REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 50/2023 OF 18TH JULY 2023

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED ..... APPLICANT

AND

SECRETARY TO INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ..... RESPONDENT

ZAMARA RISK AND INSURANCE BROKERS

LIMITED ..... INTERESTED PARTY

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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

PRESENT BY INVITATION

APPLICANT	**TRIDENT INSURANCE COMPANY LIMITED**
Mr. Mwaniki Gachuba	-Advocate, Mwaniki Gachuba Advocates
RESPONDENTS	**SECRETARY TO INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION,**
1. Dr. Mutubwa	- Advocate, Dr. Mutubwa Law Advocates, Arbitrators and Mediators
2. Ms. Joy Anami	- Advocate, Dr. Mutubwa Law Advocates, Arbitrators and Mediators
INTERESTED PARTY	**ZAMARA RISK AND INSURANCE BROKERS LIMITED**
Mr. Ochieng	-Advocate, Ochieng Teddy Advocates

BACKGROUND OF THE DECISION

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The Tendering Process

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

Addenda

2. The Respondent issued two Addenda namely: (a) Addendum No.1 dated 13th March 2023 (hereinafter referred to as "Addendum No. 1") which issued several clarifications on various provisions of the Tender Document; and (b) Addendum No. 2 dated 15th March 2022 (*perhaps meant to be 2023*) (hereinafter referred to as "Addendum No. 2")

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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

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

SN	Bidder No.	Name of Tenderer	Tender Sum in Kshs.
1.	12	CIC General Insurance Limited	**Lot 1** 491,822,145.69
2.	**17**	**Trident Insurance Company Ltd**	**Lot 1 416,615,062**

3.	18	AAR Insurance Kenya Ltd	**Lot 1** 495,197,122
4.	19	Minet Kenya Insurance Brokers Ltd.	**Lot 1** 464,076,431
5.	20	APA Insurance Limited	**Lot 1** 466,841,615
6.	**24**	**Zamara Risk and Insurance Brokers Ltd**	**Lot 1 235,785,705**
7.	28	Liaison Group (Insurance Brokers) Ltd	**Lot 1** 443,499,646
8.	31	Gold Field Insurance Brokers Ltd	**Lot 1** 239,027,448
9.	32	First Assurance Co. Ltd	**Lot 1** 476,871,819 (Discount Inclusive)
10.	34	The Kenyan Alliance Insurance Company Ltd	**Lot 1** 420,159,735
11.	35	Old Mutual General Insurance Kenya Ltd	**Lot1** 242,027,447
12.	37	Madison General Insurance Kenya Ltd	**Lot 1** 450,022,234
13.	45	Trust Mark Insurance Brokers Ltd	**Lot 1** 235,817,868
14.	1	CIC Life Assurance Ltd	**Lot 2** 22,033,699
15.	2	Madison Life Assurance Kenya Ltd	**Lot 2** 22,033,699

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16.	3	Sanlam Life Insurance Ltd	**Lot 2** 39,844,088.15
17.	4	Kenya Oriental Life Assurance Ltd	**Lot 2** 29,339,874
18.	7	Acentria Insurance Brokers Ltd	**Lot 2** 23,275,598
19.	9	Four M Insurance Brokers Ltd	**Lot 2** 24,033,699
20.	11	APA Life Assurance Ltd	**Lot 2** 17,626,956
21.	13	Liberty Life Assurance Kenya Ltd	**Lot 2** 35,253,918
22.	*23*	*Zamara Risk and Insurance Brokers Ltd*	***Lot 2*** *14,582,445*
23.	26	Liaison Group (Insurance Brokers) Ltd	**Lot 2** 35,253,918
24.	30	Trust Mark Insurance Brokers Ltd	**Lot 2** 16,033,699
25.	33	Britam Life Assurance Co. Kenya Ltd	**Lot 2** 23,437,699
26.	40	Sapon Insurance Brokers Ltd	**Lot 2** 38,846,630
27.	42	Pioneer Assurance Co. Ltd	**Lot 2** 20,831,860
28.	43	Minet Kenya Insurance Brokers Limited	**Lot 2** 30,685,234
29.	5	Kenya Orient Insurance Ltd	**Lot 3** 9,389,774

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30.	6	Acentria Insurance Brokers Ltd	**Lot 3** 4,201,478
31.	8	Four M Insurance Brokers Ltd	**Lot 3** 3,943,712
32.	10	Occidental Insurance Company Ltd	**Lot 3** 10,668,650
33.	14	APA Insurance Limited	**Lot 3** 11,737,160 (Discount Inclusive)
34.	*15*	*Zamara Risk & Insurance Brokers Limited*	***Lot 3*** *3,961,357*
35.	16	Jubilee Allianz General Insurance (K)Ltd	**Lot 3** 26,095,290
36.	22	First Assurance Co. Ltd	**Lot 3** 24,644,004
37.	27	Liaison Group (Insurance Brokers) Ltd	**Lot 3** 10,668,648
38.	36	Madison General Insurance	**Lot 3** 5,365,580
39.	38	The Kenyan Alliance Insurance Company Ltd	**Lot 3** 26,827,778
40.	41	Minet Kenya Insurance Brokers Limited	**Lot 3** 7,686,048
41.	44	Trust Mark Insurance Brokers limited	**Lot 3** 1,869,064
42.	46	Sapon Insurance Brokers Limited	**Lot 3** 6,704,282

