

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 54/2023 OF 8<sup>TH</sup> AUGUST 2023**

**BETWEEN**

**CELMEL INSURANCE AGENCY ..... APPLICANT**

**AND**

**THE MANAGING DIRECTOR,**

**KENYA ELECTRICITY GENERATING**

**COMPANY PLC ..... RESPONDENT**

Review against the decision of the Managing Director, Kenya Electricity Generating Company PLC in relation to Tender No. KGN-LEG-05-2023 for the Provision of Insurance Services for the year 2023-2024.

**BOARD MEMBERS PRESENT**

- |                               |   |                   |
|-------------------------------|---|-------------------|
| 1. Mrs. Njeri Onyango FCI Arb | - | Panel Chairperson |
| 2. Mr. Joshua Kiptoo          | - | Member            |
| 3. Eng. Lilian Atieno         | - | Member            |
| 4. Eng. Mbiu Kimani           | - | Member            |
| 5. Dr. Susan Mambo            | - | Member            |

**IN ATTENDANCE**

Mr. Philemon Kiprop - Secretariat

## **PRESENT BY INVITATION**

**Applicant**                      **Celmel Insurance Agency**

Mr. Ayisi h/b for Mr. Oketch -Advocate, Matheka Oketch & Co. Advocates

**Respondents**    **The Managing Director, Kenya Electricity  
Generating Company Plc**

Mrs. Marysheila Onyango-Oduol    - Advocate, TripleOKLaw LLP Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Electricity Generating Company PLC (hereinafter referred to as "the Procuring Entity") invited sealed tenders from qualified and interested tenderers in response to Tender No. KGN-LEG-05-2023 for the Provision of Insurance Services for the year 2023-2024 (hereinafter referred to as the "subject tender") by way of open national tendering method. The invitation was by way of an advertisement on the dailies and on the Procuring Entity's website [www.kengen.co.ke](http://www.kengen.co.ke) on 2<sup>nd</sup> May 2023 where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was initially scheduled for 17<sup>th</sup> May 2023 at 10.00 a.m.

## **Addenda & Clarifications**

2. The Procuring Entity issued four Addenda and three Clarifications namely: (a) Addendum No.1 dated 12<sup>th</sup> May 2023 (hereinafter referred to as "Addendum No. 1") which amended various provisions of the Tender Document; (b) Clarification No. 1 dated 12<sup>th</sup> May 2023 (hereinafter referred to as "Clarification No. 1") which clarified enquiries made regarding several provisions of the Tender Document; (c) Addendum No. 2 dated 12<sup>th</sup> May 2023(hereinafter referred to as "Addendum No. 2") which extended the tender submission deadline to 23<sup>rd</sup> May 2023 at 10.00 a.m. and amended various provisions of the Brokers' Mandatory Requirements and the Detailed Technical Evaluation for Insurance Brokers of the Tender Document; (d) Addendum No. 3 dated 27<sup>th</sup> July 2023 (hereinafter referred to as "Addendum No. 3") which further extended the tender submission deadline to 3<sup>rd</sup> August 2023 at 10.00 a.m. while amending several provisions of the Tender Document; (e) Addendum No. 4 dated 31<sup>st</sup> July 2023 (hereinafter referred to as "Addendum No. 4") which further extended the tender submission deadline to 10<sup>th</sup> August 2023 at 10.00 a.m. (f) Clarification No. 2 dated 2<sup>nd</sup> August 2023 (hereinafter referred to as "Clarification No. 2") which clarified that tenderers were required to proceed to bid as per the provisions of the Tender Document; and (g) Clarification No. 3 dated 7<sup>th</sup> August 2023 (hereinafter referred to as "Clarification No. 3") which made further clarifications on enquiries made regarding several provisions of the Tender Document.

## **Submission of Tenders and Tender Opening**

3. The procurement proceedings of the subject tender were suspended pursuant to Section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') when a Request for Review No. 54 of 2023 dated 8<sup>th</sup> August 2023 was filed on even date before the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board').

**REQUEST FOR REVIEW NO. 54 OF 2023**

4. On 8<sup>th</sup> August 2023, Celmel Insurance Agency, the Applicant herein, filed Request for Review No. 54 of 2023 dated 8<sup>th</sup> August 2023 together with a Statement in Support of Request for Review dated 8<sup>th</sup> August 2023 and signed by Festus K. Wanjohi, its Chief Executive Officer (hereinafter referred to as "the instant Request for Review) seeking the following orders:

***a) A declaration that the Respondent's tender document for Tender No. KGN-LEG-05-2023 for the provision of Insurance Services for the year 2023-2024 is in breach of the Constitution, PPAD Act and the Regulations, 2020 and therefore incurably flawed.***

***b) An order terminating or directing the Respondent to terminate Tender No. KGN-LEG-05-2023 and re-advertise the same in compliance with the directions issued by the Review Board in this***

***matter, the Constitution, PPAD Act and the Regulations, 2020.***

***c) Costs of the Request for Review to the Applicant.***

***d) Any other relief that the Review Board deems fit to grant under the circumstances.***

5. In a Notification of Appeal and a letter dated 8<sup>th</sup> August 2023, Mr. James Kilaka, the Acting Secretary of the Board notified 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 8<sup>th</sup> August 2023.
6. On 11<sup>th</sup> August 2023, the Respondent through TripleOKLaw LLP Advocates filed a letter dated 11<sup>th</sup> August 2023 enclosing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
7. On 14<sup>th</sup> August 2023, the Respondent filed through TripleOKLaw LLP Advocates filed a Notice of Appointment of Advocates dated 11<sup>th</sup>

August 2023 and a Respondent's Replying Affidavit to the Request for Review dated 8<sup>th</sup> August 2023 sworn on 11<sup>th</sup> August 2023 by Daniel Kitili Nzioka, the Insurance Manager of the Procuring Entity.

