

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

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 FCI Arb - Panel Chairperson
2. Mr. Joshua Kiptoo - Member
3. Eng. Lilian Atieno - Member
4. Ms. Alice Oeri - Member
5. Mr. Alexander Musau - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT **TRIDENT INSURANCE COMPANY LIMITED**

Mr. Mwaniki Gachuba -Advocate, Mwaniki GachubaAdvocates

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

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") 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	Lot 1 242,027,447
12.	37	Madison General Insurance Kenya Ltd	Lot 1 450,022,234
13.	45	Trust Mark Insurance Brokers Ltd	Lot 1 235,817,868
14.	1	CIC Life Assurance Ltd	Lot 2 22,033,699

15.	2	Madison Life Assurance Kenya Ltd	Lot 2 22,033,699
16.	3	Sanlam Life Insurance Ltd	Lot 2 39,844,088.15
17.	4	Kenya Oriental Life Assurance Ltd	Lot 2 29,339,874
18.	7	Acentria Insurance Brokers Ltd	Lot 2 23,275,598
19.	9	Four M Insurance Brokers Ltd	Lot 2 24,033,699
20.	11	APA Life Assurance Ltd	Lot 2 17,626,956
21.	13	Liberty Life Assurance Kenya Ltd	Lot 2 35,253,918
22.	23	<i>Zamara Risk and Insurance Brokers Ltd</i>	Lot 2 <i>14,582,445</i>
23.	26	Liaison Group (Insurance Brokers) Ltd	Lot 2 35,253,918
24.	30	Trust Mark Insurance Brokers Ltd	Lot 2 16,033,699
25.	33	Britam Life Assurance Co. Kenya Ltd	Lot 2 23,437,699
26.	40	Sapon Insurance Brokers Ltd	Lot 2 38,846,630
27.	42	Pioneer Assurance Co. Ltd	Lot 2 20,831,860
28.	43	Minet Kenya Insurance Brokers Limited	Lot 2 30,685,234
29.	5	Kenya Orient Insurance Ltd	Lot 3

			9,389,774
30.	6	Acentria Insurance Brokers Ltd	Lot 3 4,201,478
31.	8	Four M Insurance Brokers Ltd	Lot 3 3,943,712
32.	10	Occidental Insurance Company Ltd	Lot 3 10,668,650
33.	14	APA Insurance Limited	Lot 3 11,737,160 (Discount Inclusive)
34.	15	<i>Zamara Risk & Insurance Brokers Limited</i>	Lot 3 <i>3,961,357</i>
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	Lot 3 6,704,282

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

Evaluation of Tenders

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 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 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
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 Hundred Seventy-One Million Five Hundred Seventy-One Thousand

Four Hundred and Ten (471,571,410) for two (2) years broken down as follows; Year 1- Kshs. 235,785,705 and Year 2- Kshs. 235,785,705.

Lot 2- Group Life Assurance (GLA)

M/S Zamara Risk & Insurance Brokers with Jubilee Health Insurance Limited as the underwriter at a total cost of Kenya Shillings Twenty-Nine Million One Hundred Sixty-Four Thousand, Eight Hundred and Ninety (29,164,890) for two (2) years broken down as follow; Year 1- Kshs. 14,582,445 and Year 2- Kshs. 14,582,445.

Lot 3- Group Personal Accident (GPA)

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

Professional Opinion

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

tender (hereinafter referred to as "Request for Review No. 28 of 2023') seeking the following orders:

- a) The Respondent's decision to disqualify the Applicant's tender at the preliminary examination stage as non-responsive be substituted with the Board's decision that the Applicant's tender is substantially responsive.***
- b) The Respondent's disqualification of the Applicant's tender be annulled and set aside.***
- c) The Respondent's decision that the Interested Party's tender is responsive at the preliminary stage be substituted with the Board's decision that the Interested Party's tender is disqualified as non-responsive.***
- d) The award of Lot 1 of the Tender for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff (Tender No. IEBC/OT/23/03/2022-2023) to the Interested Party be annulled and set aside.***
- e) The notification of award of Lot 1 of the Tender for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff (Tender No. IEBC/OT/23/03/2022-2023) dated 3rd May, 2023 be annulled and set aside.***

f) The Respondent be directed to proceed with the Applicant's tender in accordance with Section 79(2) of the Public Procurement and Asset Disposal Act, 2015 and ITT 31.2 and ITT 31.3 of the tender document and to its logical conclusion.

g) Costs of the application be awarded to the Applicant.