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43.	21	Britam Life Assurance Co. Kenya Ltd	**Lot 1** 497,469,906 **Lot 3** 8,450,804
44.	39	Plan & Place Insurance Brokers Ltd	**Lot 1** 230,100,894 (Discount Inclusive) **Lot 2** 24,299,242 **Lot 3** 6,706,964
45.	25	Cannon General Insurance Kenya Limited	**Lot 2** 25,895,668 **Lot 3** 13,950,443
46.	29	Geminia Insurance Co. Ltd	**Lot 2** 19,499,824 **Lot 3** 10,551,313

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Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the forty- six (46) tenders as captured in an Evaluation

Report for the subject tender signed by members of the Evaluation Committee on 21st April 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

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

Preliminary Evaluation (Eligibility Mandatory Requirements)

5. 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.

6. 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

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responsive proceeded for evaluation at the Preliminary Evaluation (Administrative/ Formal Mandatory Requirements) stage.

Preliminary Evaluation (Administrative/ Formal Mandatory Requirements)

7. 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.

8. 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

9. 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

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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

10. 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.

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

6.1 FINANCIAL EVALUATION STAGE – LOT (Medical)

BIDDER NO	***24***
Total Amount indicated on the Form of Tender	
Year 1	***235,785,705***
Year 2	***235,785,705***

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Variance/Discount	***-***

6.2 FINANCIAL EVALUATION STAGE – LOT 2 (GLA)

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

6.3 FINANCIAL EVALUATION STAGE – LOT 3 (GPA)

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

Evaluation Committee's Recommendation

12. 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

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Hundred Seventy-One Million Five Hundred Seventy-One Thousand Four Hundred and Ten (471,571,410) for two (2) years broken down as follow*s; 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

13. In a Professional Opinion dated 28th April 2023 (hereinafter referred to as the "Professional Opinion"), the Director Supply Chain Management, Dr. Harley Mutisya, reviewed the manner in which the subject procurement process was undertaken including evaluation of

tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. He thus requested the Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

14. Thereafter, Mr. Marjan Hussein Marjan, MBS, the Respondent herein, approved the award of the subject tender to the Interested Party on 28th April 2023 by signing, dating and ticking by hand the word 'Approve' at the approval section reserved for the Accounting Officer's decision at page 5 of the Professional Opinion. The duly approved Professional Opinion was furnished to the Board by the Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Award dated 3rd May 2023.

REQUEST FOR REVIEW NO. 28 OF 2023

16. On 11th May 2023, Trident Insurance Company Limited, the Applicant herein, filed a Request for Review No.28 of 2023 dated 9th May 2023 together with a Supporting Affidavit sworn on 9th May 2023 by Mercy Kamau, the Applicant's Chief Accountant, with respect to the subject

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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.***

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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.

17. 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:

(a) 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;

(b) Whether the Interested Party, as an insurance broker as opposed to an insurance company/underwriter, was eligible to tender in the subject tender;

(c) Whether the Respondent amended and/or modified the Interested Party's tender sum to what was captured in the letter of Notification of Award dated 3rd May 2023 from the amount read out at the Tender Opening contrary to Section 82 of the Act and ITT 32.1 of Section I- Instructions to Tenderers at page 18 of the Tender Document;

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

(e) What orders should the Board grant in the circumstances?

18. 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.

19. 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.

20. 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.

21. 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.

22. 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 3rd May 2023 issued to the Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

23. On 2nd 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:

(a) The Letter of Notification of Award to the Interested Party dated 3rd May 2023 with respect to Lot 1: Medical Insurance of Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA)

and Group Personal Accident (GPA) Covers for Commissioners and Staff, be and is hereby nullified and set aside.

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

(c) 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.

(d) 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.

(e) 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.

(f) Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.

24. 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 2nd 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 2nd 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

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the lapse of 14 days from 2nd June 2023 in accordance with Section 175(1) of the Act.

RE-EVALUATION OF TENDERS

Preliminary Evaluation (Administrative/ Formal Mandatory Requirements)

25. According to the Evaluation Committee's Re-Evaluation Report signed on 8th 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 2nd 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.

26. 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.

27. 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

28. 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.

29. 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

30. 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.

31. 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:

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

Evaluation Committees Recommendation

32. 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

33. In a Professional Opinion dated 8th 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.

34. Thereafter, Mr. Marjan Hussein Marjan, MBS, the Respondent herein, approved the award of the subject tender to the Interested Party on 8th 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

35. Tenderers were notified of the outcome of evaluation of Lot 1 of the subject tender vide letters of Notification of Award dated 8th June 2023.