8. Vide a Hearing Notice dated 18<sup>th</sup> August 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 23<sup>rd</sup> August 2023 at 12:00 noon, through a link availed in the said Hearing Notice.
9. On 21<sup>st</sup> August 2023, the Respondent through TripleOKLaw LLP Advocates filed Written Submissions dated 18<sup>th</sup> August 2023 and a List of Authorities dated 18<sup>th</sup> August 2023.
10. On 22<sup>nd</sup> August 2023, the Applicant through Matheka Oketch & Co. Advocates filed Written Submissions dated 22<sup>nd</sup> August 2023 and a List of Authorities dated 22<sup>nd</sup> August 2023.
11. During the hearing on 23<sup>rd</sup> August 2023, the Board allocated parties time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

12. In his submissions, Counsel for the Applicant, Mr. Ayisi relied on the Request for Review dated 8<sup>th</sup> August 2023, Statement in Support of

Request for Review dated 8<sup>th</sup> August 2023 signed by Festus K. Wanjohi, Written Submissions dated 22<sup>nd</sup> August 2023 and List of Authorities dated 22<sup>nd</sup> August 2023 that were filed before the Board.

13. Mr. Ayisi submitted that the Applicant filed the instant Request for Review challenging the provisions of the subject tender on the basis that the said provisions are contrary to the Constitution, the Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').
14. Mr. Ayisi submitted that Clause ITT 2.1 (a) of the Tender Document was in conflict with Section 74(1) of the Act read with Regulation 72 of Regulations 2020 since it provides that tenders must be submitted through the Respondent's e-procurement platform whereas Clause D22 provides for manual submission of tenders. Counsel pointed out that Section 74(1) of the Act and Regulation 72 of Regulations 2020 do not envision a situation where a procuring entity would use both manual and electronic methods in submission of tenders.
15. Mr. Ayisi submitted that the Tender Document seeks to vary or terminate existing contracts between the Procuring Entity and prequalified bidders contrary to Sections 93 and 95(3) of the Act.
16. Counsel argued that the Respondent had admitted that the subject tender as advertised was a hybrid of an open and restricted tender contrary to Section 93, 96 and 102 of the Act as read with Regulations

2020. He further argued that Clause 4.10 of the Tender Document allows for international tenderers to participate in the tendering process yet the tender was advertised as an open national tender.

17. Mr. Ayisi submitted that paragraph 7 of the Tender Document was contrary to Section 55(1) of the Act since paragraph 7 requires tenderers who are insurance brokers to have up to Kshs.30M worth of nominal shares whereas Section 153(2) of the Insurance Act as read together with Insurance Regulatory Authority (hereinafter referred to as "IRA") registration requirements require a minimum of paid up capital of Kshs. 1M only. It is the Applicant's case that seeking to award higher evaluation marks to an intermediary with a higher paid up capital than that prescribed by IRA is contrary to Section 55(1)(c) of the Act and Article 227(1) of the Constitution and that the various bands in the Tender Document ought not have exceeded the minimum share capital envisaged under Section 153(2) of the Insurance Act.

18. Mr. Ayisi submitted that the Tender Document was in further breach of Section 55(1)(c) of the Act since Mandatory Requirement No. 16 required an insurance broker to submit a professional indemnity cover of Kshs. 300M or Kshs. 200M as provided in the addendum yet the insurance broker is required by IRA to maintain an indemnity cover of a minimum of Kshs. 10M.

19. He further submitted that Clause 2 of the Tender Document is irrational and unfair since it takes into consideration an irrelevant

consideration and fails the objectivity test provided under Section 80 of the Act and as such seeks to punish diligent brokers. Mr. Ayisi pointed out that the Tender Document is designed to eliminate insurance intermediaries yet their role is very important in the insurance industry and denies tax payers value for money.

20. Counsel submitted that it is practically impossible for underwriters to have co-insurance arrangements among themselves because they are competitors and that co-insurance arrangements work well with insurance intermediaries who are able to obtain quotations from various underwriters and submit one bid to the procuring entity.
21. He further submitted that requiring underwriters to have transacted a minimum annual premium of Kshs. 5 billion, excluding motor and medical insurance restricts the participation in the tender to four (4) underwriters thus stifling competition.
22. It is the Applicant's case that this being a national tender, the Global Credit Rating (GCR) is not an IRA's requirement and its incorporation in the Tender Document is discriminatory and it denies the tender the objectivity test.
23. Mr. Ayisi concluded by submitting that the subject tender is in breach of Articles 10, 27, 47, 201, 227 and 232 of the Constitution read with Sections 3 and 55 of the Act and urged the Board to grant the orders sought in the Request for Review.

