lot 3</b> 26,095,290
36.	22	First Assurance Co. Ltd	<b>Lot 3</b> 24,644,004
37.	27	Liaison Group (Insurance Brokers) Ltd	<b>Lot 3</b> 10,668,648
38.	36	Madison General Insurance	<b>Lot 3</b>

			5,365,580
39.	38	The Kenyan Alliance Insurance Company Ltd	<b>Lot 3</b> 26,827,778
40.	41	Minet Kenya Insurance Brokers Limited	<b>Lot 3</b> 7,686,048
41.	44	Trust Mark Insurance Brokers limited	<b>Lot 3</b> 1,869,064
42.	46	Sapon Insurance Brokers Limited	<b>Lot 3</b> 6,704,282
43.	21	Britam Life Assurance Co. Kenya Ltd	<b>Lot 1</b> 497,469,906 <b>Lot 3</b> 8,450,804
44.	39	Plan & Place Insurance Brokers Ltd	<b>Lot 1</b> 230,100,894 (Discount Inclusive) <b>Lot 2</b> 24,299,242 <b>Lot 3</b> 6,706,964
45.	25	Cannon General Insurance Kenya Limited	<b>Lot 2</b> 25,895,668 <b>Lot 3</b> 13,950,443
46.	29	Geminia Insurance Co. Ltd	<b>Lot 2</b> 19,499,824 <b>Lot 3</b>



			10,551,313
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### **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 21<sup>st</sup> 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)**

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

### **6.2 FINANCIAL EVALUATION STAGE – LOT 2 (GLA)**

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

### **6.3 FINANCIAL EVALUATION STAGE – LOT 3 (GPA)**

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

### **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 28<sup>th</sup> 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 28<sup>th</sup> 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 3<sup>rd</sup> May 2023.

### **REQUEST FOR REVIEW NO. 28 OF 2023**

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

The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 28 of 2023:

***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 3<sup>rd</sup> 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 3<sup>rd</sup> 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?***

Before proceeding with its determination on the above issues, the Board gave reasons for dismissing the Applicant's oral application for recusal of the Chairperson and one of the Board Members and the oral prayer by the Applicant for reconstitution of the panel constituted to hear and determine Request for Review No. 28 of 2023 and found that the Applicant had failed to prove the allegation of conflict of interest and bias to warrant the recusal of the Chairperson and one of the Board Members from hearing and determining Request for Review No. 28 of 2023.

On the first issue framed for determination, the Board found that 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.

On the second issue framed for determination, the Board found that 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 and was eligible to tender in the subject tender.

On the third issue framed for determination, the Board found 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. As such, 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.

On the fourth issue framed for determination, the Board found 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 3<sup>rd</sup> 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.

On 2<sup>nd</sup> June 2023, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for review No. 28 of 2023:

***1. The Letter of Notification of Award to the Interested Party dated 3<sup>rd</sup> 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 3<sup>rd</sup> 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.***

No evidence was tendered by any party in the instant Request for Review demonstrating that a party to the Request for Review No.28 of 2023 sought judicial review by the High Court of the Board's Decision dated 2<sup>nd</sup> June 2023 in Request for Review No.28 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 2<sup>nd</sup> June 2023 in Request for Review No.28 of 2023 became final and binding to all parties to Request for Review No.28 of 2023 after the lapse of 14 days from 2<sup>nd</sup> June 2023 in accordance with Section 175(1) of the Act.

## **RE-EVALUATION OF TENDERS**

### **Preliminary Evaluation (Administrative/ Formal Mandatory Requirements)**

According to the Evaluation Committee's Re-Evaluation Report signed on 8<sup>th</sup> June 2023 by members of the Evaluation Committee (hereinafter referred to as the Re-Evaluation Report) and pursuant to the orders of the Board of 2<sup>nd</sup> June 2023, the Evaluation Committee re-instated the tender

submitted by the Applicant and all other tenderers who were responsive in Lot 1 of the subject tender at this stage.

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, two (2) tenders were determined non-responsive while five (5) tenders including the Applicant's tenders and the Interested Party's tenders were determined responsive. The five (5) tenders that were determined responsive at this stage of evaluation of Lot 1 of the subject tender proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Lot-1 Medical Insurance Cover 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 under this stage to proceed for Financial Evaluation.

At the end of evaluation at this stage of Lot 1 of the Subject tender, five (5) tenders were determined non-responsive while one (1) tender, being the Interested Party's tender was 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 was determined to have the lowest evaluated tender price in Lot 1 under re-evaluation of the subject tender as indicated at page 28 of the Re-Evaluation Report which reads:

<b><i>BIDDER NO</i></b>	<b><i>24</i></b>
<b><i>Total Amount indicated on the Form of Tender</i></b>	
<b><i>Year 1</i></b>	<b><i>235,785,705</i></b>

<b><i>Year 2</i></b>	<b><i>235,785,705</i></b>
<b><i>Variance/ Discount</i></b>	<b><i>-</i></b>

## **Evaluation Committees Recommendation**

The Evaluation Committee recommended award of Lot 1 of the subject tender to the Interested Party at a total cost of Kenya Shillings Four Hundred Seventy-One Million Five Hundred Seventy-One Thousand Four Hundred and Ten (Kshs. 471,571,410) for two (2) years broken down as follows; Year 1- Kshs. 235,785,705 and Year 2- Kshs. 235,785,705.

## **Second Professional Opinion**

In a Professional Opinion dated 8<sup>th</sup> June 2023 (hereinafter referred to as the "Second Professional Opinion"), the Director Supply Chain Management, Dr. Harley Mutisya, reviewed the manner in which re-evaluation of the subject procurement process was undertaken including re-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 8<sup>th</sup>



June 2023 as can be discerned at page 5 of the Second 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 Lot 1 of the subject tender vide letters of Notification of Award dated 8<sup>th</sup> June 2023.

### **REQUEST FOR REVIEW APPLICATION NO. 44 OF 2023**

On 16<sup>th</sup> June 2023, being dissatisfied with the decision of the Procuring Entity on award of the subject tender, the Applicant filed a Request for Review dated 14<sup>th</sup> June 2023 together with a Supporting Affidavit sworn by Mercy Kamau, its Chief Accountant on 14<sup>th</sup> June 2023 (hereinafter referred to as the "instant Request for Review") through the firm of Mwaniki Gachuba Advocates seeking the following orders from the Board:

- a) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be determined as parties to the Request for Review by virtue of Section 45(5), 46(5) and 170(d) of the Public Procurement and Asset Disposal Act, 2015.***
- b) The 3<sup>rd</sup> Respondent's evaluation report be annulled and set aside.***

***c) The 2<sup>nd</sup> Respondent's professional opinion be annulled and set aside.***

***d) The 1<sup>st</sup> Respondent's approval of the 3<sup>rd</sup> Respondent's evaluation report and the 2<sup>nd</sup> Respondent's professional opinion thereof be annulled and set aside.***

***e) The determination of the Applicant's tender as non-responsive at the preliminary examination stage and the consequent disqualification be annulled and set aside.***

***(a) The 1<sup>st</sup> Respondent's decision to disqualify the Applicant's tender be substituted with the Board's decision that the Applicant's tender was responsive at the preliminary examination stage.***

***f) The determination of the Interested Party's tender as responsive at the preliminary examination stage, the technical qualification and the rating as the lowest evaluated tender be annulled and set aside.***

***g) The 1<sup>st</sup> Respondent's decision to qualify the Interested Party's tender as responsive and lowest evaluated be substituted with the Board's decision that the Interested Party's tender was non-responsive and disqualified at the preliminary examination stage.***

***h) 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.***

***i) The notification of award of dated 8<sup>th</sup> June, 2023 be annulled and set aside.***

***j) The 1<sup>st</sup> Respondent be directed to conduct technical evaluation of the Applicant's tender.***

***k) The 1<sup>st</sup> Respondent be directed to disband the 3<sup>rd</sup> Respondent.***

***l) The 1<sup>st</sup> Respondent be directed to transfer the technical evaluation of the Applicant's tender including the secretarial functions and the professional opinion writing thereof to another procuring entity with internal capacity and objectivity.***

***m) The 4<sup>th</sup> Respondent be directed to institute disciplinary actions against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in accordance with its internal disciplinary mechanisms and or the Employment Act, 2007 and the Public Procurement and Asset Disposal Act, 2015 for incompetence and willful or careless failure to comply with the Public Procurement and Asset Disposal Act, 2015 and the tender document.***

***n) The Respondents do bear the costs of the application.***

In a Notification of Appeal and a letter dated 16<sup>th</sup> June 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the 1<sup>st</sup> 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 24<sup>th</sup> 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 the date of the Notification of Appeal and letter dated 16<sup>th</sup> June 2023.

On the morning of 23<sup>rd</sup> June 2023, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents through the firm of Dr. Mutubwa Law Advocates, Arbitrators and Mediators filed a Notice of Appointment dated 22<sup>nd</sup> June 2023. On the same morning of 23<sup>rd</sup> June 2023, the 1<sup>st</sup> Respondent filed a letter dated 23<sup>rd</sup> June 2023 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide a letter dated 23<sup>rd</sup> June 2023, the Acting Board Secretary sent a reminder to the 1<sup>st</sup> Respondent referring to the Notification of Appeal for the instant Request for Review dated 16<sup>th</sup> June 2023 and notified the 1<sup>st</sup> Respondent and the Procuring Entity of the provisions Regulation 205(3) & (4) of Regulations 2020 with regard to the five days within which they were required to submit a response being on or about 21<sup>st</sup> June 2023

noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

On the same day of 23<sup>rd</sup> June 2023 at around 12.30 hrs, the Interested Party through the firm of Ochieng Teddy Advocates filed a Notice of Appointment dated 21<sup>st</sup> June 2023, an Interested Party Preliminary Objection dated 21<sup>st</sup> June 2023, and an Interested Party's List & Bundle of Authorities dated 21<sup>st</sup> June 2023.