REQUEST FOR REVIEW APPLICATION NO. 44 OF 2023

36. On 16th 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 14th June 2023 together with a Supporting Affidavit sworn by Mercy Kamau, its Chief Accountant on 14th June 2023 (hereinafter referred to as "Request for Review No. 44 of 2023") through the firm of Mwaniki Gachuba Advocates seeking the following orders from the Board:

a) The 2nd, 3rd and 4th 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 3rd Respondent's evaluation report be annulled and set aside.

c) The 2nd Respondent's professional opinion be annulled and set aside.

d) The 1st Respondent's approval of the 3rd Respondent's evaluation report and the 2nd 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 1st 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 1st 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 8th June, 2023 be annulled and set aside.*

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

k) *The 1st Respondent be directed to disband the 3rd Respondent.*

l) The 1st 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 4th Respondent be directed to institute disciplinary actions against the 1st, 2nd and 3rd 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.

37. 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. 44 of 2023:

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 26th June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4th 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 2nd and 3rd 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 29th 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 8th 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?***

38. On the first sub-issue of the first issue framed for determination, the Board found that the Interested Party's Notice of Preliminary Objection dated 21st June 2023 was properly before the Board and was not defective by reason of failure by the Interested Party to have filed a response to the instant Request for Review.

39. On the second sub-issue of the first issue framed for determination, the Board found that it had jurisdiction to hear and determine the Request for Review No. 44 of 2023 since it did not raise issues or prayers which called for constitutional interpretation by the Board.

40. On the third sub-issue of the first issue framed for determination, the Board found that the Respondents' Replying Affidavit sworn on 26th June 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the 4th Respondent was properly before the Board Request for Review No. 44 of 2023 and the Board had jurisdiction to hear the same.

41. On the fourth sub-issue of the first issue framed for determination, the Board found that the issue raised by the Applicant with regard to the Interested Party's Tender amendment of the Interested Party's Form of Tender and amendment/modification of the Interested Party's tender sum was barred by the doctrine of res judicata and would not be considered in Request for Review No. 44 of 2023. The Board proceeded to determine all other issues raised in Request for Review No. 44 of 2023 save for what it had found to be barred by the doctrine of res judicata.

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42. On the second issue framed for determination, the Board found that the 2nd and 3rd Respondents had not been properly joined as parties in Request for Review No. 44 of 2023 and proceeded to expunge them as parties in the proceedings.

43. On the third issue framed for determination, the Board found that the Further Affidavit sworn by Mercy Kamau and filed by the Applicant on 29th June 2023 was competent and properly before the Board.

44. On the fourth issue framed for determination, the Board found 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.

45. On the fifth issue framed for determination, the Board found that Applicant's letter of Notification of Award dated 8th June 2023 issued by the 1st Respondent did 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 stage at which the Applicant's tender was disqualified. Consequently, the Board deemed it fit to nullify the Applicant's Letter of Notification of Award of the subject tender dated 8th June 2023 to enable the 1st 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.

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46. On 7th July 2023, (*though erroneously indicated as 7th June 2023 in the Board's Decision No. 44 of 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. 44 of 2023:

a) The Letter of Notification of Award dated 8th 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 are hereby nullified and set aside.

b) The 1st Respondent is hereby directed to issue the Applicant with a fresh 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 with Regulation 82 of Regulations 2020 within two (2) day from the date hereof taking into consideration the Board's findings herein.

c) Further to Order No. 2 above, 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 Staff in accordance with provisions of the Act to its logical conclusion.

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

Notification to the Applicant Pursuant to Orders made in Request for Review No. 44 Of 2023

47. The Applicant was notified of the outcome of evaluation of its tender in the subject tender vide a letter of Notification of Award dated 10th July 2023.

48. No evidence was tendered by any party in the instant Request for Review demonstrating that a party to the Request for Review No.44 of 2023 sought judicial review by the High Court of the Board's Decision in Request for Review No. 44 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision in Request for Review No. 44 of 2023 and the findings therein, became final and binding to all

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parties to Request for Review No. 44 of 2023 after the lapse of 14 days from 7th July 2023 in accordance with Section 175(1) of the Act.

REQUEST FOR REVIEW APPLICATION NO. 50 OF 2023

49. On 18th July 2023, being dissatisfied with the decision of the Procuring Entity on award of the subject tender, the Applicant filed a Request for Review dated 17th July 2023 together with a Supporting Affidavit sworn by Mercy Kamau, its Chief Accountant on 17th July 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 disqualification of the Applicant's tender at the technical evaluation stage be annulled and set aside.

b) The Respondent's decision to disqualify the Applicant's tender at the technical evaluation stage be substituted with the Board's decision that the Applicant's tender was technically qualified at the technical evaluation stage.

c) 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 and any contract executed thereof be annulled and set aside.

d) The Respondent be directed to conduct financial evaluation of the Applicant's tender in accordance with ITT 35 of the tender document and compare the evaluated costs of all substantially responsive tenders to determine the tender that has lowest evaluated cost pursuant to ITT 36 of the tender document.

e) The Respondent do bear the costs of the application.

50. In a Notification of Appeal and a letter dated 18th July 2023, Mr. James Kilaka, the Acting Secretary of the Board notified the Procuring Entity and the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to them 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 Procuring Entity and Respondent 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 the date of the Notification of Appeal and letter dated 18th July 2023.

