

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 47/2023 OF 7TH JULY 2023

BETWEEN

STAR DISCOVER INSURANCE LIMITED APPLICANT

AND

COUNTY CHIEF OFFICER-PUBLIC SERVICE,

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY SECRETARY & HEAD OF COUNTY PUBLIC SERVICE,

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 3RD RESPONDENT

JUBILEE HEALTH INSURANCE INTERESTED PARTY

Review against the decision of the County Chief Officer- Public Service, Nairobi City County Government in relation to Tender No. NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024.

BOARD MEMBERS PRESENT

1. Mrs. Njeri Onyango FCI Arb - Panel Chairperson
2. Ms. Alice Oeri - Member

- 3. Dr. Susan Mambo - Member
- 4. Mr. Alexander Musau - Member
- 5. Mr. Daniel Langat - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT STAR DISCOVER INSURANCE LIMITED

Mr. Njomo holding brief for

Ms. Njoki Mboce -Advocate, Njoki Mboce & Company
Advocates

RESPONDENTS COUNTY CHIEF OFFICER-PUBLIC SERVICE, NAIROBI CITY COUNTY GOVERNMENT, COUNTY SECRETARY & HEAD OF COUNTY PUBLIC SERVICE, NAIROBI CITY COUNTY GOVERNMENT& NAIROBI CITY COUNTY GOVERNMENT

Mr. Kihara -Advocate, Kihara & Wyne Advocates

INTERESTED PARTY JUBILEE HEALTH INSURANCE

1. Mr. Elias Masika -Lead Advocate
2. Ms. Dorothy Jemator - Advocate, Chepkuto Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Nairobi City County Government, the Procuring Entity and 3rd Respondent herein invited sealed tenders in response to Tender No. NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024 (hereinafter referred to as the "subject tender") using an open tender method. The blank tender document for the subject tender issued to tenderers by the Respondents herein (hereinafter referred to as the 'Tender Document') was available for download from the 3rd Respondent's website www.nairobi.go.ke and on the Public Procurement Information Portal (PIIP) www.tenders.go.ke. The subject tender's submission deadline was scheduled for Friday, 26th May 2023 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 26th May 2023 signed by members of the Tender Opening Committee on 26th May 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 1st 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 six(6) tenders were submitted in response to the subject tender. The said six(6) tenders were opened in the presence of tenderers' representatives present at the tender opening session and were recorded as follows:

No.	Bidder's Name
1.	First Assurance Company
2.	Jubilee Health Insurance
3.	Madison General Insurance
4.	Trident Insurance Company Limited
5.	Star Discover Insurance Limited
6.	GA Insurance

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of six (6) tenders as captured in an Evaluation Report and Recommendation for Award of the subject tender signed by members of the Evaluation Committee on 16th June 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;
- ii Technical Evaluation;
- iii Financial Evaluation.

Preliminary Evaluation (Administrative/ Formal Mandatory Requirements)

4. The Evaluation Committee was required to carry out a preliminary mandatory evaluation of tenders in the subject tender using the criteria provided under Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document. Tenders were required to meet all the nineteen (19) mandatory requirements at this stage to proceed to the Technical Evaluation stage.
5. At the end of evaluation at this stage, three (3) tenders were determined non-responsive including the Applicant's tender while three (3) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause a) Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria

at page 27 to 29 of the Tender Document. Tenderers were required to score 80% and above of the technical score to proceed to the Financial Evaluation stage.

7. At the end of evaluation at this stage, three (3) tenders were found responsive and thus proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause b) Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document. A financial comparison of tenderers would be undertaken for purposes of identifying the tenderer with the lowest evaluated price. A competitive negotiation would also be carried out.

9. At the end of evaluation at this stage, tenderers were ranked according to their quoted prices as follows:

Bidder	Name of Tenderer	Tender Price (Ksh)	Ranking
2	Jubilee Health Insurance	1,469,999,000	1
1	First Assurance Company	1,887,055,248	2
3	Madison General Insurance	2,038,597,701	3

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended the Interested Party, being the tenderer with the lowest evaluated price, to be invited for negotiations on several issues as can be discerned from the Evaluation Report.

Joint Negotiations

11. Vide a letter dated 19th June 2023, the Interested Party was invited for negotiation of the subject tender scheduled on 20th June 2023 and was requested to be accompanied by its technical staff who could make binding decisions on its behalf.
12. According to Minutes of the subject tender's Joint Negotiation held on 20th June 2023 signed on 23rd June 2023 by members of the Evaluation Committee and members of the Interested Party's negotiation team (hereinafter referred to as the 'Joint Negotiation Minutes') and which Joint Negotiation Minutes were furnished to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a consensus agreement was made as can be discerned at page 1 of 5 to page 5 of 5 of the Joint Negotiation Minutes.

Professional Opinion

13. In a Professional Opinion dated 23rd June 2023 (hereinafter referred to as the "Professional Opinion"), the Director Supply Chain Management, R.M. Omanwa, reviewed the manner in which the

subject procurement process was undertaken including evaluation of tenders and the joint negotiations 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 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

14. Thereafter, Ms. Janet Opiata, County Chief Officer – Public Service Management, and 1st Respondent herein, approved the Professional Opinion on 23rd June 2023. The duly approved Professional Opinion was furnished to the Board by the Respondents as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 23rd June 2023.