On the evening of 23<sup>rd</sup> June 2023 at around 4.30hrs, the Applicant through its advocates filed a letter dated 22<sup>nd</sup> June 2023.

In response to the Request for Review, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents through the firm of Dr. Mutubwa Law Advocates, Arbitrators and Mediators filed, on 26<sup>th</sup> June 2023 a Replying Affidavit sworn by Dr. Harley Mutisya, the Director, Supply Chain Management of the 4<sup>th</sup> Respondent on 26<sup>th</sup> June 2023 on the Respondents' behalf.

Vide an email dated 26<sup>th</sup> June 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 29<sup>th</sup> June 2023 at 13:00hrs, through a link availed in the said email.

On morning of 29<sup>th</sup> June 2023, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents through the firm of Dr. Mutumbwa Law Advocates, Arbitrators and Mediators filed Written Submissions dated 27<sup>th</sup> June 2023 and a List of Authorities dated 27<sup>th</sup> June 2023.

On the same morning of 29<sup>th</sup> June 2023, the Applicant through the firm of Mwaniki Gachuba Advocates filed a Notice of Preliminary Objection dated 29<sup>th</sup> June 2023, Grounds of Opposition to Preliminary Objection dated 29<sup>th</sup> June 2023, a Further Affidavit sworn by Mercy Kamau, its Chief Accountant on 29<sup>th</sup> June 2023, and a List and Bundle of Authorities dated 29<sup>th</sup> June 2023.

The Applicant and the Interested Party did not file written submissions.

During the hearing on 29<sup>th</sup> June 2023, the Board having confirmed that there was no issue of conflict of interest directed that the hearing of the Applicant's Preliminary Objection, Grounds of Opposition and the Interested Party's Preliminary Objection would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. 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 14<sup>th</sup> June 2023, Supporting Affidavit sworn by Mercy Kamau on 14<sup>th</sup> June 2023, Applicant's Further Affidavit sworn by Mercy Kamau on 29<sup>th</sup> June 2023, Grounds of Opposition to Preliminary Objection dated 29<sup>th</sup> June 2023, Notice of Preliminary Objection dated 29<sup>th</sup> June 2023 and List and Bundle of Authorities that were filed before the Board.

On its preliminary objection to the Respondents Replying Affidavit, Mr. Gachuba submitted that the Respondents Replying Affidavit is time barred pursuant to Regulation 205(3) & (4) of Regulations 2020 as they ought to have filed their response within five days of notification of the Request for Review and failure to do so is punishable by a fine or jail term of 10 years or both. He urged the Board to escalate criminal charges against the Respondents. Counsel further submitted that no authority was annexed by the Respondents' deponent to demonstrate he had authority to swear the Replying Affidavit.

On the Notice of Preliminary Objection by the Interested Party, Mr. Gachuba submitted that it is trite law that a preliminary objection flows from pleadings and the Interested Party having not filed any pleadings meant that its preliminary objection had nowhere to stand.

On the substantive issues in the Request for Review, Mr. Gachuba submitted that the Board directed the 1<sup>st</sup> Respondent to cause re-evaluation of tenders at the Preliminary evaluation stage and that upon notification of the outcome of the re-evaluation, two reasons were given as to why the Applicant was unsuccessful.

Counsel submitted that from the Tender Document, the preliminary mandatory requirements did not include the reasons given in the Applicant's letter of regret and therefore, the Respondents introduced strange requirements and a new criterion for evaluation not provided for in the Tender Document. He urged the Board to quash the decision of the Respondents and referred it to its Further Affidavit where the Applicant had particularized the Requirements that the Respondent was required to apply.

Mr. Gachuba submitted that the Respondents awarded the subject tender to the Interested Party using similar amounts for Year 1 and Year 2 yet from the Interested Party's Form of Tender, it did not provide for the price of Year 1 and Year 2 and argued that there was a particular way that the Interested Party was supposed to submit its Form of Tender. Mr. Gachuba further submitted that the Respondents did not comply with the requirements set out in the blank notification which required a tenderer to state the total price and not the annual price.



Counsel submitted that for the Respondents to award the subject tender at a price different than what was read out was contrary to ITT 37 of the Tender Document. Mr. Gachuba argued that when the Respondents realized that the total price was abnormally low, the Evaluation Committee ought to have sought clarification and even if they sought clarification, it meant that they allowed the Applicant to amend its tender document to the detriment of other tenderers.

Mr. Gachuba submitted that the Board under Sections 28(1) and 173(b) of the Act has powers to issue the orders sought and indicated that this was the second time the subject tender was before the Board yet even after re-evaluation, the Respondents were still mischievous noting the disconnect of the Evaluation Report and the Professional Opinion. Counsel argued that the awarding authority did not look at the Evaluation Report and the decision and reasons why the Applicant was disqualified has no basis. He urged the Board to allow the instant Request for Review as prayed.

### **Respondents' submissions**

Counsel for the Respondents, Dr. Mutubwa relied on the Respondents' Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4<sup>th</sup> Respondent, written submissions and List of Authorities filed before the Board.

Dr. Mutubwa submitted that the Respondent's Replying Affidavit was filed in response to the instant Request for Review and the deponent's authority and Capacity was set out therein and not in question.

On the Further Affidavit filed by the Applicant, Dr. Mutubwa objected to the same arguing that it doesn't qualify to form basis of evidence before the Board as it was unsigned and not commissioned. Counsel submitted that if the Board is to find the Further Affidavit admissible, it ought to look at the question of the Interested Party's Form of Tender which is time barred.

On the allegation that the Respondent's response was filed out of time and ought to be struck out, Dr. Mutubwa submitted that the Board should take such steps as to ensure that it delivers substantive justice under Article 159 of the Constitution and ought to address the substance of issues before it. He further submitted that the Respondents received the Request for Review on 20<sup>th</sup> June 2023 and filed their response on 26<sup>th</sup> June 2023. He referred the Board to provisions of Section 57 of the Interpretation and General Provisions Act and argued that time starts running upon service of a document. Counsel submitted that the last day when the Respondents were required to file their response fell on a Sunday, which was an excluded day under Section 57(d) of the Interpretation and General Provisions Act and as such, filed its response on the next day. He further submitted that the submission by the Applicant was a misapprehension of the law and alludes to the conduct of the Applicant.

Dr. Mutubwa submitted that a preliminary objection ought to deal substantively and effect a fatal blow on a suit and thus disposing it entirely and as such, the Applicant's preliminary objection could not determine the suit entirely.

Dr. Mutubwa submitted that the Board had directed in its decision in Request for Review No. 28 of 2023 to proceed and re-evaluate the subject tender and complied with the Board's directions by re-admitting and re-evaluating the Applicant's tender. He further submitted that the Applicant's tender was not disqualified at the Preliminary Evaluation stage since it passed this stage and proceeded to the Technical Evaluation stage where it failed.

Dr. Mutubwa argued that the purpose of a tender document is to ensure compliance and competition amongst tenderers and referred the Board to the requirements at page 28 of the Tender Document. Counsel submitted that the Applicant's tender did not show capacity and neither did it demonstrate that it had five corporate clients the size of the Procuring Entity to service the Procuring Entity which a Technical Evaluation criteria and not a Preliminary Evaluation Criteria.

Dr. Mutubwa further submitted that the Applicant did not adduce evidence of the alleged collusion and argued that there cannot be collusion within a organisation itself. He further argued that for the Applicant to suggest impropriety without evidence so as to hold up the procurement process is to put lives of the members of the Procuring Entity in danger.

Dr. Mutubwa noted that the Board has been hesitant in the past to punish frivolous Applicant's with costs and urged the board to consider to condemn the Applicant to pay costs in the instant Request for Review since the Request for Review has no merit.

At this Juncture, Ms. Anami clarified that the Technical Evaluation requirements were provided for at page 29 of the Tender Document and that the Applicant fell short of meeting the same. She further submitted that the Applicant did not show the Board in the instant Request for Review how it qualified under the requirements of the Technical Evaluation.

### **Interested Party's Submissions**

Counsel for the Interested Party, Mr. Ochieng, submitted concurred with the submissions of Dr. Mutubwa and referred the Board to the holding in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696* on what a preliminary objection consists of. He submitted that a preliminary objection raised through pleadings ceases to be a preliminary objection.

On the issue of *res judicata*, Mr. Ochieng relied on the holding of the Court of Appeal in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* and argued that the Applicant cannot purport to raise issues in the instant Request for Review as new issues having been previous raised in Request for Review No. 28 of 2023.

## **Applicant's Rejoinder**

In a rejoinder, Counsel for the Applicant, Mr. Gachuba, submitted that with regard to the Respondents Replying Affidavit, no authority to swear had been adduced.

He further clarified that he had advance via email a draft of the Applicant's Further Affidavit and indicated that it would serve a commissioned copy later and the copy physically filed before the Board was commissioned. Counsel, in opposition to the submissions by Dr. Mutubwa on the timelines of filing the Respondents response, submitted that Dr, Mutubwa was submitting on matters of fact and the law was clear on the timelines and did not provide any discretion for extension of timelines.

He further clarified that the Applicant was not challenging the Form of Tender but the Interested Party's tender as submitted in the subject tender.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 16<sup>th</sup> June 2023 was due to expire on 7<sup>th</sup> July 2023 and that the Board would communicate its decision on or before 7<sup>th</sup> July 2023 to all parties to the Request for Review via email.

