

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 64/2023 OF 19TH SEPTEMBER 2023

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED..... APPLICANT

AND

MANAGING DIRECTOR,

KENYA INDUSTRIAL ESTATES..... RESPONDENT

JUBILEE HEALTH INSURANCE..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Industrial Estate in relation to Tender No. KIE/TNO.01/2023 –2024 for the Provision of Staff Medical Scheme Cover.

BOARD MEMBERS PRESENT

1. Mrs. Njeri Onyango, F.CI Arb - Panel Chairperson
2. Eng. Mbiu Kimani, OGW - Member
3. Dr. Susan Mambo - Member
4. Mr. Daniel Langat - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - **TRIDENT INSURANCE CO. LIMITED**

Mr. Mwaniki Gachuba - Advocate, Mwaniki Gachuba & Co. Advocates

RESPONDENT **MANAGING DIRECTOR, KENYA**
INDUSTRIAL ESTATES

Mr. Kevin Njuguna - Advocate, TripleOK Law Advocates LLP

INTERESTED PARTY **JUBILEE HEALTH INSURANCE**

Ms. Dorothy Jemator - Advocate, Chepkuto & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Industrial Estates, the Procuring Entity together with the Respondent herein, invited sealed Proposals in response to Tender No. KIE/TNO.01/2023 –2024 for the Provision of Staff Medical Scheme Cover using open national competitive tender method. The subject tender submission deadline was Thursday, 28th August 2023 at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes of 28th August 2023 under the Confidential File submitted by the Procuring Entity, the following 10 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

| No. | Name of Tenderer |
|------------|---|
| 1. | Old Mutual General Insurance Limited |
| 2. | MUA Insurance Kenya Limited |
| 3. | Pacis Insurance Company Limited |
| 4. | First Assurance Company Limited |
| 5. | Madison Insurance Company (K) Limited |
| 6. | CIC General Insurance Company of Kenya |
| 7. | APA Insurance Limited |
| 8. | AAR Insurance Limited |
| 9. | Trident Insurance Limited |
| 10. | Jubilee Insurance Limited |

Evaluation of Tenders

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 10 tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage

Preliminary Evaluation

4. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause a) Mandatory

Requirements under Section III – EVALUATION AND QUALIFICATION CRITERIA at page 25 of the Tender Document.

5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria in the Preliminary Evaluation would not proceed for further evaluation at the Technical Evaluation Stage.
6. At the end of the evaluation at this stage, only 1 tender was found unresponsive with the other 9 tenders qualifying for further evaluation.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause b) Technical Evaluation Criteria under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on pages 25 to 26 of the Tender Document. Tenderers were required to garner a minimum score of 75 marks at this stage in order to qualify for further evaluation at the Financial Evaluation Stage.
8. At the end of the evaluation at this stage, 6 tenders including that of the Applicant were found unresponsive with only 3 tenders including that of the Interested Party qualifying for further evaluation at the Financial Stage.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out under ITT 36.1 under Section I– Instructions to Tenderers on page 19 of the Tender Document. The tenderer determined to be the Lowest Evaluated Tender price would be selected for award of the tender.

10. The Evaluation Committee found that the Interested Party's tender was the lowest evaluated tender and thus recommended the award of the subject tender to it at its tender cost of **Kenya Shillings Twenty-Seven Million Three Hundred and Ten Thousand Seven Hundred and Sixty-One (Kshs. 27,310,761.00) inclusive of taxes**

Evaluation Committee's Recommendation

11. The Evaluation Committee determined the tender offered by the Interested Party as the lowest evaluated responsive tender and recommended award of the subject tender to it at its tendered price:

Professional Opinion

12. In a Professional Opinion dated 1st September 2023 (hereinafter referred to as the "Professional Opinion"), the Procurement Officer, Mr. Bob A. Atuti, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders, and recommended the award of the subject tender to the Interested Party as proposed by the Evaluation Committee. The Respondent concurred with said Professional Opinion.