REQUEST FOR REVIEW NO. 47 OF 2023

16. On 7th July 2023, Star Discovery Insurance Limited, the Applicant herein, filed a Request for Review No.47 of 2023 dated 7th July 2023 together with an Applicant's Statement in Support of the Request for Review dated 7th July 2023 and signed by Rufus Marundu

Maina, the Applicant's Director, with respect to the subject tender (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

- a) The Respondents decision awarding Tender No: NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024 (Open to Underwriters only) to the Interested Party be annulled and set aside;***
- b) The 1st Respondent's letter dated 23rd June 2023 notifying the Applicant that it had not been successful in Tender No: NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024 (Open to Underwriters only) be annulled and set aside;***
- c) Nullify and set aside any contract with respect to the subject tender that the Respondents may have entered with the Interested Party in breach of Section 135(3) of the Act read with Section 167(1) of the Act, Section 168 of the Act and Regulation 203 (2)(c) of Regulations 2020;***
- d) A declaration that the Respondent failed to evaluate the Applicant's bid at the preliminary evaluation stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act and Regulations 2020;***

- e) The Respondents be directed to re-admit the Applicant at the preliminary evaluation stage and to carry out a re-evaluation of the tender noting to observe and apply the criteria in the subject tender as required by the Act at Section 80(2) and carry out re-evaluation in compliance with Section 79,80(2) and 80(3) of the Act and Regulation 74 of Regulations 2020;***
- f) The Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings/process relating to Tender No: NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024 (Open to Underwriters only) and in exercise of its discretion, to direct the Respondents to redo or correct anything within the entire procurement proceedings/process found not to have been done in compliance with the law;***
- g) In the alternative and without prejudice to the foregoing, a declaration that the procurement proceedings/processes of the subject tender are null and void for contravening the provisions of the Constitution of Kenya 2010, the Act, Regulations 2020 and the Tender Document thus, the Public Procurement Administrative Review Board be pleased to order termination of the procurement process of the subject tender and commencement of a new procurement process;***
- h) The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and***

i) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

17. In a Notification of Appeal and a letter dated 7th July 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th July 2023.

18. Vide an email dated 11th July 2023, the Respondents sent to the Board's Secretariat a list of tenderers who participated in the subject tender together with soft copies of confidential documents pursuant to Section 67(3)(e) of the Act.

19. Vide letters dated 11th July 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence

of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 11th July 2023.

20. On 12th July 2023, the Interested Party through the firm of Chepkuto Advocates filed a Notice of Appointment dated 12th July 2023 together with a Notice of Preliminary Objection dated 12th July 2023.

21. On 14th July 2023, Mr. Partick Analo Akivaga, Ag. County Secretary and Head of County Public Service and the 2nd Respondent herein filed a letter dated 13th July 2023 accompanied by the 3rd Respondent's Response for the subject tender signed by Ms. Janet Opiata, the 1st Respondent herein together with a file containing hard copies of confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

22. Vide a Hearing Notice dated 14th July 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 20th

July 2023 at 12.00 noon through a link availed in the said Hearing Notice.

23. On 17th July 2023, the Interested Party through the firm of Chepkuto Advocates filed an Interested Party's Replying Affidavit sworn by Njeri Njomo, its Principal Officer, on 13th July 2023.
24. On the morning of 20th July 2023, the Respondents through the firm of Kihara&Wyne Advocates filed a Notice of Appointment dated 19th July 2023, a Preliminary Objection dated 19th July 2023, Written Submissions dated 19th July 2023 together with a Respondents' List of Authorities.
25. On the morning of 20th July 2023, the Applicant through its advocates filed an Applicant's Further Statement in Support of the Request for Review dated 18th July 2023 and signed by Rufus Marundu Maina, its Director, Written Submissions dated 19th July 2023 together with an Applicant's List of Authorities dated 19th July 2023.
26. On 20th July 2023 the Interested Party through its advocates filed written submissions dated 19th July 2023 and List of Authorities dated 19th July 2023.

27. When the matter came up for hearing on 20th July 2023 at 12.00 noon, the Board confirmed the pleadings on record as filed by all parties in the instant Request for Review and service of the same. The Board further directed that the hearing of the Respondents' and Interested Party's Preliminary Objections 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

28. In his oral submissions, counsel for the Applicant, Mr. Njomo holding brief for Ms. Njoki Mboce, relied on the Applicant's Request for Review dated 7th July 2023 together with the Applicant's Statement in Support of the Request for Review dated 7th July 2023 and signed by Rufus Marundu Maina, the Applicant's Further Statement in Support of the Request for Review dated 18th July 2023 and signed by Rufus Marundu Maina, Written Submissions dated 19th July 2023 and List of Authorities dated 19th July 2023 that were all filed before the Board.