51. On 21st July 2023, the Respondent filed a letter dated 21st July together with annexures concerning the subject tender and confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

52. On 24th July 2023, the Respondent filed through the firm of Dr. Mutubwa Law Advocates a Notice of Appointment of Advocates dated 24th July 2023, a Replying Affidavit sworn on 24th July 2023 by Dr. Harley Mutisya, a Respondent's Preliminary Objection dated 24th July 2023, and the Respondent's Index of Documents dated 24th July 2023.

53. On 25th July 2023, the Interested Party through the firm of Teddy & Co. Advocates (formerly Ochieng Teddy Advocates) filed a Notice of Appointment of Advocates dated 24th July 2023, and an Interested Party Preliminary Objection dated 24th July 2023.

54. Vide a Hearing Notice dated 25th 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 1st August 2023 at 12.00 noon, through a link availed in the said email.

55. On 26th July 2023, the Interested Party through Teddy & Co. Advocates filed the Interested Party Skeleton Submissions dated 25th July 2023.

56. On 28th July 2023, the Applicant through the firm of Mwaniki Gachuba Advocates filed a Further Affidavit sworn on 26th July 2023 by Mercy

Kamau, and Grounds of Opposition to Preliminary Objection dated 27th July 2023.

57. On 1st August 2023, the Respondent filed through the firm of Dr. Mutubwa Advocates Written Submissions dated 30th July 2023.

58. On 1st August 2023, the Applicant filed via email through the firm of Mwaniki Gachuba Advocates the Applicant's Skeleton Submissions dated 1st August 2023.

59. During the hearing on 1st August 2023, the Board directed that the hearing of the Respondent's Preliminary Objection 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

60. In his submissions, Counsel for the Applicant, Mr. Gachuba, relied on the Applicant's Request for Review dated 17th July 2023, Supporting Affidavit sworn by Mercy Kamau on 17th June 2023, Applicant's Further Affidavit sworn on 26th July 2023 by Mercy Kamau, Grounds of Opposition to Preliminary Objection dated 27th July 2023, and Applicant's Skeleton Submissions dated 1st August 2023 that were filed before the Board.

61. Mr. Gachuba submitted that the Respondent's Preliminary Objection and the Interested Party's Preliminary Objection were not merited. Counsel further submitted that neither the Act nor Regulations 2020 applies the doctrine of res judicata to proceedings before the Board. He argued that the doctrine of *res judicata* is provided for under the Civil Procedure Act and does not apply to review proceedings before the Board. Mr. Gachuba further argued that the Civil Procedure Act provides for civil courts and the Review Board is not a civil court nor a court within the meaning of the Civil Procedure Act.

62. Mr. Gachuba submitted that Black's Law Dictionary, 9th Edition defines the word *"review"* as *"consideration, inspection, or re-examination of a subject or thing."* while Ballentine's Law Dictionary defines the word *"review"* as *"a reevaluation or re-examination of anything"* meaning that a review is much wider in scope than a civil suit hence a request for review is a continuum of a tender proceeding and not a suit. Mr. Gachuba further submitted that a request for review

is an administrative action within the scope of Article 47(1) of the Constitution which deals with the fairness of administrative actions and the Board is only required to give the parties a fair opportunity to adequately address the issues before it. In support of his submission, counsel relied on the holdings in *Republic v Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209* and *Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.*

63. Mr. Gachuba submitted that in addition to the lack of constitutional or statutory jurisdiction to terminate requests for review before it on the basis of the doctrine of *res judicata*, the Board also lacks inherent jurisdiction to terminate requests before it on the basis of the doctrine of *res judicata*. It was counsel's case that the Board's express powers to terminate requests for review are only found under Sections 167(4), 169 and 172 of the Act.

64. Mr. Gachuba invited the Board to look at Request for Review No. 44 of 2023 and the instant Request for Review and to note that the issue raised in the instant Request for Review is about disqualification of the Applicant's tender at technical evaluation stage while the issue raised in Request for Review No. 44 of 2023 was about disqualification of the Applicant's tender at the preliminary examination stage and as such, the doctrine of *res judicata* is not applicable. Counsel submitted that the Board annulled the notification dated 8th June 2023 and the only

notification that is existent is the one dated 10th July 2023 which is the subject matter in the instant Request for Review. He urged the Board to dismiss the Respondent's and Interested Party's Preliminary Objection with costs.

65. On the substantive issues in the Request for Review, Mr. Gachuba submitted that Article 227(1) of the Constitution makes it mandatory to evaluate tenders in a fair manner and in accordance to provisions of Article 47(1) of the Constitution of procedural fairness. Counsel further submitted that the Respondent failed to fairly evaluate the Applicant's tender and did not comply with ITT 12.1(f)(j), 17.2, 17.7, 18.2, 28, 29, 30 and 31.3 of the Tender Document.

66. It was the Applicant's case that the Respondent did not provide a standard reference letter which left tenderers on their own to provide recommendation letters and that all the Respondent needed the Applicant to demonstrate was that its five insureds had more than 1000 employees for the last two consecutive years. The Applicant avers that its insured had more than 1000 employees for the last consecutive years and that by failing to request for information from the Applicant to rectify any non-conformities or omissions in its recommendation letters and the list of current clients, the Respondent was estopped from disqualifying the Applicant's technical tender on the basis of non-conformities or omissions thereof.