## Respondents' submissions

24. Counsel for the Respondent, Mrs. Oduor relied on the Replying Affidavit sworn on 11<sup>th</sup> August 2023 by Daniel Kitili Nzioka, Written Submissions dated 18<sup>th</sup> August 2023 and List of Authorities dated 18<sup>th</sup> August 2023 filed before the Board.
25. On the allegation that the tendering method was a hybrid, Mrs. Oduor submitted that pursuant to Section 167(4)(a) of the Act, the call on the method to use is left to the Procuring Entity and thus the Board lacks jurisdiction to deal with choice of procurement method and referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR* and *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Numerical Machining Complex Limited [2016] eKLR*. Without prejudice to the foregoing, counsel submitted that the Procuring Entity had not adopted a hybrid method of tendering and the tender as advertised was an open tender and as clarified under item 31 of Clarification 1 underwriters and brokers can participate in bidding.
26. On the aspect of the Procuring Entity not being joined as a party in the Request for Review pursuant to Regulation 203 of Regulations 2020, Mrs. Oduor submitted that the Request for Review ought to be structured in the form set out in the 14<sup>th</sup> Schedule of Regulations 2020

which outlines that the Respondent in a Request for Review is the procuring entity and failure to include the Procuring Entity makes the instant Request for Review inadmissible for failure by the Applicant to join the rightful parties.

27. On whether the subject tender is unfair, discriminatory and irrational, Mrs. Oduor argued that this claim was baseless, unsustainable and fit for dismissal. She submitted that the Applicant had failed to appreciate that tender documents are standard documents and the mode of submission as per ITT 2.1(a) was to be done electronically. Without prejudice to the foregoing, it is the Respondent's case that from a reading of Section 74(1) of the Act and Regulation 72 of Regulations 2020, a procuring entity is not restricted to a specific mode of submission of tenders and referred to the holding in *Civil Appeal No. 131 of 2018 James Oyondi t/a Betoyo Contractors & Another v El Roba Enterprises Limited & 8 others*.

28. Mrs. Oduor submitted that despite the Applicant alleging confusion on the mode of submission, it did not seek clarification from the Procuring Entity, which was provided for in the Tender Document and in any event, no prejudice would be suffered should a tender opt to submit physical documents.

29. On the allegations of nominal share capital and professional indemnity requirements, Mrs. Oduor submitted that Section 55 of the Act sets out the minimum criteria in determining if an entity is eligible to bid and

the provisions therein are basic standards that a procuring entity considers first in evaluating a tender. Counsel submitted that Section 60 of the Act requires a procuring entity to provide specific requirements needed by prospective tenderers which may include technical requirements. She further submitted that Section 74(j) of the Act requires an accounting officer when preparing an invitation to tender to include any other requirements that may be prescribed and that Section 79(1) of the Act provides for responsiveness of a tender. Counsel pointed out that the provisions of the Act and requirements of IRA referred to by the Applicant were but minimum requirements and that the tender requirements on the value of the professional indemnity cover are based on the value of the insurable interest and assets of the Procuring Entity and the likely exposure it is likely to suffer in the event that a tenderer is not able to meet its obligations noting the value of the assets and insurable interest.

30. On the allegation that the provisions of the Tender Document were stifling competition, Counsel submitted that the Procuring Entity's assets include critical and special security government establishments which have been designated as protected areas under the Protection Areas Act and referred the Board to Gazette Notice Number 1042 of 31<sup>st</sup> January 2022. Mrs. Oduor submitted that there was no discrimination in the provisions of the Tender Document and relied on the holding in *PPARB Application No. 79 of 2022 CIC General Insurance Limited v The Accounting Officer, Kenya Airports Authority & Another*. She further submitted that the Procuring Entity is engaged in affairs

which demand caution, high standards, reasonability and appreciation of reality and that the requirements set out in the Tender Document are designed to obtain the best possible outcome once the services are offered and taking into account the nature and value of its assets. It is the Respondent's case that seeking the highest qualifications possible and with the proper financial capability cannot be deemed to be discriminatory in the circumstances.

31. Mrs. Oduor submitted that the Applicant has not demonstrated how the subject tender is discriminatory against it and that the four underwriters allegedly targeted have not been identified. Counsel further submitted that in any event, a tenderer is to be awarded marks with the minimum marks required to proceed to financial evaluation being 75 marks and as such, the Applicant was not required to attain 100 marks. She further submitted that the issue of competition was not within the jurisdiction of the Board and ought to be addressed by the Competition Authority.

32. Mrs. Oduor further submitted that the Request for Review was unfounded on both facts and law, there was no proof of breach of any provision of law by the Respondent and Procuring Entity and urged the Board to dismiss it with costs.

33. Upon enquiry by the Board on what prevails between the ITT or TDS in a tender document, Counsel submitted that the TDS prevails as it

has specific requirements of the procuring entity against those that may have been set out in the standard tender document.

### **Applicant's Rejoinder**

34. In a rejoinder, Counsel for the Applicant, Mr. Ayisi, referred to the issue of not joining the Procuring Entity as a party to the Request for Review and referred the Board to the provisions of Section 170 of the Act which sets out the parties to a Request for Review. Counsel argued that it was not a requirement for a procuring entity to be joined as a party in proceedings before the Board.

35. On the issue of competition, Mr. Ayisi referred the Board to Article 227(1) of the Constitution and submitted that issues regarding competition were not an exclusivity of the Competition Authority and that the provisions of Article 227(1) of the Constitution grants the Board the right to intervene in matters touching on public Procurement considering the evidence before it.