Notification to Tenderers

13. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 2nd September 2023, which were sent both by post and through email. The emails were sent on 15th September 2023.

REQUEST FOR REVIEW

14. On 19th September 2023, the Applicant filed a Request for Review dated 18th September 2023 supported by an Affidavit sworn on 18th September

2023 by Ms. Mercy Kamau, the Applicant's Chief Accountant, seeking the following orders from the Board in verbatim:

- a) The Respondent's decision that the Applicant was unqualified at the technical evaluation stage be substituted with the Board's decision that the Applicant was technically qualified;***
- b) The Respondent's decision to disqualify the Applicant's tender at the technical stage be annulled and set aside;***
- c) The Respondent's award of the Tender for Provision of Staff Medical Scheme Cover (Tender No. KIE/TNO.01/2023-2014) to any tenderer be annulled and set aside;***
- d) The Respondent's notification of award of the Tender for Provision of Staff Medical Scheme Cover (Tender No. KIE/TNO.01/2023-2014) dated 2nd September 2023 be annulled and set aside;***
- e) The Respondent be directed to subject the Applicant's tender to financial evaluation in accordance with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020;***
- f) Costs of the application be awarded to the Applicant.***

15. In a Notification of Appeal and a letter dated 19th September 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing

administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 19th September 2023.

16. On 25th September 2023, in response to the Request for Review, the Respondents through the firm of TripleOK Law Advocates LLP, filed a Notice of Appointment of Advocates dated 25th September 2023, a Memorandum of Response dated 25th September 2023 and a Replying Affidavit sworn on 25th September 2023 by Dr. Parmain Ole Narikae, MBS. The Respondent also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
17. Vide letters dated 26th September 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 26th September 2023.
18. On 27th September 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 3rd October 2023 at 12.00 noon. through the link availed in the said Hearing Notice.

19. On 28th September 2023, the Applicant filed a Further Affidavit sworn on 27th September 2023 by Ms. Mercy Kamau.
20. On 29th September 2023 the Interested Party through the law firm of Chepkuto Advocates filed a Notice of Appointment of Advocates dated 29th September 2023, a Notice of Preliminary Objection dated 29th September 2023, and a Replying Affidavit sworn on 29th September 2023 by Ms. Njeri Jomo, the Interested Party's CEO.
21. On 3rd October 2023 the Respondent filed Written Submissions as well as a List and Bundle of Authorities both dated 3rd October 2023.
22. On the morning of the hearing of 4th October 2023, the Applicant filed Grounds of Opposition dated 3rd October 2023 to the Interested Party's Notice of Preliminary Objection together with a List of Documents dated 3rd October 2023. Shortly, thereafter the Interested Party filed a subsequent Notice of Preliminary Objection equally dated 3rd October 2023 together with Written Submissions and List of Authorities both dated 4th October 2023.
23. During the online hearing at 12.00 noon all the parties herein were represented. However, before the hearing commenced, Counsel for the Applicant, Mr. Gachuba made an application for an adjournment of the hearing to allow the Applicant to file a further response to the Interested Party's 2nd Notice of Preliminary Objection that was filed on the morning of the hearing.
24. Counsel for the Respondent, Mr. Njuguna, and Counsel for the Interested Party opposed the Applicant's Application.

25. The Board considered the Application for adjournment made on behalf of the Applicant and returned a Ruling granting leave to the Applicant to file and serve their further response to the Interested Party's Notice of Preliminary Objection dated 3rd October 2023 by 10.00 a.m. on 5th October. Consequently, the online hearing was adjourned to 5th October 2023 at 12.00 noon.
26. Shortly after the adjournment of the hearing session, the Secretariat sent out a new online hearing link for 5th October 2023.
27. On the morning of 5th October 2023, the Applicant filed a Grounds of Opposition dated 5th October 2023 as well as Written Submissions of even date.
28. During the online hearing, all the parties herein were represented by their respective Advocates. The Board noted that since the Interested Party had filed 2 Notices of Preliminary Objection, these would be heard as part of the substantive Request for Review. This was in line 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 the substantive request for review and render one decision.
29. Accordingly, the Board gave directions on the order of address of the Board as follows: The parties would each submit their respective cases in 15 minutes with the Applicant starting followed by the Respondents and thereafter the Interested Party. Subsequently, the Applicant would offer a rejoinder to the parties' responses in 3 minutes.