29. On the Preliminary Objections filed by the Respondents and the Interested Party, Mr. Njomo submitted that they were not proper preliminary objections in law since a proper preliminary objection is purely on points of law and the Board in considering whether the preliminary objections are merited would be required to interrogate timelines which was a matter of evidence and once an issue of evidence arises, there cannot be a proper preliminary objection.
30. Mr. Njomo submitted that Section 167(1) of the Act presents two scenarios when an aggrieved party can file an administrative review before the Board being on notification and on occurrence of breach. He further submitted that the use of the word 'or' in the said provisions of the Act was disjunctive and the Board ought to consider the possibility of another option and alternatives. Counsel submitted that the Applicant was notified that its tender was unsuccessful vide a notification letter dated 23rd June 2023 and received on 30th June 2023.
31. Mr. Njomo submitted that the Applicant elected to file the instant Request for Review within 14 days of notification of award under Regulation 203(2)(c)(ii) of Regulations 2020 and that with this option, computation of occurrence of breach is not a consideration and as such, the Request for Review having been filed on 7th July 2023 was filed within the statutory timelines.

32. Counsel argued that the invitation to strike out the Request for Review had no basis and ought to be dismissed since the Board has jurisdiction to hear and determine the instant Request for Review on merit.
33. Mr. Njomo submitted that the Applicant has raised facts proving that the Procuring Entity structured the Tender Document in a way that locked out major players with no justifiable reason and relied on hoding by Justice Mativo in the case of *R v Kenya Maritime Authority Ex-Parte Okiya Omtatah Okoiti* (hereinafter referred to as "*Kenya Maritime case*") arguing that the scenario before the Board was no different from the said case. Counsel submitted that the restriction in the Tender Document is a form of discrimination and is in breach of Article 227(1) of the Constitution since when key players are locked out, the procurement process is not fair. He further referred the Board to the provisions of PPRA Circular dated 18th May 2023 annexed to the Request for Review and submitted that the Tender Document in the subject tender gave undue advantage to certain key players, was unlawful and the procurement process being unconstitutional ought to be nullified.

Respondents' Submissions on their Preliminary Objection and the Request for Review

34. In his oral submissions, counsel for the Respondents, Mr. Kihara, relied on the Respondents Response file on 14th July 2023,

Preliminary Objection dated 19th July 2023, Written Submissions dated 19th July 2023 and List of Authorities dated 19th July 2023 that were all filed before the Board.

35. Mr. Kihara submitted that the Applicant seems to be complaining on behalf of insurance brokers and referred the Board to the provisions of Section 167 (1) of the Act on who could lodge an administrative review before the Board.
36. Counsel referred to paragraph 3 of the Request for Review and submitted that the Applicant did not categorically state what extraneous evaluation criteria was used in evaluation of its tender. He further pointed out that the Applicant at paragraphs 5 to 7 of the Request for Review was complaining about the Tender Document which was also reiterated in the Applicant's Further Statement.
37. Mr. Kihara submitted that it was instructive to determine when the Applicant learnt of the alleged restrictive and discriminatory provisions of the Tender Document complained of and pointed out that the subject tender was advertised on 11th May 2023 and was scheduled to close on 26th May 2023 at 11.00 a.m. He further submitted that the latest the Applicant can be assumed to have downloaded the Tender Document was on 26th May 2023 and as

such, it had 14 days from the 26th May 2023 within which it could have approached the Board as an aggrieved party.

38. Counsel submitted that the Board has had to deal with a similar issue where the Board's decision was upheld by the High Court in *Republic v Public Procurement Administrative Review Board & 2 Others Ex-Parte Marsep Petroleum Dealers & 2 others [2023] Eklr* that time is to be computed from when the Tender Document was available. He further pointed out that the circular from PPRA was issued on 18th May 2023 yet the subject tender was advertised on 11th May 2023.

39. Mr. Kihara submitted that the Applicant's tender failed at the Preliminary stage of evaluation and urged the Board to dismiss the Request for Review.

Interested Party's Submissions on its Preliminary Objection and the Request for Review

40. In their oral submissions counsels for the Interested Party, Mr. Masika and Ms. Jemator, relied on the Preliminary Objection dated 12th July 2023, Interested Party's Replying Affidavit sworn on 13th July 2023, Written Submissions dated 19th July 2023 and List of Authorities dated 19th July 2023 that were all filed before the Board.

41. Ms. Jemator concurred with the submissions by Mr. Kihara on the preliminary objection and submitted that Section 167(1) of the Act does not provide alternatives where an aggrieved party can pick when to lodge an administrative review but provides for various timelines within which an aggrieved party can lodge and administrative review.

42. Ms. Jemator submitted that the Applicant confirmed having submitted its tender in the subject tender and as such interacted with the Tender Documents and ought to have brought its allegations of the Tender Document being discriminative and restrictive within 14 days from 26th May 2023. Counsel submitted that the Applicant having submitted its tender was estopped from claiming that the Tender Document was restrictive or discriminative.

43. On his part, Mr. Masika called upon the Board to interrogate whether the Applicant's tender was responsive and referred to the provisions of Section 79(1) of the Act. He argued that it was not in dispute that the Applicant did not submit valid Tax Compliance Certificate, NHIF Compliance Certificate and NSSF Compliance Certificate and submitted that the Applicant had not attempted to deny this fact. Counsel further submitted that the Procuring Entity could not progress the Applicant's tender to the next stage of evaluation having failed at the Preliminary Evaluation stage.