67. Mr. Gachuba submitted that the Respondents failed to comply with the provisions of their Tender Document and prayed for the Request for Review to be allowed with costs.

Respondents' submissions

68. Counsel for the Respondents, Dr. Mutubwa relied on the Respondents' Replying Affidavit sworn on 24th July 2023 by Dr. Harley Mutisya, the Director Supply Chain Management of the Respondent, Respondent's Preliminary Objection dated 24th July 2023, and Written Submissions dated 30th July 2023 filed before the Board.

69. Dr. Mutubwa submitted that the instant Request for Review was vexatious, frivolous and an abuse of court process and consisted of misrepresentations deliberately made by the Applicant. He further submitted that the doctrine of *res judicata* is a substantive feature of civil proceedings and was found to apply even in the Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023.

70. Dr. Mutubwa submitted that the entire application by the Applicant was afoul of Section 167(1) of the Act particularly on the aspect of accrual of the cause of action and when the instant Request for Review ought to have been brought before the Board. Counsel submitted that the Applicant was notified on 8th June 2023 of the reasons of its unsuccessfulness and once notified, any cause of action ought to have been pursued within 14 days as prescribed in the Act and Regulations

2020. He urged the Board to find that the instant Request for Review was filed outside the statutory period of 14 days.

71. Counsel referred the Board to the holding in *Misc. Application No. 21 of 2015 Republic v Public Procurement Administrative Review Board & Centre for Mathematics, Science and Technology in Africa & 2 Others Ex Parte Apex Security Services Limited* which held that the Board sitting as tribunal does not have jurisdiction when moved outside stipulated timelines.

72. Dr. Mutubwa submitted that the Board's Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023 directing the Respondent to amend communication on notification to Applicant was not in itself a new cause of action. He referred the Board to paragraph 22 of the Respondent's written submissions and submitted that the Applicant was aware of any problems it may have wanted to review and had express knowledge of the findings of the Evaluation Committee.

73. Dr. Mutubwa submitted that there is no piecemeal litigation and referred the Board to paragraphs 25 to 49 of its written submissions on the issue of *res judicata* and the holding in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR)* arguing that the doctrine of res judicata ensures that litigation comes to an end.

74. Dr. Mutubwas submitted that the Board examined the evaluation criteria in the Tender Document and the actions of the 1st Respondent and reached a decision that evaluation was done in accordance with the provisions of the Constitution, the Act and the Tender Document and that the only anomaly was on the wording of the letter of notification of award issued to the Applicant. He further submitted that the decision of the Board can only be disturbed by a higher court and the Board cannot re-visit. Dr. Mutubwa referred the Board to the holding in *Fursys (K) Limited v Public Procurement Oversight Authority & 2 others [2015] eKLR* and urged the Board to dismiss the instant Request for Review with costs.

Interested Party's Submissions

75. Counsel for the Interested Party, Mr. Ochieng, in support of Dr. Mutubwa's submissions referred the Board to provisions of Section 172 of the Act which gives the Board power to award costs once it has established a review is frivolous, vexatious and meant to delay the procurement proceedings.

76. Mr. Ochieng submitted that the issues in the instant Request for Review were dealt with in Request for Review No. 44 of 2023 wherein the Board found that the Applicant herein was not qualified and had not complied with the provisions of the Tender Document. He further submitted that the issues herein are meant to delay the procurement process and urged the Board to dismiss the instant Request for Review.

77. Mr. Ochieng submitted that the Board has power to sanction a frivolous Applicant by recommending debarment of that party and the Applicant herein being a frivolous party ought to be debarred. He further referred the Board to the holding in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR)* and submitted that the Court of Appeal held that the doctrine of *res judicata* is general and applicable to all matters whether constitutional or not.

Applicant's Rejoinder

78. In a rejoinder, Counsel for the Applicant, Mr. Gachuba, submitted that the Board's decision in Request for Review No. 44 of 2023 directed the Applicant to be issued with a fresh letter of notification of award having found that the previous letter had not met the threshold set out in Section 87 of the Act. Counsel proceeded to define the meaning of the word "fresh" but following an objection by Dr. Mutubwa, he was restricted to saying that the word used is "*fresh*".

79. Mr. Gachuba submitted that the present application was not a litigation as submitted by the Respondent and Interested Party but a review and argued that the Applicant was not vexatious since the instant Request for Review was filed pursuant to Section 203(2)(c)(ii) of Regulations 2020 following receipt of the letter of notification of award dated 10th July 2023. He reiterated that the issue in contest in

Request for Review No. 44 of 2023 was about Preliminary Evaluation and not Technical Evaluation as raised in the instant Request for Review.

80. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 18th July 2023 was due to expire on or before 8th August 2023 and that the Board would communicate its decision on or before 8th August 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

81. 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 can hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on whether the issues raised in the instant Request for Review are barred by the doctrine of *Res judicata* as to divest the Board of jurisdiction to hear and determine the same?