36. He urged the Board to allow the Request for Review as prayed.

37. Upon enquiry by the Board on whether the Applicant sought clarification on the mode of submission of tenders, Mr. Ayisi confirmed that no clarification was ever sought by the Applicant from the Respondent and Procuring Entity.

38. Upon further enquiry by the Board on which provision proved that the subject tender was open to international tenderers, Counsel referred the Board to Clause 4.0 of the Tender Document. Counsel further affirmed to the Board that the Act rather than the Insurance Act is what regulates public procurement in Kenya.

39. Counsel also confirmed that pursuant to Section 167(4)(a) of the Act, the Board has no jurisdiction on the choice of procurement method.

40. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 8<sup>th</sup> August 2023 was due to expire on 29<sup>th</sup> August 2023 and that the Board would communicate its decision on 29<sup>th</sup> August 2023 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

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

In determining the first issue, the Board will make a determination on whether the allegation by the Applicant that the Respondent breached the provisions of the Act by using a hybrid of open and restricted methods of procurement in the same tender document is not subject to review by dint of Section 167(4)(a) of the Act.

**B. Whether the Request for Review is fatally defective for failure to join the Procuring Entity as a party pursuant to Regulation 203 of Regulations 2020;**

**C. Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020;**

**D. What orders should the Board grant in the circumstances.**

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

42. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter

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

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

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

***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its***

*decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

45. 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."*

46. 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.”***

47. 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.”***

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

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

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

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

50. 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.

51. 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.”**

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

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

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

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

53. 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.

54. 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. Section 167 of the Act provides as follows:

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

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

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

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

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

***(1)-***

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

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

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

55. Given the forgoing, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act.

**Whether the allegation by the Applicant that the Respondent breached the provisions of the Act by using a hybrid of open and restricted methods of procurement in the same tender document is not subject to review by dint of Section 167(4)(a) of the Act.**

56. The Applicant at paragraph 4 of the Request for Review and paragraph 6 of the Statement in Support of the Request for Review signed by Festus K. Wanjohi contends that the subject tender incorporates a hybrid of open and restricted tender contrary to sections 93(1), 95(3), 96 and 102 of the Act read with Regulation 85(4) of Regulations 2020.

57. On its part, the Respondent at paragraphs 16 and 17 of the Replying Affidavit sworn on 11<sup>th</sup> August 2023 by Daniel Kitili Nzioka objects to the jurisdiction of the Board to hear the aforementioned issue as raised by the Applicant by dint of the provisions of Section 167(4) of the Act.

58. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the 1<sup>st</sup> Respondent to the Board pursuant to section 67(3)(e) of the

Act, the issue that calls for determination by this Board is whether it has jurisdiction to hear and determine an allegation of breach of the Act emanating from the Respondent's decision to use a hybrid of open and restricted methods of procurement.

59. We understand the Applicant's contention to be that the Respondent opted to use a hybrid of open and restricted method of tendering in the subject tender which goes contrary to the provisions of the Act on methods of procurement of goods, works and services. Sections 93(1), 95(3), 96 and 102 of the Act read with Regulation 85(4) of Regulations 2020 which the Respondent is alleged to have breached deal with pre-qualification, advertisement of an open tender and restricted tendering.

60. Having carefully perused the Tender Document submitted by the Respondent pursuant to Section 67(3)(e) of the Act, we note that Clause 2 of the Invitation to Tender at page 2 of the Tender Document provides that tendering in the subject tender is under the Open National tendering method and reads as follows:

***"2. Tendering will be conducted under Open National Tendering method using a standardized tender document and is open to all qualified and interested Tenderers."***

61. From the foregoing, there is no doubt that tendering in the subject tender is by way of an Open National tendering method. It therefore

follows that this Board's jurisdiction to review and determine an allegation pertaining to the choice of a procurement method is ousted by dint of Section 167(4)(a) of the Act.

62. In the circumstances, we find and hold that the Board lacks jurisdiction to hear and determine the allegation by the Applicant that the Respondent breached the provisions of the Act by using a hybrid of open and restricted methods of procurement in the same tender document by dint of Section 167(4)(a) of the Act.

**Whether the Request for Review is fatally defective for failure to join the Procuring Entity as a party pursuant to Regulation 203 of Regulations 2020**

63. The Respondent at paragraph 18 of its Replying Affidavit sworn on 11<sup>th</sup> August 2023 by Daniel Kitili Nzioka contends that the instant Request for Review is irregular for failure to join the Procuring Entity contrary to Regulation 203 of Regulations 2020.

On its part, the Applicant posits that it is not a requirement under Section 170 of the Act to enjoin a Procuring Entity as a party to the request for review and that statutory provisions take precedence over the Regulations and forms made thereunder/thereof.

64. Section 170 of the Act provides:

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

- (a) the person who requested the review;***
- (b) the accounting officer of a Procuring Entity;***
- (c) the tenderer notified as successful by the Procuring Entity; and***
- (d) such other persons as the Review Board may determine."***

65. In essence, an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the Accounting Officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

66. Regulation 203(1) of Regulations 2020 provide that:

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

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

***"Fourteenth Schedule (r 203(1))***  
***Form for Review***  
***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***  
***Application No..... OF .....***  
***BETWEEN***  
***..... Applicant (Review Board)***  
***AND***  
***..... Respondent (Procuring Entity)"***

68. Regulation 203(1) of Regulations 2020 requires a Request for Review to be in a prescribed form which format is as above. From the above format, we note that the Respondent in the Request for Review has further been categorized as the Procuring Entity depicting an inconsistency between Section 170 of the Act and Regulation 203(1) of Regulations 2020 read with the Fourteenth Schedule.