## **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 Board has jurisdiction to hear and determine the instant Request for Review;**

In determining the first issue, the Board shall make a determination on the following sub-issues:

- a) Whether or not the Preliminary Objection by the Interested Party is defective by reason of failure to have filed a response to the instant Request for Review;***
- b) Whether the instant Request for Review raises issues or prayers which would require the Board's interpretation of the Constitution thus divesting the Board of its jurisdiction to hear and determine the instant Request for Review;***
- c) Whether the Respondents' Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4<sup>th</sup> Respondent is***

***time barred divesting the Board of its jurisdiction to entertain the same.***

***d) Whether the instant Request for Review is barred by the doctrine of res judicata***

Depending on the determination of the first issue;

- 2. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have been properly joined as parties to the instant Request for Review;**
- 3. Whether the Further Affidavit sworn by Mercy Kamau and filed by the Applicant on 29<sup>th</sup> June 2023 is fatally defective;**
- 4. Whether the Applicant's tender was re-evaluated in accordance with the provisions of the Act, the Tender Document and Article 227(1) of the Constitution;**
- 5. Whether the Letter of Notification of Intention to Award dated 8<sup>th</sup> June 2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020;**
- 6. What orders should the Board grant in the circumstances?**

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

It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

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

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

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

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

***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its"***



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

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

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

In the case of **KakutaMaimaiHamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

***"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."***

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

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

The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

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 jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***167. Request for a review***

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

***(2) .....***

***(3) .....***

***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and***

***(c) where a contract is signed in accordance with section 135 of this Act.***

***168. ....***

***169. ....***

***170. ....***

***171. ....***

***172. ....***

***172. Dismissal of frivolous appeals***

***Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.***

***173. Powers of Review Board***

***Upon completing a review, the Review Board may do any one or more of the following—***

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including***

***annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 28 and 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii)

date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020.

**a) Whether or not the Preliminary Objection by the Interested Party is defective by reason of failure to have filed a response to the instant Request for Review;**

The Applicant filed Grounds of Opposition to Preliminary Objection dated 29<sup>th</sup> June 2023 opposing the Interested Party's Notice of Preliminary Objection dated 21<sup>st</sup> June 2023 and contends that the preliminary objection by the Interested Party is incompetent, untenable and incapable of disposing of the entire Request for Review as it does not arise from any pleading by the Interested Party. During the hearing, counsel for the Applicant, Mr. Gachuba submitted that it is trite law that a preliminary objection flows from pleadings and the Interested Party having not filed any pleadings, its preliminary objection has nowhere to stand.

On the other hand, counsel for the Interested Party, Mr. Ochieng referred the Board to the case of *Mukisa Biscuit Manufacturing Company Limited v*

*West End Distributors Limited (1969) EA* submitted that a preliminary objection raised through pleadings ceases to be a proper preliminary objection.

We are therefore called upon to determine whether failure by the Interested Party to file a response to the instant Request for Review renders its Notice of Preliminary Objection dated 21<sup>st</sup> June 2023 as fatally defective.

The parameters of consideration of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits or otherwise of the Notice of Preliminary Objection by the Interested Party were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

***"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

At page 701 Sir Charles Newbold, P added:



***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."***

In essence, a valid preliminary objection should, if successful, dispose of the suit or an aspect of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law which has been pleaded or arises by clear implication from pleadings, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The Civil Procedure Act defines "pleading" as follows:

***"Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant".***

In view of the above meaning of a pleading, it is clear that a preliminary objection can be raised on points of law which arise from clear implications of pleadings filed by either an Applicant/Claimant, a Defendant/Respondent

or Interested Party and there is no requirement in law for it to be backed by any other pleading or specifically by a pleading filed by the party raising the objection since a preliminary objection is solely based on points of law.

The Interested Party herein participated in Request for Review No. 28 of 2023, also being an Interested Party therein and is assumed to be well versed with the issues arising from the procurement process of the subject tender. We note that the Interested Party's Preliminary Objection dated 21<sup>st</sup> June 2023 in the instant Request for Review is premised on the following grounds that , (a) the Board does not have jurisdiction to preside over the instant Request for Review by virtue of Section 7 of the Civil Procedure Act, (b) the Board does not have jurisdiction to preside over the instant Request for Review by virtue of Regulation 203 (c) of Regulations 2020, (c) the Board does not have jurisdiction to preside over the instant Request for Review as it seeks the Board to interpret the Constitution which is a preserve of the High Court as per Article 23 of the Constitution, (d) the instant Request for Review is frivolous and in breach of Section 172 of the Act, and (e) the instant Request for Review is a non-starter, incurably defective and abuse of the judicial process.

In our considered view, there is no requirement for a party in an administrative review to file a response for it to raise a preliminary objection. The filing of a response is not a basis for a party in an administrative review to address the Board on a preliminary issue arising from pleadings filed before it.

In the circumstance, we find that the Interested Party's Notice of Preliminary Objection dated 21<sup>st</sup> June 2023 is properly before the Board and is not defective by reason of failure by the Interested Party to have filed a response to the instant Request for Review.

**b) Whether the instant Request for Review raises issues or prayers which would require the Board's interpretation of the Constitution thus divesting the Board of its jurisdiction to hear and determine the instant Request for Review;**

The Interested Party objected to the Board's hearing and determination of the instant Request for Review under and seeks for the same to be dismissed with cost on the ground that the Board does not have jurisdiction to preside over the instant Request for Review as it seeks it to interpret the Constitution which is a preserve of the High Court as provided by Article 23 of the Constitution.

In opposition to the Interested Party's Preliminary Objection, the Applicant in its Grounds of Opposition to the Preliminary Objection dated 29<sup>th</sup> June 2023 contends that there is no prayer in the instant Request for Review for the Board to interpret the Constitution.

We understand the Interested Party to mean that the correct forum where the Applicant ought to have addressed its grievances concerning the alleged breach of duty by the Procuring Entity as raised in the instant

Request for Review was the High Court since the Board has no power to interpret the Constitution.

Article 23 of the Constitution provides that:

***"(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

In view of the provisions of Article 23 of the Constitution above, our understanding of the Applicant's allegations in the Request for Review is that the Procuring Entity breached a duty imposed by the Act in the procurement proceedings of the subject tender in disregard of the provisions of Article 10, 27, 47, 227, and 232 of the Constitution. The specific breach of duty by the Respondents complained of by the Applicant emanate from the provisions of the Act which are read in tandem with principles enumerated under Article 10, 27, 47, 227, and 232 of the Constitution.

It is our considered opinion that the Applicant has not filed the instant Request for Review with the aim of seeking redress of a breach of a right or fundamental freedom of the Bill of Rights but seeks the Board to grant prayers sought in exercising its powers under Section 173 of the Act in

view of the alleged breach of duty imposed upon the Respondents by the Act.

In the circumstances, we find that the Board has jurisdiction to hear and determine the instant Request for Review since it **does not** raise issues or prayers which call for Constitutional interpretation by the Board.

Accordingly, this ground of opposition by the Interested Party fails.

**c) Whether the Respondents' Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4<sup>th</sup> Respondent is time barred divesting the Board of its jurisdiction to entertain the same.**

The Applicant contends at paragraph 25 of the Further Affidavit that the Respondents' Replying Affidavit as filed before the Board in the instant Request for Review is time barred pursuant to Regulation 205(3) & (4) of the Act divesting the Board of jurisdiction to hear it and ought to be struck out. During the hearing, Mr. Gachuba, counsel for the Applicant submitted that the Respondents were required to file their response within five (5) days of being served with the Request for Review failure of which was punishable by a jail term and a fine as provided under Regulation 205 (3) & (4) of Regulations 2020. It is noted that there was no specific statement to confirm or prove when the Respondents actually received the

Notification of the filing of the instant Review Application. Counsel also submitted that the Respondent did not attach any authority to demonstrate that the deponent of the Respondent's reply had authority to swear the Replying Affidavit.

On their part, counsel for the Respondents, Dr. Mutubwa submitted that the Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management had been filed in response to the Request for Review and authority and capacity of the deponent was set out within it and not questioned. Counsel further submitted that the Board is mandated to do substantive justice under Article 159 of the Constitution and ought to address the substantive issues before it. Dr. Mutubwa referred the Board to Section 57 of the Interpretation and General Provisions Act and submitted that the Respondents having received the Request for Review on 20<sup>th</sup> June 2023 time started running on 21<sup>st</sup> June 2023 and the last day falling on Sunday, 25<sup>th</sup> June 2023 which is an excluded day in view of Section 57 (d) of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA"), the Respondents could only have filed their response on 26<sup>th</sup> June 2023.

Regulation 205 of Regulations 2020 provide that:

***"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.***

***(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary***

***(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.***

***(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.***

***(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."***

In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents

requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

Turning to the circumstances of the instant Request for Review, we have studied the Board's file and note that a notification of appeal and letter dated 16<sup>th</sup> June 2023 notified the 1<sup>st</sup> Respondent of filing of the instant Request for Review. We note that on 23<sup>rd</sup> June 2023, the Board Secretary having only received a Notice of Appointment of Advocates by the Respondents prompted them vide letter dated 23<sup>rd</sup> June 2023 to file their response together with the requested confidential documents as earlier requested. We note that the Respondents did file confidential documents with the Secretariat on 23<sup>rd</sup> June 2023 and their response was later filed on 26<sup>th</sup> June 2023 in form of the Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management. We do not take issue with the Replying Affidavit as sworn by Dr. Harley Mutisya, the Director Supply Chain Management as he depones to have been duly authorized by the 1<sup>st</sup> Respondent to swear the same. The stated authorizer is a party in these proceedings as the 1<sup>st</sup> Respondent and has not contradicted that position. We do not think that the deponent of the said Affidavit has to produce any further evidence of the stated authorization for the same to admitted in these proceedings.

Notably, Dr. Harley Mutisya in a Verifying Affidavit sworn on 18<sup>th</sup> May 2023 in Request for Review No. 28 of 2023 swore that he was authorized by the



1<sup>st</sup> Respondent to verify the contents of the Respondent's Memorandum of Response in Request for Review No. 28 of 2023 dated 18<sup>th</sup> May2023 and the Applicant did not take issue of him having sworn that Verifying Affidavit.

Section 57 of the IGPA which provides as follows:

***57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In computing time when the Respondents should have filed their response upon notification of the filed Request for Review, having been notified by a letter dated 16<sup>th</sup> June 2023, the 16<sup>th</sup> June 2023 is excluded pursuant to Section 57(a) of IGPA being the day the Respondents learnt of the Request for Review. This means five days started running on 17<sup>th</sup> June 2023 ( which we note was a Saturday) and lapsed on 21<sup>st</sup> June 2023. The Respondents however contend that they received the Request for Review on 20<sup>th</sup> June 2023 and as such time started running as from 21<sup>st</sup> June 2023 and lapsed on 25<sup>th</sup> June 2023, being a Sunday and an excluded day.