44. Mr. Masika submitted that pursuant to Section 80(2) & (3) of the Act, evaluation is carried out using the criteria set out in the Tender Document and for a tender to be rendered responsive, it ought to comply with all material requirements set out in the Tender Document. He further pointed out that Section 55(1) of the Act sets out who an eligible bidder is and a person participating in a procurement process must have fulfilled tax obligations and is not guilty of unfair employment practices.
45. Counsel submitted that the issue of whether the Tender Document was restrictive and discriminatory was raised on behalf of parties who were not before the Board and the Applicant being an underwriter, it has not demonstrated it personally suffered or was likely to suffer any prejudice since it was not a broker.
46. He urged the Board to dismiss the Request for Review with costs.
47. In response to an enquiry by the Board on whether the Interested Party had any evidence proving that the Applicant did not meet the mandatory requirements, Mr. Masika submitted that the Respondents in their response laid out evidence indicating that the Applicant's tender was not compliant.

Applicant's Rejoinder

48. In a rejoinder, Counsel for the Applicant, Mr. Njomo submitted that the Respondents were under an obligation to subject parties to a fair process and by locking out candidates who were not underwriters, the procurement process was unfair in accordance to Article 227(1) of the Act. Counsel reiterated the holding by Justice Mativo in the Kenya Maritime case where he prohibited Kenya Maritime Authority from enforcing the decision to lock out insurance brokers and medical insurance firms and through an order of mandamus compelled Kenya Maritime Authority to re-advertise an open tender where all eligible registered insurance service providers could tender.
49. Counsel invited the Board to interrogate the Applicant's tender and confirm that it complied to the set out mandatory requirements.
50. In response to an enquiry by the Board on the loss suffered by the Applicant resulting from its tender being determined unsuccessful, Mr. Njomo submitted that the Applicant expected a financial gain and suffered loss once the chance to supply the services to the Respondents was denied. He further submitted that the Applicant suffered loss in preparation and submission of its tender and had a legitimate expectation that it would be awarded the subject tender.

51. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 7th July 2023 was due to expire on 28th July 2023 and that the Board would communicate its decision on or before 28th July 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

52. The Board has considered each of the parties' case, documents, pleadings, oral and written submissions, list and bundle of 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 will make a determination on the following sub-issues:

a) Whether the Respondents' Preliminary Objection dated 19th July 2023 and the Interested Party's Preliminary Objection dated 12th July 2023 are proper preliminary objections in law;

b) Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad in law that the Board is divested of its jurisdiction by the absence of a competent Request for Review; and

c) Whether the allegations by the Applicant that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Depending on the determination of the first issue;

2. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with the provisions of the Tender Document, the Act and the Constitution;

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

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

a) Whether the Respondents' Preliminary Objection dated 19th July 2023 and the Interested Party's Preliminary Objection dated 12th July 2023 are proper preliminary objections in law;

53. The Applicant contends that the preliminary objections by the Respondents and Interested Party are not proper preliminary objections in law since a proper preliminary objection raises pure points of law which is usually on the assumption that all facts that are pleaded are correct. The Applicant further contends that the Board in considering whether the preliminary objections are merited would be required to examine the evidence before it and interrogate timelines to determine the question of whether the instant Request for Review was filed within the stipulated statutory timelines.

54. Having perused the instant Request for Review, we note that the same is premised on the alleged breach by the Respondents of Sections 3(a),55(1),60,70,74(1)(h), 79, 80(2), and 86 of the Act, Regulation 74 of Regulations 2020, and Articles 10, 27 and 227(1) of the Constitution. We also note that the Applicant's main contention in the instant Request for Review pertains to (a) failure by the Respondents to adhere to the evaluation criteria set out in the Tender Document, and (b) the Respondents provided prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players, extinguishing competition and fairness amongst tenderers and would be tenderers and providing a skewed Tender Document tailor made for an intended tenderer.

55. 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 Preliminary Objection by the Respondents and 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.”

56. 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...”

57. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (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.

58. Turning to the circumstances of the instant Request for Review, it is not contested that the Tender Document in the subject tender was advertised on 11th May 2023 and the submission deadline was on 26th May 2023. It is also not in contest that tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 23rd June 2023 and that this notification letter was received by the

Applicant on 30th June 2023. We have already established that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party.

59. It is our considered view that none of the dates and timelines pertaining to the Applicant's allegation of breach of duty by the Respondents has been contested by any of the parties in the instant Request for Review. We are therefore not required to inquire into evidence to ascertain any of the facts pleaded by either the Applicant, Respondents and the Interested Party. What is in contest, having come to light by clear implication of the Applicant's Request for Review, is on when the alleged breach of duty by the Respondents occurred pursuant to the provisions of law under Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

60. In the circumstances, we find that the Respondents' Preliminary Objection dated 19th July 2023 and the Interested Party's Preliminary Objection dated 12th July 2023 are proper preliminary objections in law.

b) ***Whether failure by the Applicant to sign the instant Request for Review renders it fatally defective and bad***

in law that the Board is divested of its jurisdiction by the absence of a competent Request for Review;

61. The Interested Party contends at ground 2 of its Notice of Preliminary Objection dated 12th July 2023 that the instant Request for Review is incompetent and defective having been executed by Counsel for the Applicant without the lawful authority of the Applicant and no such authority has been conferred to the Applicant's advocates on record to execute the Request for Review on behalf of the Applicant.