69. This Board notes that Section 5 (1) of the Act provides for this Act to take precedence in the event of any inconsistency between the Act and any other legislation as it provides as follows:

***"This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services."***

70. Further, Section 24(2) of the Statutory Instruments Act provides as follows:

***"A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."***

71. Section 2 of the Statutory Instruments Act interprets a statutory instrument to mean:

***"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."***

72. In essence, Regulation 203(1) of Regulations 2020 read with the Fourteenth Schedule are statutory instruments enacted for the better implementation the provisions of the Act and in the event there exists an inconsistency with the Act, these statutory instruments are void to the extent of that inconsistency.

73. From the foregoing, it is clear that in the event of any inconsistency between Section 170 of the Act and Regulation 203(1) of Regulations 2020 read with the Fourteenth Schedule, the provisions of Section 170 of the Act take precedence. This therefore means that it is not mandatory for a Procuring Entity to be included as a party to a request for review, having not been indicated as a party under Section 170 of the Act.

74. In the circumstance, we find and hold that the instant Request for Review as filed is not defective for failure to join the Procuring Entity as a party. Accordingly, this ground of objection by the Respondent fails.

**Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020;**

75. We understand the Applicant's case on this issue to be that the Tender Document as prepared by the Procuring Entity and Respondent is devoid of fairness, equitability, transparency, competitiveness and cost-efficiency contrary to Article 227(1) of the Constitution. The Applicant contends that (a) the tender had been advertised as an open national tender yet clause 4.10 of the Tender Document allows international tenderers to participate; (b) the mode of submission of tenders is contradictory and confusing contrary to Section 74(1) of the Act read with Regulation 72 of Regulations 2020 since ITT 2.1 (a) of the Tender Document requires tenders to be submitted through the Respondent's e-procurement platform whereas Clause D22 provides for manual submission; (c) the share capital and professional indemnity requirements exceed the minimum requirement under Section 55(1)(a) & (c) of the Act read with Section 153(2) of the Insurance Act and the Insurance Regulatory Authority registration requirements and the Global Credit Rating (GCR) and requirement for the minimum annual premium of Kshs. 5 Billion are restrictive; and

(d) the mandatory and technical requirements to be met by the underwriters are designed to stifle competition, discriminate against many underwriters and insurance intermediaries and deny the Respondent and the Kenyan taxpayer value for money.

76. On the other hand, the Respondent's case on this issue is that (a) the mode of submission of the subject tender is clearly set out under ITT 2(a) of the Tender Document; (b) Section 55 of the Act sets out the minimum criteria in determining eligibility of a tenderer and a procuring entity is bestowed with the power to determine various conditions be they mandatory, technical or financial that need to be satisfied by prospective tenderers; (c) the Procuring Entity's assets include critical and special security government establishments designated as protected areas under the Protected Areas Act and thus require insurance partners with the ability, experience and capacity to adequately underwrite its assets which cannot be deemed to be discriminatory in the circumstances; and (d) no breach of the Constitution, the Act and Regulations 2020 has been demonstrated by the Applicant.

77. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

***"227. Procurement of public goods and services***

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

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

**a) .....**

**b) .....**

**.....”**

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

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

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

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

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

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

**(a) .....**;

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

**(c) good governance, integrity, transparency and accountability**".

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

80. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act further underpins good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

***"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

***(a) the national values and principles provided for under Article 10;***

***(b) the equality and freedom from discrimination provided for under Article 27;***

- (c) affirmative action programmes provided for under Articles 55 and 56;***
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);***
- (e) the principles of public finance under Article 201;***
- (f) the values and principles of public service as provided for under Article 232;***
- (g) principles governing the procurement profession, international norms;***
- (h) maximisation of value for money;***
- (i) promotion of local industry, sustainable development and protection of the environment; and***
- (j) promotion of citizen contractors.”***

81. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information. Section 58 reads as follows:

***"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information***

***to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."***

82. Further Section 60 provides as follows:

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.***

***(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***

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

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

83. Section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) & (4) reads as follows:

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

***(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments."***

84. Regulation 68 of Regulations 2020 also provides for use of standard tender documents and formats. Regulation 68(4) of Regulations 2020 provides:

***"(4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments."***

85. The Applicant contends that the Tender Document in the subject tender as prepared by the Procuring Entity is flawed and fatally defective and as such, it ought to be nullified so that the Procuring Entity can prepare a tender document that complies with the Constitution, the Act and Regulations 2020.

86. We have carefully studied the Tender Document of the subject tender and note the following:

87. Clause 2 of the Invitation to Tender at page 2 of the Tender Document provides that 'tendering will be conducted under open national tendering method...'. Further Addendum 2 while referring to the subject tender indicates that it is 'an open national tender'. As such the Applicant's allegation that the tender had been advertised as an open national tender yet clause 4.10 of the Tender Document allows international tenderers to participate is a misapprehension of the provisions of the Tender Document.