This Board is cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

***"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural***

***requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”***

In our considered view, the mischief that Regulation 205 (3) & (4) of Regulations 2020 intends to cure is to avoid instances where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. We are cognizant of the need for a court or quasi-judicial body to exercise its discretion with utmost care when faced with an application to strike out pleadings for having been filed out of time as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:

***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ...."***

We are also cognizant that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows:

***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require***

***that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”***

Guided by the holding in the above cases, we find that failure by the Respondents to file their response as requested in the Notification of Appeal within the stipulated five (5) days from 16<sup>th</sup> June 2023 was not inordinate and should not adversely affect their pleadings and documents in these proceedings since they responded, albeit late, to the Request for Review and submitted confidential documents as requested and attended the virtual hearing as scheduled. The Respondents Replying Affidavit as filed together with the annexures and confidential documents filed with the Board have enable the Board have an informed view of the procurement proceedings in the subject tender and enabling it to review the instant Request for Review. Having filed a response, the 1<sup>st</sup> Respondent is not subject to the sanctions provided under Regulations 204 (4) of Regulations 2020. We would have held otherwise if the Respondents had not filed any response to the Request for Review or submitted confidential documents to the Board in accordance with Section 67(3) of the Act. We are also of the view that the Applicant has not been unduly prejudiced by reason of the late filing of the Respondents Replying Affidavit. It is noted that the Applicant filed an elaborate Further Affidavit in response to the issues raised by the Respondents in the Replying Affidavit in question. The Board also allowed the parties sufficient opportunity to canvass and address it on

the issues raised in all the documents. Therefore in our view the filing of the subject Replying Affidavit late did not prejudice and therefore the ends of justice would be better served by retaining the said Affidavit on record.

In the circumstances, we find that the Respondents' Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4<sup>th</sup> Respondent is properly before the Board in the instant Request for Review and the Board has jurisdiction to consider the same.

Accordingly, the Applicant's Preliminary Objection fails.

**d) Whether the instant Request for Review is barred by the doctrine of res judicata?**

The Interested Party contends that the instant Request for Review is res judicata as all the issues raised have been previously determined in Request for Review No. 28 of 2023.

On the other hand, the Respondents at paragraph 27 and 28 of the Replying Affidavit sworn on 26<sup>th</sup> June 2023 by Dr. Harley Mutisya, the

Director Supply Chain Management of the 4<sup>th</sup> Respondent contend that the Applicant's allegation of collusion by the Respondents to correct, adjust or amend the Interested Party's tender sum is barred by the doctrine of *res judicata* and ought to be dismissed *in limine* as that same was already determined with finality by the Board in Request for Review No. 28 of 2023.

On its part, the Applicant in its Grounds of Opposition to the Preliminary Objection dated 29<sup>th</sup> June 2023 contend that the instant Request for Review is not *res judicata*.

The doctrine of *res judicata* is set out in Section 7 of the Civil Procedure Act as follows:

**"7. *Res judicata***

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

***Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

***Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

***Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

***Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.***



In **Nathaniel Ngure Kihui v Housing Finance [2018] eKLR**, Lady Justice Njuguna L. set out a detailed exposition of the doctrine of *Res Judicata* as follows:

***"14. The plea of res judicata is provided for in section 7 of the Civil Procedure Act (CPA) which reads.....***

***15. Justice Richard Kuloba (as he then was) set out the definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided....***

***17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;***

***(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.***

***(ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.***

***(iii) Such parties must have been litigating under the same title in the former suit.***

***(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.”[Emphasis by the Board]***

Similarly, the Court of Appeal in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** outlined the ingredients of a successful plea of the doctrine of *res judicata* in the following words:

***"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***

***(a) The suit or issue was directly and substantially in issue in the former suit.***

***(b) That former suit was between the same parties or parties under whom they or any of them claim.***

***(c) Those parties were litigating under the same title.***

***(d) The issue was heard and finally determined in the former suit.***

***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***

The import of the above provisions and case law is that the doctrine of *res judicata* ousts the jurisdiction of a court to try any **suit, claim or issue** which had finally been determined by a court of competent jurisdiction in a former suit involving the same party or parties litigating under the same title. This doctrine is founded on the fundamental belief that there should be an end to litigation. The doctrine is meant to protect public interest so that a party is not endlessly dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction and also save on precious time and public resources that go into funding courts, tribunals, quasi-judicial bodies and administrative bodies that are funded by the tax payer.

In essence, to successfully plead the bar of *res judicata*, a party must prove that (a) the suit or issue under consideration is directly or substantially in issue in a former suit; (b) the former suit was between the

same parties or parties claiming through them; (c) the parties were litigating under the same title; (d) the issue was heard and determined in a former suit; and (e) the court that determined the former suit was competent.

Turning to the instant Request for Review, it is not in dispute that the parties in the instant Request for Review are the same parties as those that litigated in Request for Review No. 28 of 2023. The Applicant, Respondents and Interested Party in the instant Request for Review were the same Applicant, Respondents and Interested Party respectively in Request for Review No. 28 of 2023. The procurement proceedings of the subject tender in the instant Request for Review was the same procurement proceedings of the tender in Request for Review No. 28 of 2023. This Board hearing the instant Request for Review also heard and determined Request for Review No. 28 of 2023.

However, the above similarities between the instant Request for Review and Request for Review No. 28 of 2023 are not enough to prove that the instant Request for Review is barred by the doctrine of *res judicata*.

To successfully plead the bar of *res judicata*, one must equally establish that the issues under consideration by the Board in the instant Request for Review are directly or substantially in issue with the ones the Board considered in Request for Review No. 28 of 2023 and that the Board heard and determined such issues in Request for Review No. 28 of 2023. We say so because, all the elements for the bar of *res judicata* must be rendered

conjunctively and not disjunctively. If one element is not available or is missing, then a bar of *res judicata* cannot be sustained.

In order to establish whether the issues under consideration in the instant Request for Review were directly or substantially in issue in Request for Review No. 28 of 2023 and that the same were heard and determined by this Board in Request for Review No.28 of 2023, we have carefully studied the pleadings, documents and the Board's Decision dated 2<sup>nd</sup> June 2023 in the Request for Review dated 9<sup>th</sup> May 2023 and filed on 11<sup>th</sup> May 2023 in Request for Review No. 28 of 2023 and note that the Applicant requested for the following orders from the Board:

- 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.***

The Board further notes that the above prayers were premised on the following grounds set out in the Request for Review dated 9<sup>th</sup> May 2023 in Request for Review No. 28 of 2023, *inter alia*, that (a) the disqualification of the Applicant's tender at the preliminary examination stage was in breach of Section 79(2) of the Act, (b) the Interested Party was ineligible to tender in the subject tender by virtue of Section 55(1)(c) of the Act, (c) the award amounted to an amendment of the Interested Party's tender after the deadline of submitting tenders contrary to Section 76(1)(b) of the Act and was not based on the tender sum read out during the tender opening, (d) the Respondents failed to disqualify the Interested Party's tender for non-responsiveness at the preliminary examination stage, and (e) the notification of award was unfair and in breach of Section 87(3) of

the Act as it failed to give reasons as to why the Interested Party was successful.

We further note that the Board, having considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act, framed the issues for determination in Request for Review No. 28 of 2023 as follows:

- 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 3<sup>d</sup> 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 3<sup>rd</sup> 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?***

The Board made a determination on the above issues on 2<sup>nd</sup> June 2023, in Request for review No. 28 of 2023 as follows:

***1. The Letter of Notification of Award to the Interested Party dated 3<sup>rd</sup> 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 3<sup>rd</sup> 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.***

We have also carefully studied the pleadings and documents in the instant Request for Review and note that the Applicant prays for the following orders from the Board:

- a) The 2<sup>nd</sup>, 3<sup>d</sup> and 4<sup>th</sup> Respondents be determined as parties to the Request for Review by virtue of Section 45(5), 46(5) and 170(d) of the Public Procurement and Asset Disposal Act, 2015.***
- b) The 3<sup>rd</sup> Respondent's evaluation report be annulled and set aside.***
- c) The 2<sup>nd</sup> Respondent's professional opinion be annulled and set aside.***
- d) The 1<sup>st</sup> Respondent's approval of the 3<sup>rd</sup> Respondent's evaluation report and the 2<sup>nd</sup> Respondent's professional opinion thereof be annulled and set aside.***
- e) The determination of the Applicant's tender as non-responsive at the preliminary examination stage and the consequent disqualification be annulled and set aside.***

- (a) The 1<sup>st</sup> Respondent's decision to disqualify the Applicant's tender be substituted with the Board's decision that the Applicant's tender was responsive at the preliminary examination stage.***
- f) The determination of the Interested Party's tender as responsive at the preliminary examination stage, the technical qualification and the rating as the lowest evaluated tender be annulled and set aside.***
- g) The 1<sup>st</sup> Respondent's decision to qualify the Interested Party's tender as responsive and lowest evaluated be substituted with the Board's decision that the Interested Party's tender was non-responsive and disqualified at the preliminary examination stage.***
- h) 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.***
- i) The notification of award of dated 8<sup>th</sup> June, 2023 be annulled and set aside.***
- j) The 1<sup>st</sup> Respondent be directed to conduct technical evaluation of the Applicant's tender.***

- k) The 1<sup>st</sup> Respondent be directed to disband the 3<sup>rd</sup> Respondent.***
- l) The 1<sup>st</sup> Respondent be directed to transfer the technical evaluation of the Applicant's tender including the secretarial functions and the professional opinion writing thereof to another procuring entity with internal capacity and objectivity.***
- m) The 4<sup>th</sup> Respondent be directed to institute disciplinary actions against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in accordance with its internal disciplinary mechanisms and or the Employment Act, 2007 and the Public Procurement and Asset Disposal Act, 2015 for incompetence and willful or careless failure to comply with the Public Procurement and Asset Disposal Act, 2015 and the tender document.***
- n) The Respondents do bear the costs of the application.***

We note that the above prayers are premised on the following grounds set out in the instant Request for Review, inter alia, that (a) the Respondents failed to ensure compliance with evaluation and moderation procedures prescribed under the Act and Regulations 2020, (b) the Respondents colluded to determine its tender non-responsive at the preliminary evaluation stage, (c) the Respondents colluded to negate and waive the Interested Party's non-compliant Form of Tender and to determine it as responsive at the preliminary examination stage, (d) the Respondents

colluded to correct, adjust or amend the Interested Party's tender sum in the Form of Tender that was not read out loud at the tender opening, (e) the Respondents colluded to prepare an unfair and baseless evaluation report, professional opinion, and recommendations, (f) the Respondents failed to provide the Applicant with reasons why and how the Interested Party was successful in the subject tender, and (g) the Respondents lacked capacity to comply with provisions of Article 10, 27, 47, 227(1), 232 of the Constitution, Section 45, 79(1), 80, 82(1), 84, 85, and 87 of the Act and Regulation 29, 31, 33, 74, and 75 of Regulations 2020.