62. The Applicant submitted that it annexed to its Further Affidavit in Support of the Request for Review exhibit marked RMM-1 being a Resolution of the Applicant dated 6th July 2023 appointing its advocates on record for purposes of lodging a request for review on its behalf and representing it in the administrative review proceedings before the Board and any other litigation with respect to the subject tender.

63. The Board notes that Regulation 203(1) of Regulations 2020 provides that:

"(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations"

64. Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

Fourteenth Schedule (r 203(1))

Form for Review

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

Application No..... OF

BETWEEN

.....Applicant

AND

.....Respondent

REQUEST FOR REVIEW

I/We.....the above named Applicant (s) of address.....physical address.....P.O Box No.....Tel No..... Email hereby Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely

1.

2.

SIGNED(APPLICANT)

**DATED.....ONDAY
OF...../20**

FOR OFFICIAL USE ONLY

Lodged with the Secretary,

**Public Procurement Administrative Review Board on.... Day of
.....20...**

SIGNED

Board Secretary

65. From the format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

66. However, Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

"Reg. 208 Representation by person of own choice

Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."

67. We are also cognizant of the provisions of Section 26(2) of the Statutory Instruments Act which provides that:

"Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead."

68. In the same breath, Section 72 of the Interpretation and General Provisions Act provides that:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

69. In essence, where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to

mislead or which subsequently does not affect the substance of that document or statutory instrument.

70. The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as “the Alfred Mutua case”) where it held:

"In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."

71. The Board notes that the Applicant’s Request for Review dated 7th July 2023 and filed on even date reads in part as follows:

".....

REQUEST FOR REVIEW

We, STAR DISCOVER INSURANCE LIMITED, of Physical Address: 1st Floor, The Arch Place, Nyangumi Road in Kilimani and of P.O. Box 3421-00506 Nairobi and Email address: info@starinsurance.co.ke have appointed the firm of NJOKI MBOCE & COMPANY ADVOCATES to represent us in these proceedings and whose address for purpose of the review proceedings shall be 2nd Floor, Wing B, Utimishi Cooperative House, Mamlaka Road, P.O. Box 44015-00100 Nairobi; Email: partners@njokimboce.com ; Cell:+ 254725862223, hereby request the Public Procurement Administrative Review Board to review the whole of the above-mentioned decisions on the following grounds, namely:

1.....

2.....

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4.....

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13.....

BY THIS MEMORANDUM the Applicant requests the Public Procurement Administrative Review Board for orders that;

a.....

b.....

c.....

d.....

e.....

f.....

g.....

h.....

i.....

DATED at Nairobi this 7th day of July 2023

(signed)

NJOKI MBOCE & COMPANY ADVOCATES

ADVOCATES FOR THE APPLICANT

.....”

72. From the above Request for Review filed by the Applicant, we note that it (a) is made in the name of the Applicant and not its Advocate and indicates its physical address, (b) indicates that it has appointed the firm of Njoki Mboce & Company Advocates to represent it in the instant proceedings, (c) indicates that the Applicant’s address for purposes of the Request for Review proceedings shall be its advocates address and indicates the advocates physical address, postal address, email and telephone contacts, (d) sets out the request to review the subject tender while laying out grounds for review and orders sought from the Board; (d) has been signed off by the Applicant’s advocates on record Njoki Mboce & Company Advocates; (e) was lodged and received by the Board’s Secretary on 7th July 2023 as evidenced by the signature endorsed Board’s Secretary.

73. In our considered view, the import of the words *"have appointed the firm of NJOKI MBOCE & COMPANY ADVOCATES to represent us in these proceedings and whose address for purpose of the review proceedings shall be 2nd Floor, Wing B, Utimishi*

Cooperative House, Mamlaka Road, P.O. Box 44015-00100 Nairobi; Email: partners@njokimboce.com ; Cell:+ 254725862223” in the Applicant’s Request for Review filed on 7th July 2023 connote that any document or information delivered to the Applicant’s Advocate’s indicated in the Request for Review is considered to have been delivered to the Applicant itself and is binding on the Applicant and that the Applicant’s Advocate has authority to act in its capacity in the instant Request for Review proceedings. Being guided by the Supreme Court’s holding in the **Alfred Mutua** case, it is our considered view that the deviation by the Applicant in the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review.

74. In the circumstances, we find that failure by the Applicant to sign the instant Request for Review does not render it fatally defective and bad in law thus the Request for Review is not incompetent. Accordingly, this ground on the Interested Party’s Notice of Preliminary Objection dated 12th July 2023 and filed on even date fails.

c) Whether the allegations by the Applicant that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender

thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

75. The Applicant at paragraphs 5 of the Request for Review, paragraphs 13 to 17 of the Applicant's Statement in Support of the Request for Review dated 7th July 2023 and signed by Rufus Marundu Maina and at paragraphs 8 to 13 of the Applicant's Further Statement in Support of the Request for Review dated 18th July 2023 and signed by Rufus Marundu Maina contends that the Respondents in preparing the Tender Document provided for prohibitive and restrictive requirements for participation in the subject tender hence discriminated against other insurance players and extinguished competition and fairness in the procurement process since the requirements in the Tender Document were skewed and tailor made for an intended tenderer.