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 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:

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

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.

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.

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 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. 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.

BOARD'S DECISION DATED 7TH AUGUST 2023

60. The Board 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 found the issues that arose for determination were:

A. 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;

B. 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;

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

61. The Board proceeded to address the issues framed for determination and made the following determination:

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.

62. In exercise of the powers conferred upon it by Section 173 of the Act, the Board issued the following orders in its Decision dated 7th August 2023 in the Request for Review dated 17th July 2023 and filed on 18th July 2023:

- a) 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.*
- b) Given our findings herein, each party shall bear its own costs in the Request for Review.*

NAIROBI HIGH COURT JUDICIAL REVIEW APPLICATION NO. E113 OF 2023 (hereinafter referred to as "the Judicial Review")

63. Dissatisfied with the Decision of the Board dated 7th August 2023 in the instant Request for Request the Applicant sought judicial review by the High Court against the said decision in Nairobi in Judicial Review Application No. E113 of 2023 where it sought:

- a) *An order of Certiorari to remove to the High Court the proceedings and the decision of the Respondent dated 7th August, 2023 for the purposes of being quashed.*
- b) *An order that the Request for Review dated 17th July, 2023 and the decision thereof dated 7th August 2023 be remitted with directions to the Respondent for reconsideration.*
- c) *Costs of the suit.*

64. The Applicant's case in the Judicial Review was that the Board condemned it unheard contrary to Article 47(1) of the Constitution and Section 28 of the Act. The Applicant contended that the Board's Decision dated 7th August 2023 was tainted by an illegality for reliance on the doctrine of *res judicata* and was materially influenced by an error of law as it adopted, without any statutory power, the adversarial civil litigation rules and procedures and the doctrine of *res judicata* under Section 7 of the Civil Procedure Act hence was ultra vires. The Applicant further contended that it was denied an opportunity to be heard and that the Board was wrong to apply the principle of *res judicata* as it was not a judicial body but an administrative body and it had erroneously expanded and arrogated itself the status, jurisdiction and powers of a local tribunal.

65. The Applicant also argued that a purported contract dated 25th July 2023 was illegal, *void ab initio* and of no legal effect as it offended the provisions of Section 135(3) and 167(1) of the Act and Regulation 205(2)(3) of Regulations 2020.

66. Justice J. Chigiti (SC) considered the Judicial Review and held as follows:

a) On the issue framed for determination on whether the Board is bound by the doctrine of Res Judicata, it was the court's finding that the Respondent is bound by the doctrine of Res Judicata.

b) At paragraph 92 of his Decision, the court held:

"This Court does not find any fault in the Respondent's decision to bring closure to litigation by striking out a request for review that it finds to be scandalous, frivolous or vexatious by invoking the doctrine of res judicata. The doctrine accords with Fair Administrative Action Act."

c) At paragraph 95 of his Decision, the court held:

"The Public Procurement and Asset Disposal Act does not have a provision that bars it from applying the principles of Res Judicata. To hold otherwise would open up the space to frivolous, vexatious and scandalous litigation which would offend the principles of Article 22 of The Constitution."

d) On the issue framed for determination on whether the Applicant was given a chance to be heard, the Court found that the Applicant was given a chance to be heard.

e) At paragraph 104 and 105 of his Decision, the court held:

"104. I have looked at the proceedings and the ruling through the lens of Article 47 and 50 of the Constitution that guarantees all litigants to the right to Fair Administrative Action and I am satisfied that the Applicant was accorded a right to fair hearing in that it participated and actively engaged in the proceedings and it cannot be heard to say that it was not heard. The Applicant was given the determination and the reasons for the finding.