The issues for consideration in the instant Request for Review are primarily premised on the re-evaluation of the subject tender as carried out by the Procuring Entity following the Board's orders in Request for Review No. 28 of 2023. It is our view that a Re-evaluation sets in motion a fresh procurement process and any issues arising therefrom are subject to administrative review in accordance with the Act provided the issues raised have not been previously determined. We have also taken note from the past decisions referred to above that a preliminary point can be suit based or issue based. Having outlined the issues that were for consideration in Request for Review No. 28 of 2023 and the issues for consideration in the instant Request for Review, it is clear that though the issues in both reviews are substantially different, one of the issues pleaded as prayer (f) in the instant Request for Review pertaining issues concerning amendment/modification of the Interested Party's tender sum as awarded from what was read out at the Tender Opening was an as prayer (c) and set out as issue No 3 for determination in Request for Review No. 28 of

2023 and that the Board made a determination of the same in its Decision of 2<sup>nd</sup> June 2023 in Request for Review No. 28 of 2023 as follows:

***"Given the foregoing, it is clear to the Board that the tender sum as indicated in the Letter of Notification of Award dated 3<sup>d</sup> 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 29<sup>th</sup> 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."***

To this extent, the Board finds and holds that the issue raised by the Applicant with regard to the eligibility and responsiveness of the Interested Party's Tender amendment of the Interested Party's Form of Tender and amendment/modification of the Interested Party's tender sum is barred by the doctrine of res judicata and will not be considered in the instant Request for Review. Consequently, we shall proceed and determine all other issues raised in the instant Request for Review save for that specific issue which we have found to be barred by the doctrine of res judicata.

Accordingly, this ground of objection on Res Judicata raised by both the Respondents and Interested Party partially succeeds.

The upshot of our finding on the first issue for determination is that this Board has jurisdiction to hear and determine the instant Request for Review and now moves on to the substantive issues framed for determination.

**Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have been properly joined as parties to the instant Request for Review;**

A question arises of whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents named and joined in the instant Request for Review are non-suited parties with no capacity to sue or be sued and as such, their joinder in these proceedings is fatally defective and they ought to be struck out as parties in the instant Request for Review for lack of capacity.

A determination of this issue falls squarely on interpretation of Section 170(d) of the Act which provides that

***"170. The parties to a review shall be.***

***(a) the person who requested the review;***

***(b) the accounting officer of a Procuring Entity;***

***(c) the tenderer notified as successful by the Procuring Entity; and***

***(d) such other persons as the Review Board may determine.***

Our understanding of the above provision is that parties to an administrative review are (a) a candidate or tenderer as provided under Section 167(1) of the Act being the person who requested the review, (b) an accounting officer of a procuring entity, (c) the successful tenderer as notified by the procuring entity, and (d) any other person as the Board may determine.



Notably, Section 44(1) & (2) of the Act read with Regulation 23 of Regulations 2020 provides that an accounting officer of a public entity shall be primarily responsible for ensuring that a public entity complies with the Act. Section 44(2) of the Act further sets out that in performance of this responsibility, the accounting officer shall, *inter alia*, (a) constitute all procurement and asset disposal committees within a procuring entity in accordance with the act, (b) approve and sign all contracts of the procuring entity, (c) ensure the procurement and asset disposal process of the public entity shall comply with the Act, (d) ensure that the procurement processes are handled by different professional offices in respect of procurements, initiation, processing and receipt of goods, works and services, and (e) ensure compliance with any other responsibilities assigned by the Act.

We note that both the 2<sup>nd</sup> and 3<sup>rd</sup> named Respondents are referred to under the Act under Sections 46 and 47 of the Act as follows:

Section 46(1) of the Act provides that:

***"(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise."***

Section 47 (1) & (2) of the Act provides that:

***"(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.***

***(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer."***

It is evident that the 2<sup>nd</sup> and 3<sup>rd</sup> named Respondents owe their existence to the Act. The Act does not however confer on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents any corporate status, and therefore these are unincorporated bodies, they are actually ad hoc organs of the Procuring entity. The Board is cognizant of the fact that the rules in civil procedure have a correlation in procurement disputes and notes that Order 1 Rule 3 of the Civil Procedure Rules, 2010 provides for who may be sued as a defendant or respondent as:

***"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."***

Article 260 of the Constitution defines a person to include:

***"a company, association or other body of persons whether incorporated or unincorporated."***

We are cognizant of the holding of the High Court in **Republic v Committee on Senior Counsel & another Ex parte Allen Waiyaki Gichuhi [2021] eKLR**(hereinafter referred to as "Allen Waiyaki case")on this issue of capacity of unincorporated bodies to sue and be sued where the Court held as follows:

***"20. In essence therefore, a person can sue or be sued in law if they are a natural person, an unincorporated body of persons or a corporate body, and the only difference in bringing suits against natural, corporate and unincorporated persons is in the manner and procedure employed in suing. This is for the reasons that while natural and corporate persons are bestowed with legal capacity so long as certain conditions exist, unincorporated associations do not have a separate legal personality, and the law does not recognize them as legal entities separate from their natural members.***

***21. An exception however exists in the case of statutory bodies, particularly in judicial review, and the unincorporated status of a defendant has not been regarded as a bar to being subject to and defending judicial review proceedings. It was stated in this regard that a statute can confer legal status on an unincorporated association in the***

**case of Baskins v. United Mine Workers (1921) 15o Ark. 398, 40l, 234 S. W. 464, 465.1, wherein it was held that in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name. and all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from their members.**

**22. This is mainly for the reason that a statutory body gets its powers and authority from an act of parliament, and is generally established to perform specific functions and make judgments in some area of activity. In this respect, the meaning of a 'statutory body' may change depending upon the legislation, but the defining factor is that all statutory bodies are established and operate under the provisions of their own enabling legislation, which sets out the purpose and specific powers of the agency.**

**23. It is notable in this respect that in judicial review, the defining factor that gives capacity to a defendant is whether there are certain statutory and legal powers and duties conferred or imposed on the public body or official by a statute or other law. The different rules as regards capacity to sue and be sued in the case of unincorporated associations were the subject of the decision in the English case of Aireborough Neighbourhood Development Forum v**

**Leeds City Council [2020] EWHC 45, wherein it was found that an unincorporated association, which in that case was a neighbourhood forum, had capacity to bring both a judicial review and a statutory challenge against the decision of a public authority. The case confirmed that legal capacity to sue is not a critical requirement in determining a claimant's capacity to bring a statutory challenge. Instead the claimant must be a person aggrieved, or in the case of judicial review, have standing to challenge. Such a test does not consider legal capacity but instead, focuses on the critical component of sufficient interest in the decision.**

**24. The rationale for the different treatment of unincorporated associations in public and private law was explained as follows in paragraph 29 of the said decision:**

**"...there is a critical distinction between private and public law litigation. In private law the individual has to be able to show that they have a legal right which has been infringed, therefore it is fundamental that they have legal capacity to sue. In contrast the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision...The claim is 'invoking the powers of the court to exercise its supervisory jurisdiction...to quash curb or correct**

***decisions of bodies subject to public law. The personal rights of individual applicants...may never be in play."***

***25. Likewise, in R v Traffic Commissioners of the North Western Traffic Area ex p Brake [1996] COD 248 Turner J. considered an applicant in judicial review to be invoking the powers of the court to exercise its supervisory jurisdiction to quash, curb or correct decisions of bodies subject to public law, and held as follows:***

***"In the case of a private law action, it is fundamental that a private law right has been violated. Private law rights can only be enjoyed by those who possess the characteristics of a legal person. Similarly, it is necessary, in such a case, that, the defendant who is asserted to have infringed that legal right, has the characteristics of a legal person. The situation in public law cases may be different. For a case to lie in public law... Thus, it will not be in every case that an individual applicant need assert that any right of his has been infringed, rather it is that by the unlawful manner in which a body amenable to public law has reached its decision, or the unlawfulness of the decision itself, they have been directly or indirectly affected by that decision..."***

***26. Since judicial review is a special supervisory jurisdiction which is different from both ordinary adversarial litigation between private parties and appeal rehearing on the merits, the question that determines the capacity of a defendant is whether there is some recognisable public law wrong that has been committed. A defendant in judicial review proceedings therefore, is the the public body or public office holder which made the decision under challenge (or failed to make a decision where that failure is challenged), or where the public body or official has legal responsibility for the relevant matter.***

***27. This Court therefore finds for the foregoing reasons, that the Committee of Senior Counsel, being an unincorporated body that has been given existence and duties by the Advocates Act, is a statutory and public body that is capable of suing and being sued for purposes of judicial review.”***

From the Allen Waiyaki case, the Board notes that as a general rule, unincorporated bodies do not have a separate legal personality and are not recognized in law as legal entities separate from their natural members. However, an exception to this rule exists where a statute confers legal status on an unincorporated body making it a statutory body whose defining factor is that it is established and operated under the provisions of its own enabling legislation which sets out its purpose and specific powers.