76. The Applicant further contends that in view of the Public Procurement Regulatory Authority Circular No. 03/2023 dated 18th May 2023 (hereinafter referred to as "PPRA Circular No. 03/2023"), the procurement process of the subject tender was illegal/unlawful and the Board ought to arrest the same before the said illegality/unlawfulness results in an unlawful contract by nullifying the procurement proceedings of the subject tender, terminating the procurement process of the subject tender and ordering commencement of a new procurement process.

77. It is the Applicant's case that the Board has jurisdiction to hear and determine the instant Request for Review since Section 167 (1) of the Act provides for two options which a tenderer elects the period within which it can seek administrative review. The Applicant submits that the word "or" appearing in Section 167 (1) of the Act and Regulation 203 (2)(c) of Regulations 2020 provides for two alternatives for the time frame within which an aggrieved tenderer may seek administrative review. The Applicant further submits that it elected to file the instant Request for Review within 14 days of notification of award as provided under Regulation 203(2)(c)(ii) of Regulations 2020 since the instant Request for Review, *inter alia*, seeks to challenge the reasons why its tender was determined unsuccessful in the subject tender as notified in the Notification of Regret dated 23rd June 2023 and received on 30th June 2023.

78. The Respondents on the other hand objected to hearing and determination of the instant Request for Review on the ground that the Board has no jurisdiction to entertain the same since it was filed outside the statutory period of 14 days provided under Section 167 (1) of the Act. It is the Respondents' case that the complaint by the Applicant relates to how the Tender Document was framed and ought to have been raised from the onset and not at the conclusion of the tendering process rendering it time barred. The Respondents contend that since the subject tender was published on 11th May 2023 and closed on 26th May 2023, and assuming that the Applicant downloaded the Tender Document on 26th May 2023, it had 14 days from 26th May 2023 to lodge the instant Request for Review as provided under Section 167(1) of the Act.

79. On its part, the Interested Party similarly objected to hearing and determination of the instant Request for Review on the ground that the Board lacks jurisdiction to entertain the same for having been filed outside the statutory period of 14 days after the occurrence of the alleged breach of duty imposed upon the Respondents by Section 167 (1) of the Act read with Regulation 203 (2)(c) of Regulations 2020. During the hearing, counsel for the Interested Party, Ms. Jemator, submitted that by interacting with the Tender Document and proceeding to submit its tender, the Applicant was estopped from claiming that the Tender Document was discriminative or restrictive.

80. The Board notes that it is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question regarding its 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 in respect of which it is raised.

81. 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."

82. 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."

83. 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."
[Emphasis by the Board]

84. 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."

85. 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...."

86. 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."

87. 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."

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

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

89. Further, Section 28 of the Act provides for the functions of the Board as:

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

90. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

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

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

91. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings filed before the Board.

92. 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.

93. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

94. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. This request for review is to

be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

95. A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

96. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the

aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

97. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, we understand the Respondents and Interested Party's contention to be that, by the Applicant's own admission of having elected to participate in the subject tender by submitting its tender on or before the stipulated tender submission deadline of 26th May 2023, any contents of the Tender Document ought to have been challenged by the Applicant before the Board on or before the 9th of June 2023.

98. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a

tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.This was the holding by this Board in **PPARB Application No. 87 of 2022 Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in **PPARB Application No. 97 of 2022 Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others.**

99. The Board is also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure C04" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go

noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

100. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant was aware of the contents and provisions of the Tender Document of the subject tender advertised on 11th May 2023 and scheduled to close on 26th May 2023 since it

chose to participate in the tendering process. It was only after its tender was found non responsive that it opted to challenge, *inter alia*, the contents of the Tender Document as being discriminatory and skewed to favour an intended tenderer as alleged in the instant Request for Review filed on 7th July 2023. In our considered view, the Applicant ought to have challenged the contents of the Tender Document on allegations that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers by virtue of Regulation 203(2)(c)(i) of Regulations 2020 noting that the occurrence of the alleged breach of duty by the Respondents complained of took place way before the tender closed and an award was made in the subject tender.

101. With respect to PPRA Circular No. 03/2023, it is clear that the said circular was issued on 18th May 2023 which was within the period when the subject tender was advertised and before the scheduled tender submission deadline. As such, the Applicant being aware of the provisions of the Tender Document in the subject tender and the provisions of PPRA Circular No. 03/2023, and, being aggrieved by the same, ought to have moved the Board by way of an administrative review by virtue of Regulation 203(2)(c)(i) of

Regulations 2020 much earlier and not to wait for the Notification before filing the Request based on that issue.

102. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter 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.”

103. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the contents and provisions of the Tender Document on allegations of being skewed to favour an intended tenderer and not meeting the provisions of PPRA Circular No. 03/2023, the Act and the Constitution, the 18th May 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of the occurrence of the alleged breach with respect to allegations that the provisions of the Tender Document were discriminatory and were skewed to favour an intended tenderer and did not meet the provisions of PPRA Circular No. 03/2023, the Act and Constitution. This means, 14 days started running from 19th May 2023 and lapsed on 1st June 2023. In essence, the Applicant had between the 19th May 2023 and 1st June 2023 to seek administrative review before the Board with respect to its allegation that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers.