105. The fact that the Respondent invoked the doctrine of Res judicata in determining the review cannot be equated to a denial of the right to hearing. I find no procedural improprieties in the way the Respondent conducted its proceedings."

f) On the issue framed for determination on whether the contract signed on 25th July 2023 has an impact on the procurement process, the court found that the said contract was illegal and subsumed and trapped in the judicial review terrain of one that must be quashed.

g) At paragraph 121 of his Decision, the court held:

"The contract that was entered into on 25th July 2023 is illegal and in flagrant breach of Section 135 of the Public Procurement and Asset Disposal Act given that it was entered into during the pendency of the Request for Review No. 50 of 2023. This

simply means that the procurement process was not suspended after all."

h) At paragraph 124 of his Decision, the court held:

"The Court has on its own merit can and has taken up this issue since it has an impact on the jurisdiction of the court even when the same was not pleaded by the Applicant."

i) At paragraphs 126,127,129 and 130 of his Decision, the court held:

"126. I find that the hearing of Application No. 50 of 2023 of 18th July 2023 were illegal and that the decision dated 7th August 2023 was rendered by a board that was devoid of jurisdiction. The decision that it rendered did not adjudicate the procurement dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority and I hold so.

127. Given that the contract was signed during the pendency of the fourteen statutory days when the procurement process was under suspension, then the contract is null and void and the same must be quashed on the ground of illegality, for breach of Section 135(3) of the Public Procurement Act which prescribes the period within which a procurement contract cannot be signed.

.....

129. The signing of the contract during the period when the procurement process is under suspension waters down the well-intended Constitutional spirit of a fair, equitable, transparent, competitive and cost-effective standard. It erodes and detracts from the right to a fair hearing guaranteed under Article 47 thereby lending itself to judicial review scrutiny.

130. There cannot be a competitive procurement exercise once one of the competitors signs a contract during the pendency of an administrative review as is the case here. The purpose of sitting to preside over the request for review is defeated. The board is also denied the opportunity to invoke Section 167(4) of the PPADA.”

- j) Justice J. Chigiti (SC) proceeded to issue the following orders dated 27th September 2023 in the Judicial Review:
- i An Order of Certiorari is hereby issued to remove to the High Court the proceedings and the decision of the Respondent dated 7th August, 2023 for the purposes of being quashed.*
 - ii The Request for Review dated 17th July, 2023 is hereby readmitted to the Respondent for reconsideration within 14 days.*
 - iii Costs to the Applicant.*

RE-HEARING OF REQUEST FOR REVIEW NO. 50 OF 2023

67. Vide a letter dated 5th October 2023, the Acting Board Secretary, Mr. J. Kilaka, communicated the Board's directions with respect to re-consideration afresh of the instant Request for Review and notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 9th October 2023 at 12.00 noon, through a link availed in the said email.

68. During the hearing on 9th October 2023, the Board issued hearing directions allocating the Applicant, Respondent and Interested Party 10 minutes each to highlight their cases with the Applicant being granted a right of rejoinder on matters of law only.

PARTIES' SUBMISSIONS

Applicant's Submissions

69. 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.

70. Mr. Gachuba submitted that the issue in contention in the instant Request for Review is the unfair disqualification of the Applicant at

the Technical Evaluation stage. Counsel referred the Board to paragraph 4.1 Technical Evaluation Results of the Evaluation Report where the Applicant was disqualified under the Business Operational Capacity for (a) failure to provide reference from five (5) corporate clients each for medical insurance with above 1,000 employees with an average family size of 3 members each year, for the last 2 consecutive years and (b) lack of evidence of presence of medical service providers in all Counties in Kenya where it was mandatory to provide contracts with medical providers showing coverage of the 47 Counties.

71. Mr. Gachuba further referred the Board to paragraph 2 of the letter of Notification of Award dated 10th July 2023 which indicated that the Applicant was disqualified because (a) the reference letters submitted from corporate clients for medical insurance did not indicate the number of employees covered as per the criteria; and (b) the reference letters submitted did not prove provision of medical insurance for the last two (2) consecutive years; (i) County Government of West Pokot- Not Indicated (ii) County Assembly of Embu – 1 Years (2021) (iii) Tana & Athi Rivers Development Authority – Years not specified (iv) County Government of Elgeyo Marakwet – Years not specified (v) County Assembly of Busia – Years not specified.

72. Counsel argued that the reasons in the letter of Notification of Award departs from provision of paragraph 4.1 Technical Evaluation

Results of the Evaluation Report being an indication that evaluation of the subject tender was unfair and not done in accordance to the provisions of the Tender Document. He proceeded to refer the Board to the individual evaluation report of Moses Sunkuli which stated under the operational capacity that the Applicant failed for lack of providing reference of 5 corporate clients each for medical insurance with above 1000 employees and lack of providing evidence of medical service providers in all counties in Kenya.