88. Clause D of Section I- Instructions to Tenderers at page 12 of the Tender Document provides for Submission and Opening of Tenders. ITT 22 under Clause D of Section I- Instructions to Tenderers at page 12 of the Tender Document provides for sealing and Marking of Tenders as follows:

***"22.1 The Tenderer shall deliver the Tender in a single, sealed envelope. Within the single envelope the Tenderer shall place the following separate, sealed envelopes....."***

89. ITT 23.1 under Clause D of Section I- Instructions to Tenderers at page 12 of the Tender Document further provides for Deadline for Submission of Tenders as follows:

***"23.1 Tenders must be received by the Procuring Entity at the address and no later than the date and time specified in the TDS. When so specified in the TDS, Tenderers shall have the option of submitting their***

***tenders electronically. Tenderers submitting Tenders electronically shall follow the electronic Tender submission procedures specified in the TDS."***

90. We note that Section II- Tender Data Sheet (TDS) at pages 20 to 22 of the Tender Document provides for specific data for the insurance services to be procured which complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). It is imperative to note that the Tender Document under Section II- Tender Data Sheet (TDS) clearly stipulates that the provisions under the TDS prevail over those in the ITT whenever there is a conflict.

91. ITT 2.1 (a) of Section II- Tender Data Sheet (TDS) at pages 20 of the Tender Document provides for tender submission through the Procuring Entity's e-procurement platform found at [www.kengen.co.ke\(https://eprocurement.kengen.co.ke:50001/irj/portal\)](https://eprocurement.kengen.co.ke:50001/irj/portal) ). Notably, this is further reiterated at ITT 23.1 of Section II- Tender Data Sheet (TDS) at pages 22 of the Tender Document.

92. Additionally, MR 10 of Clause A. Brokers' Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 23 of the Tender Document and MR 22 of Mandatory Requirements Proposed Underwriters of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document provides that:

***" Tender documents Must be submitted through our e-procurement platform found at [www.kengen.co.ke](http://www.kengen.co.ke) (<https://eprocurement.kengen.co.ke:50001/irj/portal>"***

93. In view of the foregoing, we find that the mode of submission of the subject tender has been clearly provided for in the Tender Document and there is no doubt that tenderers submitting their tenders in the subject tender are required to do so using the Procuring Entity's e-procurement platform.

94. The Applicant takes issue with the requirements under Clause 7 of the Clause 7 of the Detailed Technical Evaluation for Insurance Brokers of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document as amended by Addendum No. 2 of the Tender Document and MR16 under Clause 2 Brokers Mandatory Requirements under Addendum No. 2 of the Tender Document for being in breach of Section 55(1)(c) of the Act. The Applicant contends that the Procuring Entity ought to consider the minimum requirements on paid up capital and professional indemnity as provided for under Section 153(2) of the Insurance Act read with the Insurance Regulatory Authority requirements.

95. Clause 7 of the Detailed Technical Evaluation for Insurance Brokers of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document provides as follows:

“

<b>7.</b>	<p><b><i>Provide documentary evidence of certified paid up capital – CR 12 be stamped, certified &amp; signed by the principal officer or the Managing Director</i></b></p> <p><b><i>I. Up to Kshs. 30,000,000 (nominal shares) Five (5 Marks)</i></b></p> <p><b><i>II. Up to Kshs. 20,000,000 (nominal shares) Four (4 Marks)</i></b></p> <p><b><i>III. Up to Kshs. 15,000,000 (nominal shares) Three (3 Marks)</i></b></p>	<b>6</b>
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96. However, Clause 3 of Addendum 2 amended the above requirement as follows:

<b>7.</b>	<p><b><i>Provide documentary evidence of certified paid up capital – CR 12</i></b></p> <p><b><i>I. Up to Kshs. 5,000,000 (nominal shares) Five (5 Marks)</i></b></p> <p><b><i>II. Up to Kshs. 2,000,000 (nominal shares) Three (3 Marks)</i></b></p> <p><b><i>III. Up to Kshs. 1,000,000 (nominal shares) Two (2 Marks)</i></b></p>	<b>5</b>
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97. In essence, a tenderer who is an insurance broker would be scored under Clause 7 of the Detailed Technical Evaluation for Insurance Brokers of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document as amended by Addendum No. 2 of the Tender Document based on evidence availed in proof of its paid up capital with the maximum marks to be awarded under this requirement being five marks.

98. In view of the above and considering the averments made by the Applicant at paragraph 7 of the Statement in Support of the Request for Review, we find that Addendum No. 2 of the Tender Document amended the requirement of the paid up capital to the extent of Kshs. 1M and as such, the minimum paid up share capital has been provided for in the Tender Document.

99. We further note that a requirement for Professional Indemnity was provided at Clause 2 of Addendum No. 2 under MR 16 as follows:

“

<b>MR 16</b>	<b><i>A copy of the Professional Indemnity Policy document of not less than Kshs. 200 million from reputable insurance company in Kenya and valid renewal confirmation/endorsement for more than</i></b>
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<p><i>ninety days after the closing date of the tender certified, signed &amp; stamped by the issuing underwriter (KenGen reserves the right to confirm the validity of the policy document/ renewal endorsement with the issuing underwriter).</i></p>
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100. The Applicant contends that the minimum professional indemnity cover has been capped at Kshs.300M in the Tender Document yet insurance brokers are required by IRA to maintain an indemnity cover of a minimum of Kshs. 10M hence this requirement is contrary to Section 55(1)(c) of the Act. Further, the Applicant takes issue with the Global Credit Rating requirement and the requirement for underwriters to have transacted a minimum annual premium of Kshs. 5 billion excluding motor and medical insurance.