104. Assuming that the last day that the Applicant became aware of the alleged breach of duty by the Respondents was on the tender submission deadline being 26th May 2023, the 26th May 2023 is excluded pursuant to Section 57(a) of IGPA being the tender submission deadline and the last day which the Applicant is assumed to have received the Tender Document before submitting its tender and at least learnt of occurrence of the alleged breach of duty by the Respondents. This means, 14 days started running from 27th May 2023 and lapsed on 9th June 2023. In essence, the Applicant had between the 27th May 2023 and 9th June 2023 to seek administrative review before the Board with respect to its allegation that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 7th July 2023 which was the 42nd day from the date it is assumed to have received the Tender Document at the latest and its aforesaid allegations are therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203 (2)(c)(i) of regulations 2020 in so far as the Applicant became aware of the alleged breach of duty complained of with respect to the provisions of the Tender Document being discriminatory and skewed to favour an intended tenderer and being in breach of provisions of the Act and Constitution.

105. In the circumstances, **we find and hold that the allegations by the Applicant that the Respondents provided for prohibitive and restrictive requirements for participation in the subject tender thus discriminating against other insurance players and the allegation that the provisions of the Tender Document were skewed and tailor made for an intended tenderer thus extinguishing competition and fairness amongst tenderers are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 thus ousting the jurisdiction of the Board only to this extent.**

Having found as above, it is the position then that only the aspect of the allegations regarding the contents of the Tender document are time barred. The Board shall therefore proceed to make determination on the Issue regarding the evaluation of the Applicant's Tender which issue is raised in the instant Request for review.

Whether the Applicant's tender in response to the subject tender was evaluated in accordance with the provisions of the Tender Document, the Act and the Constitution;

106. We understand the Applicant's case on this issue to be that its tender met all the eligibility and mandatory requirements in the Tender Document and that the decision of the Respondents to disqualify its tender was unlawful, unfair and prejudicial to it. The Applicant at paragraph 3 of the Request for Review contends that the Respondents breached the provisions of Section 80(2) of the Act by failing to adhere to the evaluation criteria set out in the Tender Document and introduced an extraneous criterion during the tender evaluation process. The Applicant invited the Board to interrogate its original tender submitted in the subject tender and confirm that its tender was compliant with the requirements of the Tender Document.

107. We understand the Respondents' response on this issue to be that the Applicant's tender did not meet the mandatory requirements provided in the Tender Document and was non responsive as stipulated under Section 79 and Section 55(1)(f) & (h) of the Act. The Respondents contend that they adhered to the set out evaluation criteria in the Tender Document which was objective and quantifiable and complied with provisions of the Act and Constitution.

108. On its part, the Interested Party associated itself with the Respondents submissions and submitted that the reasons for disqualification of the Applicant's tender were substantiated and the

requirements set out in the Tender Document were clear and unambiguous and fault cannot be apportioned to the Respondents for the Applicant's failure to meet the stipulated mandatory requirements in the Tender Document. The Interested Party contends that it complied with the provisions of the Tender Document and that the award of the subject tender was fair and in accordance with the Act and Constitution.

109. 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).....”

110. 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)

(b)

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

111. 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, integrity, transparency and accountability amongst others.

112. 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)

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

114. Section 70 of the Act requires a procuring entity to use a standard tender document 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."

115. We have carefully studied the Tender Document of the subject tender and note that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria at page 25 of 31 of the Tender Document.

116. Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document provided as follows:

A. PRELIMINARY/ MANDATORY EVALUATION CRITERIA

MR	MANDATORY REQUIREMENTS (MR)	YES/NO
1	Must be registered with the Insurance Regulatory Authority (IRA)- (MEDICAL CATEGORY) and have been in operation for the last five (5) years. Attach evidence thereof	
.....	

.....	
4	<p><i>The underwriter must submit valid and current (2023) certified copies of the following documents;</i></p> <p><i>a) Valid Tax Compliance Certificate</i></p> <p><i>b) Valid NSSF Compliance Certificate</i></p> <p><i>c) Valid NHIF Compliance Certificate</i></p>	
5	<p><i>Underwriters MUST provide a certified copy of CR-12 from Registrar of Companies issued not earlier than six (6) months from date of tender opening (Attach certified copies of appointment letters, National Identity Cards/Passports for the local Directors).</i></p>	
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16	<i>Provide sworn affidavit on litigation history in the last three years 2020,2021 & 2022</i>	
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117. From the above Mandatory Requirements No. 1, 4, 5, and 16 of Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document, a tenderer was required to submit evidence proving that it was registered with the IRA under Medical Category for the last five years, it had valid Tax, NSSF and NHIF Compliance Certificates, it had certified copies of its directors appointment letters and a sworn affidavit on its litigation history for the last three years being 2020, 2021 & 2022.

118. Having perused the Applicant’s letter of Notification of Regret in the subject tender dated 23rd June 2023, we note that the reasons for disqualification of the Applicant’s tender were laid out as follows:

".....