Depending on the determination of the first issue;

2. **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;**

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

Whether the Board can hear and determine the instant Request for Review ;

82. It is now a settled principle of law that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence would dictate that where a question of jurisdiction is raised, a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

83. 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 in to facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

84. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"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 evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

85. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"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 Respondent 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."

86. In the persuasive authority from the Supreme Court of Nigeria in the case of ***State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59*** the Supreme Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

87. 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.

88. 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."

89. 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)<u>reviewing, hearing and determining tendering and asset disposal disputes</u>; and

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

90. 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.

91. 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, <u>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,</u> 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. 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.

92. 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 where the Act does not apply 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.

93. 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.

94. 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 the issues raised in the instant Request for Review are barred by the doctrine of *res judicata* as to divest the Board of jurisdiction to hear and determine the same?

95. Counsel for the Respondent, Dr. Mutubwa and Counsel for the Interested Party, Mr. Ochieng separately assailed the instant Request

for Review and pointed out that the issues raised in the instant Request for Review were conclusively dealt with and determined by the Board in its Decision issued on 7th July 2023 in Request for Review No. 44 of 2023 rendering the instant Request for Review *res judicata* and an abuse of the Board's process.

96. On its part, the Applicant through its Counsel, Mr. Gachuba submitted that the instant Request for Review is not *res judicata* and that the Board has jurisdiction to hear and determine the same since (a)the doctrine of *res judicata* is provided for in the Civil Procedure Act and not in the Act or Regulations 2020 and as such, the doctrine of res judicata is not applicable in procurement proceedings, and (b) the grounds and prayers sought in the instant Request for Review are different from those in Request for Review No. 44 of 2023 noting that the cause of action herein arose on 10th July 2023 by virtue of the letter of Notification dated 10th July 2023 which notified the Applicant on the outcome of the Technical Evaluation of its tender. Mr. Gachuba further submitted that the Board does not have inherent jurisdiction and that in exercise of its powers, its jurisdiction only emanates from the Constitution and statute.

97. We understand the doctrine of *res judicata* to be a Common Law legal principle of law which ousts the jurisdiction of a court to try any legal dispute or issue which had finally been determined by a court or decision-making organ 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. It also safeguards the use of judicial time so that a court or judicial body will not be engaged in a repeat action on a matter is has already pronounced itself upon. 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.

98. This Board is cognizant of the fact that the decision to award a tender constitutes an administrative action and as such, the provisions of Article 227(1) of the Constitution apply to the tendering process of a state organ or public entity. 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:

"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) .....”

99. A cause of action for review of a procuring entity's administrative action and decision may arise at any stage of the tendering process. We note that the legislation contemplated in Article 227(2) of the Constitution is the Act and Regulations 2020. We have hereinbefore established that this Board is a creature of statute tracing its establishment under Section 27(1) of the Act. The Act has clearly provided for efficient management of public procurement disputes by ensuring that members of the Board have the required qualifications to discharge its functions under Section 28 of the Act, being to review, hear, and determine procurement disputes as can be discerned from the composition of the Board under Section 29 read with Section 30 of the Act.

100. As such, the powers conferred upon the Board are specifically with regard to procurement disputes and as such, the Board ordinarily operates within the Act and Regulations 2020. In saying this, we are guided by the holding of Lady Justice Mumbi Ngugi while at the High Court in Nairobi in the case of **Kituo Cha Sheria & another v**

Central Bank of Kenya & 8 others [2014] eKLR where she held that:

"*.....*

35. Further, and again I am constrained to agree with the respondents on this, the Public Procurement and Disposal Act 2005 contains very clear provisions with regard to public procurement. Should there be violation of its provisions, that does not amount to a violation of constitutional provisions. As submitted by Counsel for the 1st respondent, Mr. Waweru Gatonye, once a claim is based on the Public Procurement and Disposal Act, one brings oneself within its provisions and any dispute pertaining to procurement must go before the Public Procurement Administrative Review Board; the law being that once a procedure is prescribed by law, one should use that procedure unless there are special circumstances to show that the matter is best dealt with in the High Court."

101. Turning to the circumstances in the instant Request for Review, we understand the Applicant's contention to be that the doctrine of *res judicata* is not applicable in administrative review proceedings before the Board since the Review Board is not a civil court applying the Civil Procedure Act but is rather guided by provisions of the Act and Regulations 2020.

102. While the Board is ordinarily mandated to follow the rules and procedures as contained in the Act and Regulations 2020, it also can

and is guided by other legal propositions such as those derived from Common Law and the Evidence Act while reviewing, hearing and determining tendering and asset disposal disputes. In any event, tendering and asset disposal disputes are civil in nature and there is nothing in the Act and Regulations 2020 that restricts the Board from being guided by applicable legal principles and doctrines of law while rendering its decisions. This Board sits as a quasi-judicial Tribunal, which Tribunals are defined under Article 169(1) of our Constitution as Subordinate Courts. Thus, the Applicant is wrong in its argument that *res judicata* does not apply to proceedings before the Board, as we sit as a court upon which the Civil Procedure Act is invariably applicable and strictures thereunder binding. An excerpt of the relevant Article 169 of the Constitution provides:

"169. Subordinate courts

(1) The subordinate courts are—

(a) the Magistrates courts;

(b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

103. In view of this, we are not persuaded by the statement by Counsel for the Applicant that the doctrine of *res judicata* is not applicable in administrative review proceedings before the Board or that the same is restricted to Civil Matters

104. In **Nathaniel Ngure Kihiu 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."

105. 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."