101. Section 55(1)(c) of the Act provides as follows:

***"(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria-***  
***(a) .....***  
***(b) .....***  
***(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;***  
***....."***

102. In essence, the Applicant seems to opine that so long as a person has satisfied all the professional requirements set out by IRA, the Procuring Entity is obligated to set the requirements in its Tender Document at the very minimum required by IRA. We have considered the submission by the Respondent that the requirements set out in the Tender Document were based on the value of the insurable interest and assets of the Procuring Entity and the likely exposure it might suffer in the event that a tenderer is not able to meet its obligations upon occurrence of an insured risk, noting the value of its assets and insurable interest. In the Board's view, the requirements as to Nominal Capital of a tenderer as per paragraph 7 of the Tender document do not conflict with Section 55(1) of the Act. On matters Procurement, the Operative Law is the Procurement Act. Section 5 of the Act is clear on issues concerning conflict between the Act and other Laws touching on procurement.

103. Noting the provisions in Section 60 and 70 of the Act read with Regulation 68 of Regulations 2020 aforementioned, it is our considered view that it is the purview of the Respondent and Procuring Entity to provide a criteria such as the one above at Clause 2 of Addendum No. 2 under MR 16 following consultation with the user department which quantifies and measures the value of the professional indemnity cover that tenderers ought to submit in view of assets intended to be insured. As such, a tenderer is not only required to satisfy the requirements under Section 55 of the Act but ought to also meet the criteria set out by the Procuring Entity in the Tender Document.

104. It is not lost to us that the Applicant has alleged that the mandatory and technical requirements to be met by underwriters are designed to stifle competition, discriminate against many underwriters and insurance intermediaries and deny the taxpayer good value for money.

105. Eligibility of a tenderer is a necessary component of a Tender Document. Section 74(1)(h) of the Act provides that:

***"74. Invitation to tender***

***(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—***

***(h) a declaration that the tender is only open to those who meet the requirements for eligibility;***"

106. In essence, once a tender is floated it must declare that it is intended for tenderers who meet the requirements for eligibility set out in the tender document. A Procuring Entity is therefore required to satisfy itself that all tenderers who participate in a tendering process are qualified.

107. An allegation of discrimination in the subject tender has been raised. This Board is cognizant of its Decision in **PPARB Application No. 79 of 2022 CIC General Insurance Limited v The Accounting**

**Officer, Kenya Airports Authority & Another** where it held at pages 28 to 37 as follows:

“ .....

*The mandatory requirement MR-13 in the subject tender has been challenged on the grounds of being discriminatory against the Applicant and locks it out of the bidding process.*

*Black’s Law Dictionary, 9th Edition defines “discrimination” as*

***(1) the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship***

***(2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.***

*In the case of **Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another [2018] eKLR** Justice Mwita while addressing the issue of discrimination stated:*

***"27. In the case of Peter K Waweru v***

***Republic [2006]eKLR, the court stated of discrimination thus:-***

***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have***

*accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)*

*28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation*

in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

.....

43. I agree with the Court's observation in the case of Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality. (National

**Coalition for Gay and Lesbian Equality v Minister for Justice-supra)**

The Board also observes that in the case of **James Nyasora Nyarangi & 3others v Attorney General [2008] eKLR** (hereinafter referred to as "the James Nyasora case") Nyamu J. (as he then was) while discussing discrimination stated:

**"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in Section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:**

- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and**
- (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.**

***(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”***

*From the James Nyasora case the Board notes that discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. Additionally, it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. The law does not prohibit discrimination but rather unfair discrimination. For the Applicant to succeed on the issue of discrimination, it must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution.*

.....

*What emerges from the above statutory provisions is that the preparation of a tender document is the mandate of the accounting officer in consultation with the relevant department and the Public Procurement Regulatory Authority.*

.....

*Applying the formulae in the James Nyasora case in determining whether the Mandatory Requirement Item MR-13 is a permissible classification, it is the Board considered view that the differentia is that*

*the insurance underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2019, 2020 and 2021 (or 2022) and must provide copies of audited accounts for each of these years.*

*On the other hand, the object to be achieved by this mandatory requirement is that it is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios when required for contracted services. This has been said to be a cautionary measure to safeguard against loss of public funds. The Procuring Entity wants to ensure that the successful bidder is one with a sound financial standing and would thus not commit funds to settlement of motor business to the disadvantage of medical business when required. The Procuring entity's cautionary measure cannot be said to be irrational or unreasonable based on the needs of the Procurement Entity. The Board further takes judicial notice of instances where medical insurance policies have failed to be honored by an insurer.*

*The Board opines this to be a reasonable objective and considers Justice Mativo's holding in the case of **Judicial Review Application No. 646 of 2017 Konton Trading Limited V Kenya Revenue Authority & 3 others** while addressing the concept of reasonableness stated at paragraph 64 that:*

***"Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law."***

*Consequently, despite the fact that insurers offering motor insurance have been treated differently from insurers offering other types of insurance such as travel, life insurance, property insurance etc, this cannot be termed as discrimination and does not amount to unfavourable bias as there is a clear rational relation between the differentia and the object of the mandatory requirement MR-13.*

*In light of the above, and bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that the specific requirements of a Tender Document are within the preserve of the Procuring Entity. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and open competition and are applicable to all parties who wish to participate in the subject tender. [Emphasis]*

.....