However, your bid was not successful because of the following:

- ***Must have been in operation for the last five (5) year where the bidder was registered in the year 2022***
- ***Did not attach certified copies of appointment letters of the Directors***
- ***Did not provide Valid Tax Compliance Certificate***
- ***Did not provide Valid NSSF Compliance Certificate***
- ***Did not provide Valid NHIF compliance Certificate hence disqualified for further evaluation***
- ***Did not Provide sworn affidavit on litigation history in the last three years 2020, 2021 & 2022.***

Thank you for showing interest in the above tender and looking forward to doing business with you in future.

....."

119. We further note that according to the Evaluation Report submitted to the Board pursuant to Section 67(3)(e) of the Act, the Applicant was determined non-responsive at the Preliminary Evaluation stage because it:

" - Not registered with the Insurance Regulatory Authority (IRA) – (MEDICAL CATEGORY) and have been in operation for the last five (5) years as you were registered in the year 2022

-Did not attach certified copies of appointment letters for the Directors

-Did not provide Valid Tax Compliance Certificate

-Did not provide Valid NSSF Compliance Certificate

-Did not provide Valid NHIF compliance Certificate hence disqualified for further evaluation

-Did not provide sworn affidavit of litigation history in the last three years 2020, 2021 & 2022."

120. We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender and note the following with respect to the Applicant's compliance with the requirements under Mandatory Requirements No. 1, 4, 5, and 16 of Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document:

Mandatory Requirement	What was submitted in the Applicant's original Tender	Board's observation
1	<ul style="list-style-type: none">Submitted at page 9 a letter dated 30th June 2022 from the Commissioner of Insurance & Chief Executive	<ul style="list-style-type: none">Applicant has not been in operation for the last five years having been

	<p>Officer</p> <ul style="list-style-type: none"> Submitted at page 10 certificate of registration under Registration No. IRA/01/085/01 - Registration as an Insurer 	<p>registered on 30th June 2022.</p> <ul style="list-style-type: none"> Applicant's registration was granted in respect of all classes of General Insurance Business. Applicant not registered under the Medical and no evidence submitted as to its registration under the Medical Category.
4	<ul style="list-style-type: none"> Submitted at page 22 Tax Compliance Certificate Number KRAWON1273863222 valid up to 12/05/2023 Submitted at page 23 NSSF Compliance Certificate NSSF: HILL/7/1/6039 dated 19/08/2022 Submitted at page 24 	<ul style="list-style-type: none"> The Tax Compliance Certificate having been valid up to 12/05/2023 was not valid as at the tender submission deadline of 26th May 2023. The NSSF Compliance

	<p>NHIF Certificate of Compliance No:X5432177 for the period up to and including 31/01/2023</p>	<p>Certificate was valid for only six months from the date of issue and having been issued on 19/08/2022 was valid up to 19/01/2023 and as such was not valid as at the tender submission deadline of 26th May 2023.</p> <ul style="list-style-type: none"> • The NHIF Certificate of Compliance was only valid up to 31/01/2023 and as such was not valid as at the tender submission deadline of 26th May 2023.
<p>5</p>	<ul style="list-style-type: none"> • Submitted at page 26 a certified copy of CR 12 	<ul style="list-style-type: none"> • Did not submit any certified copies of

	<p>dated 17th April 2023.</p> <ul style="list-style-type: none"> Submitted at pages 34 to 60 certified copies of identity cards of directors 	<p>appointment letters of the local directors.</p>
16	<ul style="list-style-type: none"> Submitted at page 235 a Sworn Affidavit sworn on 26th May 2023 by Jonah Tomno 	<ul style="list-style-type: none"> Paragraph 3 of the said Sworn Affidavit certify that there is no contractual disputes being litigated against the Applicant but does not provide any averments on litigation history of the Applicant in the last three years 2020, 2021, & 2022.

121. From the foregoing, it is clear to the Board that the Applicant's tender was non responsive as it did not meet the requirements under Mandatory Requirements No. 1, 4, 5, and 16 of Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document.

It is noteworthy that a number of those requirements are in fact also legal requirements for instance the need for Tax Compliance.

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

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

123. In essence, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. These eligibility and mandatory requirements were considered by the High Court in **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** where it held that:

"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].

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

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of

power and disregard of the law by not only bidders, but also procuring entities.” [Emphasis ours]

125. In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which is the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the preliminary evaluation stage following which other stages of evaluation are conducted. Further, tenderers found to be non-responsive are excluded from the tender process regardless of any other merits of their tenders.

126. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirements No. 1, 4, 5, and 16 of Clause A. Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document.

127. In the circumstances, we find that the Applicant’s tender in response to the subject tender was evaluated in accordance with provisions of the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution.

What orders should the Board grant in the circumstances?

128. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

FINAL ORDERS

129. 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 7th July 2023 and filed on even date:

- 1. The Request for Review dated 7th July 2023 and filed on even date with respect to Tender No. NCC/PSM/T/329/2022-2023 for Provision of Comprehensive Medical Cover for Nairobi City County Staff for FY 2023-2024 be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 28th Day of July 2023.



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PANEL CHAIRPERSON

PPARB



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BOARD SECRETARY

PPARB