73. Counsel proceeded to the individual report of Dickson Kwanusu who failed the Applicant for lack of providing reference of 5 corporate clients each for medical insurance with above 1000 employees but passed the Applicant on the requirement of evidence of medical service providers in all counties in Kenya and remarked that the remarks were not clear in the documents provided by the Applicant and as such DicksonKwanusu departed from the Individual Report by Moses Sunkuli.

74. Counsel proceeded to the Individual Report by Dr. Meshak Korir which failed the Applicant on the two requirements under the Business Operational Capacity and the Individual Report of Victoria Chege which failed the Applicant under the first requirement under the Business Operational Capacity and passed the Applicant on the second requirement under the Business Operational Capacity. Similarly, in the Individual Report of Jackton Nyonje, Counsel pointed out he failed the Applicant under the first requirement under the

Business Operational Capacity and passed the Applicant on the second requirement.

75. Mr. Gachuba submitted that there was no concurrence of the evaluators and this required a resolution by the Head of Procurement pursuant to Section 84(2) of the Act which requires that the Professional Opinion under subsection 1 provides guidance in procurement proceedings in the event of dissenting opinions between tender award and recommendations. He urged the Board to look at whether there was resolution on the divergence of the evaluators.

76. Mr. Gachuba submitted that the Respondents failed to comply with the provisions of their Tender Document and that the evaluation of the Applicant's tender was not fair and reasons for disqualification issued were not based on the Tender Document. Counsel referred the Board to Applicant's Supporting Affidavit where it had annexed documents to show that the Applicant had complied with the two requirements under the Business Operational Capacity.

77. Mr. Gachuba argued that the Respondent failed to fairly evaluate the Applicant's tender since it did not apply ITTs numbers 12 to 35 of the Tender Document which ought to have been followed in evaluating the Applicant's tender. He further argued that should there have been any reason or doubt on the Applicant's tender, the said ITTs

provide for a mechanism to seek clarification and specifically ITT 28 provided that the Respondent would seek clarification from the Applicant should anything not be clear in its tender.

78. It was the Applicant's case that the Respondent did not provide a standard reference letter for purposes of information which left the Applicant to its own device to improvise and the Respondent failed to look at the information provided by the Applicant which was unfair. Counsel urged the Board to review, pursuant to Section 28 of the Act, how the Applicant's tender was evaluated and send it back to the Respondent with directions to qualify the Applicant's tender at the Technical Evaluation stage.

79. Mr. Gachuba submitted that in failing to seek clarifications, the Respondent prejudiced the Applicant and caused it to lose out on award of the subject tender. He pressed on that the recommendations letters provided by the Applicant were sufficient and in terms of loss suffered, the Applicant suffered an unfair disqualification of its tender and failure to proceed to the next level of evaluation and there were damages that the Applicant suffered in breach of Article 47 of the Constitution.

80. Counsel prayed for the Request for Review to be allowed.

Respondents' submissions

81. 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.
82. Dr. Mutubwa submitted that parties were before the Board because the High Court directed in its judgement delivered on 27th September 2023 in the Judicial Review which specifically directed the Board to revisit the instant Request for Review in a circumscribed limited manner. Counsel submitted that Mr. Gachuba had gone to great lengths to argue matters that had already been argued before the Board in no less than two occasions and the Board had found that the matters argued in the complaint in the first instance were *res judicata*.
83. Dr. Mutubwa submitted that the High Court in the Judicial Review had framed only three issues one being an issue with respect to the doctrine of *res judicata* and agreed with the Board that matters that were being raised by the Applicant were *res judicata* meaning that those matters had been determined in Request for Review No. 44 of 2023 with finality.

84. Counsel submitted that *res judicata* has two limbs being matters which are to be argued and those which ought to have been raised so that one cannot litigate in piecemeal. He pressed on that the High Court confirmed that contrary to the Applicant's argument, the doctrine of *res judicata* is applicable to all judicial. Quasi-judicial and even administrative organs and by saying so, shut the door to a re-agitation of the matter on merit.