106. Further, in the case of **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising

reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved...."

107. In essence, and the Board's take from these decisions is that, to successfully plead the bar of *res judicata*, whether litigating under the Civil Procedure Act or other quasi-judicial process, 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.

108. 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. 44 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.44 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. 44 of 2023. The panel hearing the instant Request for Review heard and determined Request for Review No. 44 of 2023. However, the above similarities between the instant Request for Review and Request for Review No.44 of 2023 are not enough to prove that the instant Request for Review is barred by the doctrine of *res judicata.*

109. 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. 44 of 2023 and that the Board heard and determined such issues in Request for Review No. 44 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.

110. 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. 44 of 2023 and that the same were heard and determined by this Board in Request for Review No.44 of 2023, we have carefully studied the pleadings, documents and the Board's Decision delivered on 7th July 2023 in the Request for Review No. 44

of 2023 dated 14th June and note that the Applicant requested for the following orders from the Board:

a) ***The 2nd, 3rd and 4th 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) ***<u>The 3rd Respondent's evaluation report be annulled and set aside. (Emphasis added)</u>***

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

d) ***The 1st Respondent's approval of the 3rd Respondent's evaluation report and the 2nd 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 1st 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.

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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 1st 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 8th June, 2023 be annulled and set aside.*

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

k) *The 1st Respondent be directed to disband the 3rd Respondent.*

l) *The 1st 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 4th Respondent be directed to institute disciplinary actions against the 1st, 2nd and 3rd 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.

111. 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.

112. We have 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 disqualification of the Applicant's tender at the technical evaluation stage be annulled and set aside. (Emphasis added)

b) The Respondent's decision to disqualify the Applicant's tender at the technical evaluation stage be substituted with the Board's decision that the Applicant's tender was technically qualified at the technical evaluation stage. (Emphasis added)

c) 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 and any contract executed thereof be annulled and set aside.

d) The Respondent be directed to conduct financial evaluation of the Applicant's tender in accordance with ITT 35 of the tender

document and compare the evaluated costs of all substantially responsive tenders to determine the tender that has lowest evaluated cost pursuant to ITT 36 of the tender document.

e) The Respondent do bear the costs of the application.

113. The above prayers are premised on the grounds set out in the instant Request for Review that (a) the Respondents breached, inter alia, Article 47(1) and 227(1) of the Constitution and Section 80(2) of the Act by failing to fairly and objectively evaluate the Applicant's business operational capacity in accordance with several ITT provisions of the Tender Document, (b) the Respondents failed to seek the Applicant's clarification or rectification of non-conformities or omissions in respect of its reference letters, and (c) the Respondent breached Article 227(1) of the Act by awarding the subject tender to the Interested Party whose tender was not cost-effective.

114. It is quite clear that the issues for consideration in the instant Request for Review are primarily premised on whether the Applicant's tender was re-evaluated by the Procuring Entity's Evaluation Committee in accordance with the provisions of Article 227(1) of the Constitution, the Act and the Tender Document.

115. Having outlined the issues that were for consideration in Request for Review No. 44 of 2023 and the issues for consideration in the instant Request for Review it is evident what the Board is being called to

review and determine in the instant Request for Review is an issue that came up for review and determination in Request for Review No. 44 of 2023. Those are the orders sought by the Applicant both in the Instant Application for review and in Application No 44 as underlined for emphasis above. We say so because this Board in its Decision in Application No44 did deliberate at length and determined the issue of whether the Applicant's tender was re-evaluated by the Procuring Entity's Evaluation Committee at the Technical stage in accordance with the provisions of Article 227(1) of the Constitution, the Act and the Tender Document as seen at pages 92 to 124 of its Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023.

116. In its determination in the Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023, we note that the Board took note of the findings of the Evaluation Committee as reported in the Re-Evaluation Report and found at page 109 to 110 of its Decision delivered on 7th July 2023 that the Applicant's tender was disqualified at the Technical Evaluation stage and the reasons for such disqualification.

117. The Board also did carefully study the Applicant's original tender submitted to the Board as part of the confidential documents by the Respondent pursuant to Section 67(3)(e) of the Act during its review of Request for Review No. 44 of 2023 and found at pages 110 to 115 of its Decision 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. As such, the Board's observations confirmed the findings of the Evaluation Committee as reported in the Re-Evaluation Report.