108. In **Constitutional Petition No. 607 of 2017 Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR**, Justice Mativo, *as he then was*, held as follows in regard to the question of discrimination on account of a set age requirement which was under dispute:

"

95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

96. *The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.*

97. The requirement for qualifications to occupy a particular office cannot amount to unfair discrimination. The test will depend on the nature of the job or post the applicants are required to perform, and the responsibilities that go with it. The drafters of the provisions under challenge in their wisdom felt that the post of the President of the Law Society is a high calling that calls for the most qualified person. Consequently, they opted for high qualifications. They felt that the

**qualifications similar to those required for appointment of a Supreme Court Judge would suffice.**

.....

**99. In my view, lowering the bar to make it easy for people to qualify may not necessarily be in the best interests of the society. But should the majority feel the necessity to effect the changes, then this can be achieved legally by Members voting for the changes in a properly constituted AGM. That way, the majority will have their say as opposed to a Court decision which may have the force of law, but may go against the preference of the majority. In other words, a court of law should be hesitant to involve itself in internal matters of professional bodies especially where the law provides for clear mechanisms of resolving them.**

....." [Emphasis]

109. Turning to the circumstances in the instant Request for Review, the Respondent is adamant that the magnitude of the assets of the Procuring Entity in terms of value and importance to the State informed the requirements of the Tender Document.

110. In the Respondent's Replying Affidavit sworn on 11<sup>th</sup> August 2023, Mr. Daniel Kitili Nzioka depones as follows:

***" 40. The tender requirements on the value of the professional indemnity cover are based on the value of***

*the insurable interest and assets of KENGEN and the likely exposure it is likely to suffer in the event that a tenderer is not able to meet its obligations and noting the value of its assets and insurable interest.*

.....

*47. It is not true that the tender documents are aimed at stifling competition. There are various requirements and in respect of which each of the tenderers is to be awarded marks with the minimum marks required to proceed to financial evaluation being 75 marks.*

.....

*53. The inclusion of the requirement of global credit rating is for purposes of assessing the ability of a tenderer to settle claims having regard to the value, strategic nature of the assets of KENGEN which are also gazetted as protected areas and are of economic and strategic importance.*

*54. The magnitude of the assets of KENGEN in terms of value and strategic importance has informed the requirements of the tender document and the terms of the PPA Agreement require KENGEN to always have the same insured and for any claims to be settled promptly without delay.....*

*su*

111. From the foregoing, it is our considered view that the specific requirements of a Tender Document are within the preserve of a Procuring Entity and such discretion is vested on the Procuring Entity provided that it ensures the requirements of the Tender Document allow for competition amongst tenderers who are qualified and wish to participate in the tendering process. Where a legitimate reason exists as to why the Procuring Entity opts to set certain requirements and criteria in a tender document, this cannot amount to discrimination provided that the provisions of the Constitution and the Act are observed while setting the said requirements and criteria.

112. We are therefore not persuaded by the Applicant's submission that the Tender Document as drafted is discriminative and aims to stifle competition. There is no evidence that insurance brokers and underwriters cannot come together under a joint venture as envisioned under Clause 4 of Section I- Instructions to Tenderers at page 5 of the Tender Document and tender in the subject tender. This would certainly afford tenderers a higher chance of being awarded the subject tender noting for instance that in providing a scoring criteria at the Technical Evaluation stage the differentia is in the scoring where every tender as submitted is scored depending on how it meets the set out requirements and since it is required to meet the pass mark of 75% to proceed for financial evaluation, the objective of the Procuring Entity to award the subject tender to a tenderer who is able to meet its obligations and handle the value of its assets and insurable interest would be met.

113. In the circumstances, we find and hold that the provisions of the Tender Document in the subject tender are not in breach of the Constitution, the Act and Regulations 2020.

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

114. In determining the appropriate order to issue in the circumstances, we have found that this Board lacks jurisdiction to hear and determine the allegation by the Applicant that the Respondent breached the provisions of the Act by using a hybrid of open and restricted methods of procurement in the same tender document by dint of Section 167(4)(a) of the Act. We have also found that the instant Request for Review as filed is not fatally defective for failure to join the Procuring Entity as a party.

115. The Board has established that the provisions of the Tender Document in the subject tender are not in breach of the Constitution, the Act and Regulations 2020.

116. In totality of the foregoing, the Request for Review is for dismissal and the Board proceeds to make the following specific orders:

**FINAL ORDERS**

117. In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 8<sup>th</sup> August 2023 and filed on even date:

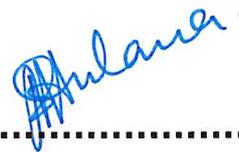
- 1) The Request for Review dated 8<sup>th</sup> August 2023 and filed on even date by the Applicant herein with respect to Tender No. KGN-LEG-05-2023 for the Provision of Insurance Services for the year 2023-2024 be and is hereby dismissed.**
  
- 2) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 29<sup>th</sup> Day of August 2023.**



.....  
**PANEL CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**