85. He submitted that the High Court found that the Board could not hear in the instant Request for Review matters which it had already determined or ought to have determined in Request for Review No. 44 of 2023. As such every argument on the evaluation process and the considerations made by the Procuring Entity are *res judicata* and cannot be entered and the High Court gave a seal of approval to the Board's decision to this respect.

86. Dr. Mutubwa further submitted that High Court in the Judicial Review considered the issue of fair trial and in its determination, found that there was a fair trial and the Applicant was given an opportunity to be heard by the Board.

87. Counsel argued that the Applicant had gone to the High Court complaining about the procedural aspect and not the merits of the Board's decision and as such, its application was not an appeal. He further argued that the Board was not sitting on appeal of its decision.

88. Dr. Mutubwa submitted that the High Court, suo moto, faulted the Respondent and the Interested Party for signing a contract before lapse of the 14 days' standstill period and according to the Judge, by signing that agreement, there was a breach of a statutory provision. He further submitted that the Board is restrained by the High Court's decision in reconsidering the matter understanding that the Board was right on the issue of *res judicata*, a fair trial had been afforded to the Applicant and the only misadventure is that a contract was signed before the standstill period had lapsed. Counsel was of the view that the only thing left for the Board is to direct the Respondent and Interested Party to proceed and enter into a contract in compliance with the provisions of the Act.

89. Dr. Mutubwa submitted that the High Court did not fault the procedural fairness or compliance with the Tender Document by the Respondent. He pointed out that the Board had found on merit in Request for Review No. 44 of 2023 that there was compliance with the law.

90. Upon enquiry by the Board on what the basis was for signing the contract dated 25th July 2023 within the standstill period, Dr. Mutubwa submitted that in their understanding, the Respondents issued a notification after the Board asked it to re-issue the letter of notification on 10th July 2023 and in its computation, the 14 days' statutory period would lapse on 24th July 2023 hence proceeded to sign the contract on 25th July 2023. Dr. Mutubwa further submitted

that this notwithstanding, there was no disturbance on the pronouncements on merit of the Board's decision in Request for Review No. 44 of 2023 and Request for Review No. 50 of 2023 and the Court on its own motion picked the issue of the signing of the contract.

Interested Party's Submissions

91. Counsel for the Interested Party, Mr. Ochieng, associated fully with Dr. Mutubwa's submissions and referred the Board to the issues in Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review.
92. Mr. Ochieng submitted that the issues dealt with in Request for Review No. 44 of 2023 were not for re-opening and referred the Board to paragraphs 67 to 73 of the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review and submitted that the Court was categorical that those matters having been determined were not for reopening in the instant Request for Review and doing so would be going against the Court's decision.
93. Counsel submitted that the Applicant was trying to urge the Board to act on appeal against the High Court's decision and that the only outstanding issue in the matter was the issue on signing the contract dated 25th July 2023.

94. Counsel submitted that the Interested Party was not in agreement with the Learned Judge since once a contract is signed, the Board ceases to have jurisdiction.

95. Mr. Ochieng concluded by praying for the Board to award costs in the matter.

96. Upon enquiry by the Board on whether the Board is divested of jurisdiction to hear and determine an administrative review when a contract is signed or when a contract is signed in accordance with provisions of Section 135 of the Act, Mr. Ochieng confirmed that it was once a contract is signed in accordance with Section 135 of the Act and confirmed that the contract dated 25th July 2023 was signed outside the 14 days' statutory period prescribed under Section 135 of the Act.

97. At this juncture, Dr. Mutubwa submitted that the decision of the High Court was binding and had identified that the aforementioned contract was signed outside the 14 days' statutory period and had consequently set it aside requiring parties to sign a contract in accordance with the Act.

Applicant's Rejoinder

98. In a rejoinder, Counsel for the Applicant, Mr. Gachuba, submitted that the High Court referred the matter for re-adjudication meaning a fresh trial.

99. On the issue of *res judicata*, Counsel submitted that the Judge made pronouncements on when *res judicata* applies and reiterated that the Board did not look at issues addressed in the instant Request for Review.

100. On the issue of costs, Mr. Gachuba submitted that the Applicant ought to be awarded costs in the instant Request for Review based on the conduct of the Respondent and Interested Party which was contemptuous.