118. It is not lost to us that the Board in its Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023 pointed out that it was the Applicant's contention that the reasons for its disqualification were extraneous since they were not provided at the Preliminary Evaluation (Administrative/Formal mandatory Requirements) stage. This Board however found that the Applicant's tender was disqualified at the Technical Evaluation stage and that the letter of Notification of Award dated 8th June 2023 erroneously notified the Applicant that that it was disqualified at the Preliminary Evaluation stage 1 instead of the Technical Evaluation stage since the reasons for its disqualification fell under the requirements and criteria stipulated under the Technical Evaluation as amended under Addendum No. 2. In considering what orders the Board should grant in Request for Review No. 44 of 2023, the Board held as follows as seen at pages 129 to 130 of its Decision delivered on 7th July 2023:

"……

We have found that the Applicant's tender was evaluated in accordance with provisions of Section 80(2) of the Act read Document.

We have found that the Applicant's letter of Notification of Award dated 8th 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 8th June 2023 to enable the 1st 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(emphasis added)

....."

119. In view of the foregoing, it is the Board's considered view that the issues raised in the instant Request for Review are barred by the doctrine of *res judicata.* We are guided by the holding in **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** (hereinafter referred to as "Civil Appeal No. 42 of 2014") where it was held that:

".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud

or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

120. This Board is not a stranger to the issue of whether the Applicant's tender was re-evaluated in accordance with the provisions of Article 227(1) of the Constitution, the Act and the Tender Document as the same arose and was deliberated at length in Request for Review No. 44 of 2023 and determined conclusively. It is quite clear that there are no new set of intervening facts that arose after the Board's Decision delivered on 7th July 2023 in Request for Review No. 44 of 2023 since what the Respondent was required to do was to correct the error made in the letter of Notification of Award dated 8th June 2023 of notifying the Applicant that that it was disqualified at the Preliminary Evaluation stage 1 instead of the Technical Evaluation stage. None of the reasons for disqualification changed as evidenced by the letter of Notification of Award dated 10th July 2023 issued by the Respondent to the Applicant.

121. It is our considered view that the plea of *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. As rightly observed in Civil Appeal No. 40 of 2014 that:

"...Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling **uncontrollably.** ***In a nutshell,*** **res judicata** ***being a fundamental principle of law may be raised as a valid defence."***

122. The Board is inclined to adopt the position of the Court of Appeal in Civil Appeal No. 40 of 2014 and will therefore resist the invitation to address an issue governing the same parties, litigating under the same title, in the same tender, with respect to an issue which was raised by the Applicant in Request for Review No. 44 of 2023 and determined by the Board conclusively.

123. In doing so, the Board has asked itself whether it can engage in a fresh discussion of the parties pleadings herein and possibly come to a different decision and in so doing would it not be sitting on Appeal on its own decision in Application for Review No 44 of 2023? Does the Board have powers to sit in Review or Appeal on matters it has already

pronounced itself upon? The answer in both instances is in the negative. To do what the Board is asked to do in the current Application would entail a revisit of its discussions, findings and determinations in the previous Application for Review. That is the exact action that the doctrine of *Res Judicata* aims to curb.

124. It is interesting to note that the plea of *Res Judicata* was raised by the Respondents and the Interested Party in Application No 44 of 2023 in regard to findings as to the Interested Party's Tender and determinations of the Board in Request for Review No 28 of 2023 where it held that the Interested Party's tender was properly determined as having met the mandatory requirements of the Tender Document. The Board in its decision in Request for Review No 44 of 2023 specifically found and held that, that point was *Res judicata* and had been pleaded and determined in Application No 28 of 2023.

125. The Applicant in its submissions before the Board in Application No 44 of 2023 did not raise the objection of the non-applicability of the Doctrine of *Res Judicata* in that Application. Also, the Board in its decision in Request for Review No. 44 of 2023 did specifically hold that it could not address itself to the question of the Interested Party's Tender evaluation as that point was *Res judicata* by reason of the holding and decision in Request for Review No 28 of 2023. The Applicant if aggrieved by the Board's application of the doctrine of *res judicata* in Review Applications ought to have taken up the same by way of Judicial Review to the High Court as prescribed under Section

175 of the Act. Therefore, that point being taken now is rather late in the day as far as the Board is concerned as it has previously determined that the Doctrine is applicable in matters before it.

126. In the circumstances, the Board finds and holds that the complaints regarding the findings by the Evaluation Committee in the Reevaluation of the Applicant's tender leading to the disqualification of the tender at the Technical stage raised in the instant Request for Review are barred by the doctrine of *res judicata* and thus downs its tools at this point. Accordingly, this ground of objection raised in the Respondent's Preliminary Objection and the Interested Party's Preliminary Objection succeeds.

What orders should the Board grant in the circumstances?

127. We have established that the Board lacks jurisdiction to hear and determine the instant Request for Review since it is barred by the doctrine of *res judicata*. In these circumstances, the logical consequence is for striking out the instant Request for Review for as the issues sought to be determined are *res judicata*.

127.The Board has powers under section 173 (d) to order the payment of costs as between parties to a Review. Such power should be exercised in a manner not to be punitive as to deter parties from coming before the Board.

FINAL ORDERS

128. 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 17th July 2023 and filed on 18th July 2023:

1. **The instant Request for Review dated 17th July 2023 and filed on 18th July 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 struck out as the issues raised therein are *res judicata*.**
2. **Given our findings herein, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 7th Day of August 2023

.....	.....
PANEL CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**