Having the above in mind, the defining factor of whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have the capacity to be joined as Respondents in the instant proceedings is whether there are certain statutory and legal powers and duties conferred or imposed upon them by the Act that would lead them to have capacity to sue or be sued in an administrative review. Also, to be considered is whether there are specific reliefs that are sought against them that would be unavailable or unenforceable unless those parties are before the Board.

The Board notes that the provisions of Sections 167(1) dictate that an administrative review results from a breach of duty imposed on a procuring entity. Section 170 of the Act dictate the parties to any administrative review process. Additionally, Section 44 of the Act read with Regulation 23 of Regulations 2020 enumerate the responsibilities of the accounting officer of a procuring entity and establishes it as the party answerable for any alleged breach of duty by any function of the procuring entity imposed by the Act or Constitution and the Act. This explains why an administrative review filed against a procuring entity and excluding an accounting officer is fatally defective for non-compliance with provisions of Section 170 of the Act which has expressly stipulated the parties in an administrative review. In our considered view, it is not open to a party filing review proceedings to pick and choose parties other than those stipulated by the Act and more so without seeking leave from the Board to join any other party under the guise of Section 170(d) of the Act. We think that the call under section 170(d) is that of the Board for reasons to be specified.



Section 170(d) of the Act gives the Board discretion to determine whether a party can participate in an administrative review before it. Black's Law Dictionary (Tenth Edition) defines judicial discretion as:

***"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."***

In essence, a determination by the Board of which other person participates in an administrative review under Section 170 (d) of the Act ought to be based on what is fair under the circumstances and should be guided by the rules and principles of law.

Turning to the circumstances in the instant Request for Review, it is important to note that the reliefs sought by the Applicant herein by filing the instant Request for Review in line with the provisions of Section 167(1) of the Act emanate from an alleged breach of duty imposed on the Procuring Entity by the Act or Regulations. The Applicant has faulted the Procuring Entity's Head of Procurement and Evaluation Committee and did not seek the Board's leave to join them as parties in the instant Request for Review. It is also noted that the respective committees are made up of natural persons who are not named, dully served with the pleadings and granted a chance to be heard. In any breach of duty imposed by the Act upon the Procuring Entity, the buck stops with its Accounting Officer, who

in this case is the 1<sup>st</sup> Respondent herein. Any order issued by the Board under Section 173 of the Act is directed to the 1<sup>st</sup> Respondent being the party who implements and ensures compliance with such orders from the Board.

In the circumstances, the Board finds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not been properly joined as parties to the instant Request for Review and proceeds to expunge them as parties in these proceedings. Their presence in this Application is neither necessary, relevant nor does it add value.

**Whether the Further Affidavit sworn by Mercy Kamau and filed by the Applicant on 29<sup>th</sup> June 2023 is fatally defective;**

The Respondents submitted that the Further Affidavit sworn by Mercy Kamau and filed by the Applicant on 29<sup>th</sup> June 2023 is fatally defective for failure to be signed and commissioned.

On its part, the Applicant submitted that it sent an advance copy via email of its Further Affidavit to parties in these proceedings and thereafter filed a physical copy of its Further Affidavit with the Board on 29<sup>th</sup> June 2023 before the scheduled hearing.

The Board is cognizant of the provisions of Section 5 of the Oaths and Statutory Declaration Act which provides that:

***"5 Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in***

***the jurat or attestation at what place and on what date the oath or affidavit is taken or made”***

In **Election Petition No. 3 of 2017, Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**, the Court considered the import of section 4 and 5 of the Oaths and Statutory Declarations Act when dealing with commissioning of an affidavit and held as follows:

***"Section 4 and 5 of the Oaths and Statutory Declarations Act provide for the role of commissioner for oaths. Blacks' Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. ...."***

It is clear from the foregoing case that an affidavit must be voluntary, written and commissioned by a Commissioner for Oaths for it to be said to be a "sworn affidavit" that has been provided in support of an application. Further, proper commissioning of the Affidavit involves stating truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

An examination of the Board's file in the instant Request for Review reveals that the Applicant filed with the Secretariat on 29<sup>th</sup> June 2023 at around 12.00 noon a Further Affidavit sworn by Mercy Kamau on 29<sup>th</sup> June 2023. A closer look at the Further Affidavit reveals that it has been signed and commissioned in Nairobi before Julius O. Opini Advocate.

In the circumstance, we find that the Further Affidavit sworn by Mercy Kamau and filed by the Applicant on 29<sup>th</sup> June 2023 is competent and properly before the Board.

**Whether the Applicant's tender was re-evaluated in accordance with the provisions of the Act, the Tender Document and Article 227(1) of the Constitution;**

We understand the Applicant's case to be that the Respondents (a) failed to ensure compliance with evaluation and moderation procedures prescribed under the Act and lacked capacity to evaluate and award the subject tender, (b) disqualified its tender based on extraneous requirements which were outside the provisions of ITT 12.1(g) & ITT 18.2 of Section I- Instructions to Tenders and Clause 2(i)(ii) of Section III- Evaluation and Qualification criteria, (c) colluded to prepare an unfair and baseless Evaluation Report, Professional Opinion and Recommendations and have demonstrated that they have no interest in conducting a fair and transparent evaluation of the Applicant's tender.

We understand the Respondent's case on this issue to be that (a) the allegation that the Applicant's tender was disqualified based on extraneous requirements is a gross misrepresentation of fact, (b) the Applicant has failed to demonstrate that the reasons for disqualification of its tender were unwarranted, (c) the members of the Evaluation Committee had the capacity to evaluate and award the subject tender, (d) they adhered to the provisions of the Constitution, the Act and Regulations 2020 at all times during the procurement process of the subject tender.

On its part, counsel for the Interested Party concurred with the submissions made by Dr. Mutubwa, counsel for the Respondents.

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides 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) ....."**

Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

***"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

***(2) The national values and principles of governance include—***

***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***

***(b) .....;***

***(c) good governance, integrity, transparency and accountability"***  
***[Emphasis ours].***

***(d) .....***

Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, public participation, integrity, transparency and accountability amongst others.

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

***"80. Evaluation of tender***

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.***
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

**(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

**(a) the criteria shall, to the extent possible, be objective and quantifiable;**

**(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**

**(4) .....**

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

Section 46 of the Act provides for establishment of an ad hoc Evaluation Committee for purposes of conducting evaluation of tenders or proposals. Section 46 (3)&(4) provides that:



***"(3) Despite subsection (1), where technical expertise is required from outside the organization, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.***

***(4) An evaluation committee established under subsection (1), shall—***

***(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;***

***(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;***

***(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;***

***(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;***

***(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution."***

The composition of the Evaluation Committee established above is as provided for under Regulation 29 of Regulations 2020 which reads:

***"(1) The ad hoc evaluation committee established and appointed under regulation 28 of these Regulations shall consists of—***

***(a) at least three members appointed on rotational basis comprising heads of user departments or their representatives; and***

***(b) a professional or consultant, where required.***

***(2) The accounting officer shall designate one of the members of the evaluation committee as the chairperson.***

***(3) The quorum for the conduct of business of the evaluation committee shall be at least three persons including the chairperson.***

***(4) The person in charge of the procurement function shall be the secretary of the ad hoc evaluation committee.***

***(5) The role of the secretary of the ad hoc evaluation committee shall be— to provide technical input in terms of compliance with the Act and these Regulations;***

***(a) to avail all the relevant documents to the evaluation committee;***

***(b) to facilitate official communication with tenderers, where clarification is required;***

***(c) to provide logistical support to the evaluation committee;***

***(d) to provide secretariat services to evaluation committee.”***

Regulation 30 of Regulations 2020 provides for conduct of members of the evaluation Committee as follows:

***"In discharging the mandate provided for under the Act, members of the evaluation committee shall—***

***(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents;***

***(b) perform the evaluation or negotiation with due diligence;***

***(c) conduct the evaluation within the periods specified in the Act;***

***(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;***

***(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and***

***(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function."***

Additionally, Regulation 31 of Regulations 2020 provides for Independent Evaluation by each member of the Evaluation Committee as follows:

***"(1) Each member of the evaluation committee shall evaluate independently from the other members prior to sharing his or her analysis questions and evaluation including his or her rating with the other members of the technical evaluation committee.***

***(2) The individual score sheets shall be kept as records of a procurement proceeding.***

***(3) Upon sharing of individual evaluators ratings, the committee shall moderate the analysis to arrive at an average rating.***

***(4) Where technical and financial bids are submitted in separate envelopes, a technical report shall be prepared and submitted to the head of procurement for review and invitation of bidders for the opening of financial proposals.”***

Section 85 of the Act provides that:

***“Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers”***

In essence, it is the mandate of an accounting officer to appoint an evaluation committee whose purpose is evaluation of tenders in a procurement process. The evaluation committee consists of at least three members who may either be heads of user departments or their representatives and a professional or consultant, if required. The quorum for the conduct of evaluation of tenders is three members including the chairperson, and also includes a secretary who is in charge of the procurement function. In discharging their mandate under the Act, members of the Evaluation Committee are expected to strictly adhere to the evaluation criteria set out in the Tender Document, the Act and the Constitution and on conclusion of the evaluation process, to prepare and submit a report to the head of the procurement function on the analysis of

tenders, final ratings assigned to each tender, recommendations on the outcome of evaluation.

Turning to the circumstances of the instant Request for Review, we note that the Applicant was notified of its unsuccessfulness in the subject tender following evaluation of its tender as detailed in the letter of Notification of Award dated 8<sup>th</sup> June 2023 which reads in part:

".....

***The Commission hereby regrets to inform you that your tender was not successful at the Preliminary Evaluation stage 1 due to the following reasons after re-evaluation:-***

***1. The reference letters submitted from corporate clients for medical insurance did not indicate the number of employees covered as per the criteria.***

***2. Reference letters submitted did not prove provision of medical insurance for the last two (2) consecutive years;***

***(i) County Government of West Pokot – Not Indicated.***

***(ii) County Assembly of Embu – 1 Year (2021).***

***(iii) Tana & Athi Rivers Development Authority – Years not specified.***

***(iv) County Government of ElgeyoMarakwet – Years not specified.***

***(v) County Assembly of Busia – Years not specified.***

.....”