101. Upon enquiry by the Board on his understanding of the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review, Mr. Gachuba submitted that the Court left it to the Board to go into facts before it and questions raised in the instant Request for Review and decide if the same had been addressed and determined in Request for Review No. 44 of 2023. He further submitted that the High Court quashed the Board's decision dated 7th August 2023 in the instant Request for Review meaning it was not binding and that the instant Request for Review was required to be re-adjudicated.

102. Upon enquiry by the Board on whether the Applicant was aware about the signed contract dated 25th July 2023 during the pendency of the proceedings before the Board in the instant Request for Review, Mr. Gachuba submitted that they were not aware of the

signed contract and that he submitted as such during the proceedings in the Judicial Review.

103. At the conclusion of the online hearing, the Board informed parties that pursuant to the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review the instant Request for Review was required to be reconsidered within 14 days and was due to expire on or before 11th October 2023 and that the Board would communicate its decision by end of day on 11th October 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

104. 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 in the instant Request for Review:

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

In determining the first issue, the Board will make a determination on

- i Whether the contract with respect to the subject tender signed on 25th July 2023 was signed in accordance with*

Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

- ii 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;

B. 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;

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

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

105. 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.

106. 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."

107. 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."

108. 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."

109. 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."

110. 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.

111. 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 L

112. 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 dis

(b) to perform any other function conferred to the Review Board by this

113. 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.

114. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board

and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

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

(a) the choice of a procurement method;

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

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

168.

169.

170.

171.

172. 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.**

115. 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.

116. 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.

117. 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 contract with respect to the subject tender signed on 25th July 2023 was signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act;

118. In the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review, it emerged that a contract dated 25th July 2023 with respect to the subject tender had been signed by the Respondent and Interested Party.

119. At paragraphs 111 to 141 of the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review the High Court suo moto raised the issue of whether the said contract dated 25th July 2023 had been signed in accordance with the provisions of the Act and found as follows:

"111. In a sudden turn of events, The Procuring Entity that is the IEBC and the 2nd Interested Party herein proceeded and entered into a contract on 25th July,2023.

112. In its decision dated 7th August, 2023 in Application No. 50 of 2023 of 18th July 2023, the board [Public Procurement & Administrative Review Board] observed that,

"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."

113. It is uncontroverted that the Respondent herein issued the Notification and a letter dated 18th July, 2023 to the Ex-parte Applicant, and the Interested Parties herein.

114. The 2nd Interested Party makes an accurate reference to the contract and argues that in the notice of motion dates 19th August, 2023 as filed by the Exparte Applicant, The Applicant did not seek any

prayers for the nullification of the contract signed between the 2nd Interested Party and the 1st Interested Party.

115. To this effect, the court is bereft of jurisdiction to amend the pleadings in chambers and make determination based on an amendment it has introduced itself without being moved by any party.

116. The 2nd Interested Party admits that it has already signed a contract with the 1st Interested Party.

117. This court has confirmed from contract in issue that it was indeed signed during the pendency of the request for review Application No. 50 of 2023 of 18th July 2023.

118. The notice of motion dated 19th August, 2023 has no prayer for the nullification of the contract. However, The Applicant submits that the purported contract is illegal as it offended Section 135(3) and 167(1) of the Public Procurement and Asset Disposal Act, 2015; and Regulation 205(2)(3) of the Public Procurement and Asset Disposal Regulations, 2020 and the same is void ab initio and of no legal effect.

119. I have looked at the Contract dated 25th July 2023 and I confirm that indeed it is duly executed.

120. The Supreme Court in the case of Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

"40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:

"25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination

*thereon without the same being pleaded...”
(Emphasis supplied).*

121. The contract that was entered into on 25th July, 2023 is illegal and in flagrant breach of Section 135 of The Public Procurement and Asset Disposal Act given that it was entered into during the pendency of the Request for Review No. 50 of 2023. This simply means that the procurement process was not suspended after all.

122. Though not pleaded, the applicant also argues that the purported contract dated 25th July, 2023 is illegal as it offended Section 135(3) and 167(1) of the Public Procurement and Asset Disposal Act, 2015; and Regulation 205(2)(3) of the Public Procurement and Asset Disposal Regulations, 2020 and the same is void ab initio and of no legal effect.

123. On its part, the 2nd interested party argues he Applicant did not have a prayer for the nullification of the contract signed between the 2nd Interested Party and the 1st Interested Party and the same cannot be introduced through affidavits and granted. The Applicant did not invoke Order 53 Rule 4 of the Civil Procedure Rules for leave to amend the statement.

124. The Court has on its own motion can and has taken up this issue since it has an impact on the jurisdiction of the court even when the same was not pleaded by the Applicant.

125. In the case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] The Supreme Court Case made a binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

126. I find that the hearing of Application No. 50 of 2023 of 18th July 2023 were illegal and that the decision dated 7th August, 2023 was rendered by a

board that was devoid of jurisdiction. The decision that it rendered did not adjudicate the procurement dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority and I so hold.

127. Given that the contract was signed during the pendency of the fourteen statutory days when the procurement process was under suspension, then the contract is null and void and the same must be quashed on the ground of illegality, for breach of Section 135 (3) of the Public Procurement Act which prescribes the period within which a procurement contract cannot be signed.

.....
.....

138. It is my finding that the Respondent acted illegally and ultra vires Article 27,47(1),48,50 and 227 of The Constitution and Section 135 and 168 of the Public Procurement and Asset Disposal Act.

139. The upshot of the foregoing is that there was a massive procedural impropriety and an illegality and the impugned process is amenable to judicial review under Section 7(2(a)(ii)(d) of the Fair Administrative Action Act, 2015.

140. The 1st and the 2nd interested parties failed to adhere and observe procedural rules expressly laid down in the Public Procurement and Asset Disposal Act by which such authority exercises jurisdiction to make a decision.

141. The argument that an order that the decision thereof dated 7th August, 2023 be remitted with directions to the Respondent for reconsideration will amount to setting aside the contract which will displace contractual rights and obligations of the parties to the contract is attractive. However, this court cannot leave an illegal contract undisturbed or in limbo. To do so would offend the rule of law and render The Fair Administrative Action Act. “[Emphasis Board]

120. Our interpretation of the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the Judicial Review is outlined below.

121. First, the Learned Judge confirmed that indeed a contract dated 25th July 2023 had been signed by the Respondent and Interested Party during the pendency of the proceedings in the instant Request for Review dated 18th July 2023 and as such, the procurement process was not suspended despite that Board having issued a

Notification and Letter dated 18th July 2023 to parties on suspension of the procurement proceedings in the instant Request for Review.

122. Secondly, the Learned Judge found that the contract dated 25th July 2023 was illegal and in breach of Section 135 of the Act and proceeded to quash the same.

123. Thirdly, the Learned Judge found that the hearing of the instant Request for Review and the subsequent Decision of the Board dated 7th August 2023 was illegal as the Board was devoid of jurisdiction and the said decision did not adjudicate the procurement dispute as a result of the signed contract dated 25th July 2023. The Learned Judge further held that the Board acted illegally and ultra vires Articles 27, 47(1), 48, 50, and 227 of the Constitution and Section 135 and 168 of the Act.

124. The Board has carefully reviewed the confidential documents submitted by the Respondent when the instant Request for Review first came up for hearing and notes that the said contract dated 25th July 2023 was never submitted by the respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act. In fact, the Board has only come to learn through the Judicial Review that the Respondent and Interested Party had proceeded to sign a contract during the pendency of the instant Request for Review filed on 18th July 2023 despite having issued a Notification and Letter dated 18th July 2023 advising parties on suspension of the

procurement proceedings in the subject tender pursuant to Section 168 of the Act.

125. This then begs the question as to what is the effect of any act done by parties to an administrative review during the standstill period and pendency of procurement proceeding before the Board?

126. Section 168 provides that:

***"168. Notification of review and suspension of proceedings
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

127. This Board's in **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** pronounced:

"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."

128. In essence, any action taken by the Respondent in furtherance of the procurement proceedings before the Request for Review has been heard and the Board rendered its decision is null and void. This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:

"...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound. 53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point"

129. We have hereinbefore established that the High Court in the Decision dated 27th September 2023 by Hon. J. Chigiti (SC) in the

Judicial Review quashed the contract dated 25th July 2023 on the ground of illegality for breach of Section 135(3) of the Act for having been signed during the standstill period.