The criteria used in re-evaluating the Applicant’s tender was provided for in the Tender Document. We note that Section 70 of the Act requires a procuring entity to use a standard tender document in all procurement and asset disposal proceedings which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***“(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.”***

Having carefully studied the Tender Document of the subject tender, we note that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 26 to page 34 of the Tender Document and tenders were to be evaluated in four stages being (a) Preliminary Evaluation (Eligibility Mandatory Requirements), (b) Preliminary Evaluation (Administrative/Formal Mandatory Requirements), (c) Technical Evaluation, and (d) Financial Evaluation.

We note that Clause 2 (ii) Preliminary Evaluation (Administrative/Formal mandatory Requirement) of Section III- Evaluation and Qualification Criteria provides as follows:

***ii. Preliminary Evaluation (Administrative/ Formal mandatory Requirements)***

<b><i>No.</i></b>	<b><i>Subject</i></b>	<b><i>Criteria</i></b>	<b><i>Mandatory Requirements</i></b>	<b><i>Pass or Fail</i></b>
<b><i>1.</i></b>	<b><i>Tender format</i></b>	<b><i>The whole tender document to be downloaded and then filled in the format provided.</i></b>	<b><i>Must submit an original of the tender document and a copy as part of the bid document with all forms filled, signed and stamped as instructed in the tender document.</i></b>	
<b><i>2.</i></b>	<b><i>Pagination/serialization</i></b>	<b><i>To ensure proper governance of tendering process.</i></b>	<b><i>Tender document MUST be sequentially Paginated/ serialized on each page including all the attachments</i></b>	
<b><i>3.</i></b>	<b><i>Power of Attorney</i></b>	<b><i>To be determine that the person</i></b>	<b><i>Must submit a written power of</i></b>	



		<i>signing any tender documents and contract is authorized to do so.</i>	<i>attorney in the format prescribed in law in Kenya</i>	
<b>4.</b>	<b>Price Quotation</b>	<i>The form of tender to be duly filled, stamped and signed to confirm prices are valid for 182 days from the tender closing date</i>	<i>Must submit a Duly filled, signed and stamped form of tender</i>	
			<i>If bidder is not an underwriter, a Price Quotation from the underwriter is attached.</i>	
<b>5.</b>	<b>Tender Security</b>	<i>To cushion against procurement proceedings risks.</i>	<i>Must submit Tender security equivalent of Kshs. 1,000,000 for Lot 1 and Ksh. 100,000 for each of tenders for Lot Two (2)</i>	

			<p><b><i>and Three (3); valid for 180 days from the date of tender closing in form of either the following:-</i></b></p> <p><b><i>(a) Cash;</i></b></p> <p><b><i>(b) A bank guarantee;</i></b></p> <p><b><i>(c) A guarantee by an insurance company registered and licensed by the Insurance Regulatory Authority listed by the Authority;</i></b></p> <p><b><i>or</i></b></p> <p><b><i>(d) A guarantee issued by a financial institution approved and licensed by the</i></b></p>	
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			<b><i>Central Bank of Kenya.</i></b>	
<b><i>6.</i></b>	<b><i>Registration with the Regulator</i></b>	<b><i>Evidence that the tenderer meets statutory requirements set by Insurance Regulatory Authority (IRA)</i></b>	<b><i>Certified copy of license Certified in 2023 by Insurance Regulatory Authority (IRA)</i></b>	

We also note that tenders were required to be determined responsive at the Preliminary Evaluation (Administrative/Formal mandatory Requirements) stage above, to proceed for evaluation at the Technical Evaluation stage at page 29 to 32 of the Tender Document which provides in part:

***"Technical Evaluation***

***The tenderers shall be evaluated based on the criteria indicated below:***

***Lot- 1 Medical Insurance Cover***

<b><i>Instruction to tenderers</i></b>	<b><i>to Evaluation and Comparison of Tenders</i></b>	<b><i>Pass/Fail</i></b>
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.....	.....	
<b><i>Business Operational Capacity</i></b>	<b><i>Reference from Five (5) corporate clients each for medical insurance with above 1,000 employees with an average family size of 3 members each year, for the last 2 consecutive years.</i></b>	
	.....	
.....	.....	

We observe that the above provision at the Technical Evaluation was clarified in Addendum 1 which state that it would remain as provided under the Technical Evaluation. However, Addendum 2 amended the said provision as follows:

<b><i>QUERY/CLARIFICATION</i></b>	<b><i>REFERENCE</i></b>	<b><i>RESPONSE</i></b>
<b><i>Previously read as below; <u>Business Operation Capacity</u> Reference from Five (5) corporate clients each</i></b>	<b><i>Lot – 1 Medical Insurance Cover Technical Evaluation</i></b>	<b><i>The tender now reads; <u>Business Operation Capacity</u> Reference from Five (5) corporate</i></b>

<b><i>for medical insurance with above 1,000 employees with an average family size of 3 members each year, for the last 2 consecutive years</i></b>		<b><i>clients each for medical insurance with above 1,000 employees for the last 2 consecutive years.</i></b>  <b><i>The requirements of an average family size of 3 members is hereby waived.</i></b>

In essence, a tenderer was required to submit in its tender reference letters from five of its corporate clients for medical insurance each of whose employees were above 1000 in number and the provision of the medical insurance ought to have been for the last two consecutive years.

The Board has carefully studied the Re-Evaluation Report submitted by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act and observes that upon re-evaluation of Lot 1 of the subject tender, the Applicant's tender was found responsive at the Preliminary Evaluation (Administrative/Formal mandatory Requirements) stage and proceeded to the Technical Evaluation stage. We note that the Applicant's tender was disqualified at the Technical

Evaluation stage as discerned at page 26 of the Re-Evaluation Report because (a) its reference letters submitted from corporate clients for medical insurance did not indicate the number of employees covered as per the criteria and (b) its reference letters submitted did not prove provision of medical insurance for the last two (2) consecutive years; (i) County Government of West Pokot – Not Indicated, (ii) County Assembly of Embu – 1 Year (2021) (iii) Tana & Athi Rivers Development Authority – Years not specified (iv) County Government of Elgeyo Marakwet – Years not specified (v) County Assembly of Busia – Years not specified. The reference letter from the County Government of Embu is the only one that met the required criteria of 2 years (2020 & 2021).

We have carefully studied the Applicant's original tender submitted by the 1<sup>st</sup> Respondent as part of the confidential file pursuant to Section 67(3)(e) of the Act and note the following with regard to the above provision of the Business Operational Capacity of the Technical Evaluation:

Requirement	Reference Letters submitted by the Applicant	Board's observation
<b><i>Reference from Five (5) corporate clients each for medical insurance with above 1,000 employees for the</i></b>	<ul style="list-style-type: none"> <li>At page 390, submitted a Certified copy of a letter of Recommendation for Trident Insurance Company signed and</li> </ul>	<ul style="list-style-type: none"> <li>This letter confirmed that the Applicant was the current staff medical provider and recommended</li> </ul>

<b><i>last 2 consecutive years.</i></b>	dated 31 <sup>st</sup> January 2022 from County Government of West Pokot	<p>them to any other organization.</p> <ul style="list-style-type: none"> <li>• The letter did not indicate the number of employees covered.</li> <li>• The letter did not indicate that the medical insurance provision was for the last 2 consecutive years.</li> </ul>
	<ul style="list-style-type: none"> <li>• At page 391, submitted a Certified copy of a letter whose reference is Trident Insurance Company Limited signed and dated 27<sup>th</sup> January 2022 from Embu County Government.</li> </ul>	<ul style="list-style-type: none"> <li>• This letter confirmed that the Applicant has been the medical provider since 2020 and recommended them to any other organization.</li> <li>• The letter did not indicate the number of employees covered.</li> </ul>

	<ul style="list-style-type: none"> <li>• At page 392, submitted a Certified copy of a letter whose reference is Trident Insurance Company Limited signed and dated 27<sup>th</sup> January 2022 from Embu County Government</li> </ul>	<ul style="list-style-type: none"> <li>• This letter confirmed that the Applicant has been the medical provider since 2021 and recommended them to any other organization.</li> <li>• The letter did not indicate the number of employees covered.</li> </ul>
	<ul style="list-style-type: none"> <li>• At page 393, submitted a Certified copy of a letter of Recommendation for Trident Insurance Company signed and dated 3<sup>rd</sup> November 2022 from Tana and Athi Rivers Development Authority</li> </ul>	<ul style="list-style-type: none"> <li>• This letter confirmed that the Applicant was well known to them and that over the years, it had a mutual and beneficial working relationship.</li> <li>• The letter did not indicate that the medical insurance provision by the Applicant was for</li> </ul>



		<p>the last 2 consecutive years.</p> <ul style="list-style-type: none"> <li>• The letter did not indicate the number of employees covered.</li> </ul>
	<ul style="list-style-type: none"> <li>• At page 394, submitted a Certified copy of a letter of Recommendation for Trident Insurance Company signed and dated 28<sup>th</sup> October 2022 from County Government of ElgeyoMarakwet Department of Public Service Management &amp; Administration.</li> </ul>	<ul style="list-style-type: none"> <li>• This letter confirmed that the Applicant was well known to them and that over the years, it had a mutual and beneficial working relationship.</li> <li>• The letter did not indicate that the medical insurance provision by the Applicant was for the last 2 consecutive years.</li> <li>• The letter did not indicate the number of employees covered.</li> </ul>

	<ul style="list-style-type: none"> <li>• At page 395, submitted a Certified copy of a letter of Recommendation for Trident Insurance Company signed and dated 10<sup>th</sup> November 2022 from County Assembly of Busia</li> </ul>	<ul style="list-style-type: none"> <li>• This letter confirmed that the Applicant was well known to them and that over the years, it had a mutual and beneficial working relationship.</li> <li>• The letter did not indicate that the medical insurance provision by the Applicant was for the last 2 consecutive years.</li> <li>• The letter did not indicate the number of employees covered.</li> </ul>
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From the above analysis, it is clear to the Board that the Applicant did not comply with the requirements of the Business Operational Capacity of the Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 29 as amended by Addendum No. 2 of the Tender Document since it failed to submit reference letters indicating the number of employees covered by its medical insurance for the corporate clients and also failed to

indicate or prove that the medical insurance provided was for the last two (2) consecutive years. Our observations above then confirm the findings of the Evaluation Committee as reported in the Re-Evaluation Report.