130. In reiterating the High Court's decision on the issue of the Contract dated 25th July 2023 being null and void, we acknowledge that the jurisdiction of this Board flows from Section 167(1) of the Act. We also acknowledge that such jurisdiction of the Board is ousted by Section 167(4) of the Act which provides as follows:

"167. (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 62 of this Act; and

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

131. In essence, the mere act of signing a procurement contract does not automatically oust the jurisdiction of the Board. The provision of Section 167(4)(c) of the Act is conditional on such a procurement contract being signed in accordance with Section 135 of the Act.

132. Section 135 of the Act provides for creation of procurement contracts and where a contract is signed in accordance with Section

135 of the Act, the Board is divested of its jurisdiction by dint of Section 167 (4) (c) of the Act.

133. Section 135 of the Act provides as follows:

"135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.”

134. The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* ; (a) such a procurement contract must be in writing, (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the

successful tenderer and (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

135. The High Court in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** which was upheld by the Court of Appeal in **Civil Appeal No. 35 of 2018 Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR** stated as follows:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my

further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction.....

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder.”

136. In view of the foregoing, the contract with respect to the subject tender dated 25th July 2023 was null and void having been signed in breach of the provisions of Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.

b) 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;

137. The Respondents and the Interested Party 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.

138. On its part, the Applicant 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. The Applicant 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.

139. 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.

140. 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).....”

141. 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.

142. 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.

143. 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.

144. 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).

145. In view of this, we are not persuaded 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.

146. 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."

147. 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."

148. 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...."

149. 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.

150. 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*.

151. To successfully plead the bar of *resjudicata*, 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.

152. 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) The 3rd Respondent's evaluation report be annulled and set aside. (Emphasis added)

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 3^d 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.

153. 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.

154. 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.

155. 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.

156. **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.

157. 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 Request for Review No. 44 of 2023 deliberated 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.

158. 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 signed on 8th June 2023 by members of the Evaluation Committee 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.

159. 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.

160. 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)

....."

161. 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.”

162. 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.

163. 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.”

164. 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.

165. 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 Request 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 instant Request for Review would entail a revisit of its discussions, findings and determinations in the previous application being Request for Review No. 44 of 2023. That is the exact action that the doctrine of *res judicata* aims to curb.

166. It is interesting to note that the plea of *res judicata* was raised by the Respondents and the Interested Party in Request for Review 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.

167. The Applicant in its submissions before the Board in Application No. 44 of 2023 did not raise the objection of thenon-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 which provides as follows:

"175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty-five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.”

168. 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 of *res judicata* is applicable in matters before it.

169. In the circumstances, the Board finds and holds that the complaints regarding the findings by the Evaluation Committee in the Re-evaluation of the Applicant's tender leading to the disqualification of the tender at the Technical Evaluation stage raised in the instant Request for Review are barred by the doctrine of *res judicata* and thus down its tools at this point.

170. We note that this finding is similar to our finding when we first heard and determined the instant Request for Review and the same was never faulted by Justice J. Chigiti (SC) in the Judicial Review.

171. 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?

172. 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*.

173. We note that the Board has powers under Section 173 (d) of the Act 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

174. 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:

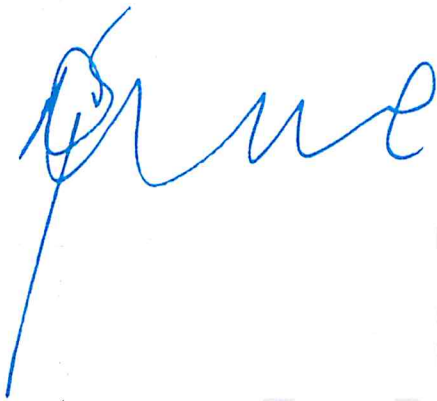
a) The instant Request for Review dated 17th July 2023 and filed on 18th July 2023 with respect to Lot 1: Medical Insurance of Tender No. IEBC/OT/23/03/2022-2023 for Provision of Medical Insurance, Group Life Assurance (GLA) and Group Personal Accident (GPA) Covers for Commissioners and Staff be and is hereby struck out as the issues raised therein are *res judicata*.

b) The Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement proceedings 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 to its logical conclusion taking into consideration the Board's findings in this Review and the provisions of the Act and Regulations 2020.

c) Given our findings herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 11th Day of October 2023



.....
PANEL CHAIRPERSON

PPARB

.....
SECRETARY

PPARB