The Applicant contends that the reasons for disqualification of its tender are extraneous as they were not provided under Preliminary Evaluation (Administrative/Formal mandatory Requirements). From the foregoing, the Board has confirmed that the Applicant's tender was disqualified at the Technical Evaluation stage for failure to meet the evaluation criteria provided under Addendum 2 on the requirements of the Business Operational Capacity of the Technical Evaluation of the Tender Document. It is outright clear that this was an evaluation criterion that was provided for in the Tender Document, it was clarified in addendum 2 and it is clear that the Respondent's Evaluation Committee adhered to the evaluation criteria as stipulated in the Tender Document while evaluating the Applicant's tender.

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

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

From the above provision, a tender only qualifies as a responsive tender if it meets all requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board &**

another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR, relied on by the Respondents in their submissions, the High Court stated:

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***  
***[Emphasis ours].***

In **Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS security Services Limited [2018] eKLR**. Justice Mativo (as he then was) held that:

***"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration. [9] Briefly, the requirement of responsiveness operates in the following manner:  
- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.***

***20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***

The import of the aforementioned cases is that tenders ought to meet the requirements provided by a procuring entity in its tender document as failure to do so would defeat the very essence of providing information to tenderers for the preparation of tenders. In this instance therefore, the Evaluation Committee had no option but to find the Applicant's tender non-responsive at Technical Evaluation stage for having failed to comply with the requirements of the Business Operational Capacity of the Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 29 as amended by Addendum No. 2 of the Tender Document.

The Applicant at paragraph 17 of the Supporting Affidavit sworn by Mercy Kamau on 14<sup>th</sup> June 2023 in support of the Request for Review alleges that the Respondents failed to ensure that each evaluator conducted independent evaluation, ratings and rankings. This allegation was opposed by the Respondents as seen from paragraph 31 of the Respondents Replying Affidavit sworn by Dr. Harley Mutisya on 26<sup>th</sup> June 2023 whereby the Respondents annexed copies of Scoresheets as exhibits marked "HM13" despite these being confidential documents as provided for Section 67(3) of the Act.

The Applicant has alleged that the Respondents lack capacity to evaluate and award the subject tender, colluded to disqualify its tender, ought to disband the Evaluation Committee to allow another entity that has capacity to evaluate the subject tender and prays for the Board to direct the Procuring Entity to institute disciplinary action against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as seen at paragraphs 12, 18, 19, 20, 21, 22, 23, and 24 of the Supporting Affidavit sworn by Mercy Kamau on 14<sup>th</sup> June 2023 in support of the Request for Review.

Having carefully considered the Applicant's allegations, we deem it necessary to understand the meaning of the word collusion as used by the Applicant in its claim against the Respondents. Oxford Learners Dictionary defines the word "collusion" to mean "secret agreement especially in order to do something dishonest or to trick people".

From the meaning of the word collusion as used by the Applicant, we note that the allegation of collusion by the Respondents to disqualify its tender is a serious allegation akin to fraud in the procurement process of the subject tender and the standard of proof for fraud is quite high in which the Applicant, in the Board's considered view, has failed to discharge. The Board is guided by the Court of Appeal decision in **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317** where the court held:

***"There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not."***

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

***"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that***



**the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."**

In essence, the onus of proving fraud rests on a party who seeks to rely on an allegation of fraud by another party and the standard of proof required is more than a balance of probability. The first step is particularizing the allegations in the pleading and thereafter providing evidence to meet the standard of proof required. As such, it is not enough for the Applicant to infer or allege that there was collusion by the Respondents with the intention of disqualifying its tender. The Applicant is required to take further steps in proving such allegations to the Board other than claiming that the Respondents colluded to disqualify its tender in the subject tender. It is clear that the Applicant did not make any attempt of responding to the reasons for its disqualification as highlighted in these proceedings despite such reasons having emanated from the requirements of the Tender Document and despite the disqualification in the Notification having been erroneously stipulated to be under the Preliminary Evaluation (Administrative/Formal mandatory Requirements) stage instead of the Technical Evaluation stage.

It is the Board's considered view that the Applicant has not substantiated its allegations of incapacity of the Respondents to evaluate and award the subject tender so as to necessitate transfer of the technical evaluation of the Applicant's tender to another entity that has capacity and propensity. Nor has the Applicant persuasively demonstrated to the Board why it should grant its prayer to the Procuring Entity to institute internal disciplinary action against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents. It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

***"107. Burden of proof***

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

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. Incidence of burden***

***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***109. Proof of particular fact***

***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***111.....***

***112.Proof of special knowledge in civil proceedings***

***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies on the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

We are guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."***

In the circumstances, the Board finds that the Applicant's tender was re-evaluated in accordance with the provisions of the Act, the Tender Document and Article 227(1) of the Constitution.

**Whether the Letter of Notification of Intention to Award dated 8<sup>th</sup> June 2023 issued to the Applicant met the threshold required under Section 87 of the Act read with Regulation 82 of Regulations 2020**

The Applicant contends at ground 7 of the Request for Review dated 14<sup>th</sup> June 2023 and paragraphs 12 and 17 of the Further Affidavit sworn by Mercy Kamau on 29<sup>th</sup> June 2023 that breached Section 87 of the Act by failing to (a) provide it with reasons why the Interested Party was

determined as the successful tenderer in the subject tender, and (b) insert in its Notification of Award the names of all tenderers that submitted tenders, their evaluated tender prices as well as the tender price as read out.

On the other hand, the Respondent contend at paragraph 38 of the Replying Affidavit sworn by Dr. Harley Mutisya that the Applicant's Notification of Award spelt out the reasons why the Interested Party ought to be awarded the subject tender.

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 that 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 their own specific 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 8<sup>th</sup> June 2023 addressed to the Applicant informed it that its tender was unsuccessful and that the Interested Party was the successful tenderer and reads in part 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 reasons after re-evaluation: -**

.....

**The successful bidder, being the lowest evaluated responsive tenderer is as follows:**

**1. Lot 1 is M/S Zamara Risk & Insurance Brokers Ltd at Kshs. 235,785,705 for Year 1 and Kshs. 235,785,705 for Year 2.**

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

.....”

From the above notification letter, it is clear that the Applicant was informed that the reason the Interested Party was the successful tenderer was because it was the lowest evaluated responsive tender in the subject tender. To this extent, the Notification of Award dated 8<sup>th</sup> June 2023 addressed to the Applicant complied with the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 by disclosing who the successful tenderer was and the reason as to why it was determined to be the successful and at what price it was awarded the subject tender. It is important to note that the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 do not require a procuring entity to disclose the reasons why other tenderers who participated in a procuring



process were found to be unsuccessful. The obligation placed upon the procuring entity is to notify each and every tenderer of the outcome of its individual tender, who was determined as the successful tenderer and the reasons why and at what price the successful tenderer was awarded the tender.

We do however note that despite the Applicant's Notification of Award dated 8<sup>th</sup> June 2023 notifying the Applicant of all the reasons why it was determined unsuccessful in the subject tender, the said Notification erroneously notified the Applicant that it was disqualified at the Preliminary Evaluation stage 1 instead of the Technical Evaluation stage.

Consequently, it is the Board's considered view that the Applicant's letter of Notification of Award dated 8<sup>th</sup> June 2023 issued by the 1<sup>st</sup> Respondent does not satisfy the threshold of section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 for failure to disclose to the Applicant the correct stage at which the Applicant's tender was disqualified.

In the circumstances, the Board finds the Letter of Notification of Award dated 8<sup>th</sup> June 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 established that the Board has jurisdiction to hear and determine the instant Request for Review.

We have found that the Applicant's tender was 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 found that the Applicant's letter of Notification of Award dated 8<sup>th</sup> June 2023 failed to disclose the correct stage at which the Applicant was disqualified in the subject tender though it correctly provided the reasons as to why the Applicant was found unsuccessful. Consequently, the Board deems it fit to nullify the Applicant's Letter of Notification of Award of the subject tender dated 8<sup>th</sup> June 2023 to enable the 1<sup>st</sup> Respondent to notify the Applicant of the outcome of evaluation of its tender in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020. None of the other tenderers challenged their own evaluation and disqualifications and the reasons issued for such disqualification.

The upshot of our findings is that the instant Request for Review dated 14<sup>th</sup> June 2023 and filed on 16<sup>th</sup> June 2023 succeeds only to the extent that the Letter of Notification of Award dated 8<sup>th</sup> June 2023 issued to the Applicant did not meet the threshold required under Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 14<sup>th</sup> June 2023 and filed on 16<sup>th</sup> June 2023:

- 1. The Letter of Notification of Award dated 8<sup>th</sup> June 2023 addressed to the Applicant 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 1<sup>st</sup> Respondent is hereby directed to issue the Applicant with a fresh Letter of Notification of Award 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 disclosing the correct stage at which the Applicant was disqualified in accordance with Section 87 of the Act read together with Regulation 82 of Regulations 2020 within two (2) days from the date hereof taking into consideration the Board's findings herein.**

3. Further to Order No. 2 above, and upon compliance thereof, the Procuring Entity is hereby directed to proceed with the procurement proceedings for 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 Staffin accordance with provisions of the Act to its logical conclusion

4. In view of our findings above, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 7<sup>th</sup> Day of June 2023.

.....  
**CHAIRPERSON**

**PPARB**

.....  
**SECRETARY**

**PPARB**