PARTIES SUBMISSIONS

Applicant's Case

30. During the online hearing, Counsel for the Applicant, Mr. Gachuba, placed reliance on the Applicant's filed documents i.e. Request for Review dated 18th September 2023; Further Affidavit sworn on 27th September 2023 by Ms. Mercy Kamau; Grounds of Opposition dated 3rd October 2023; Grounds of Opposition dated 5th October 2023 and Written Submissions dated 5th October 2023.
31. He submitted that the Interested Party's Notices of Preliminary Objection were unmerited as they were filed by a party who was not properly before the Board. Counsel argued that the Letter of Notification of Award in the subject tender did not disclose the Interested Party as the successful tenderer and thus the Interested Party ought to have made an application to be enjoined in the proceedings. He added that since no such application had been placed before the Board, the Interested Party could not purport to file the said Notices of Preliminary Objection.
32. Additionally, he submitted that the Secretariat issued the Notification of Appeal on 19th September 2023 pursuant to Regulation 205(1) of the Regulations 2020 which triggered responses from all concerned parties. He submitted that Regulation 209(1) of the Regulations 2020 required any party including the Interested Party to file their responses and or Preliminary Objections within 3 days.
33. Counsel submitted that the Interested Party having been served with the Notification of Appeal in respect of the present proceedings ought to have filed their responses and objections within 3 days. Having failed to do so

by 22nd September, the Interested Party waived their right to bring their Notices of Preliminary Objection thereafter relying on the case **Banning v Wright (1972) 2 All ER 987**, and **Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR**. He therefore submitted that the Board lacked jurisdiction over the Interested Party's Notices of Preliminary Objection. Relying on the case of **Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992)** he argued that parties should adhere to laid down procedures.

34. Relying on the case of **Trust Bank Limited v Shah [2023] KEHC 21017 (KLR)**, Counsel added that the Interested Party's filing of Notices of Preliminary Objections in a piecemeal fashion flies in the face of public policy.
35. Mr. Gachuba further added that he had filed before the Board a letter giving him the authority to file the present Request for Review.
36. He also referred the Board to the Power of Attorney dated 24th august 2023 and Board Minutes dated 19th December 2022 Annexures MK004 and MK005 forming part of the Applicant's documents and submitted that the same granted Ms. Kamau authority to represent the Applicant before the Board or any forum in connection with the subject tender....he relied on the case of **Morris v Kanssen [1946] AC, 474** for the proposition that persons dealing with a company proceed on the assumption that the company has complied with its own internal management rules. Accordingly, he sought that the Preliminary Objections be dismissed.

37. Mr. Gachuba further argued that the evaluation was not conducted in accordance with Article 471(1), 227(1) of the Constitution. Section 80(2) of the Act and ITT 35.1 of the Tender Document, Table 3 Paragraph B as demonstrated in the Request for Review and Supporting Affidavit and in the Further Affidavit.
38. He added that the Letter of Notification of Award by the Procuring Entity failed to comply with Articles 10(2)(c), 201(a), 227(1) of the Constitution, section 87(3) of the Act, Regulation 82(3) of the Regulations 2020.....ITT 41. 1 of the Tender documents which stipulates how the notification should be structured and the mandatory contents thereof
39. Mr. Gachuba contended that from the responses filed in the matter, the Procuring Entity does not address the shortcomings of the Letter of Notification of Award and thus the breach pleaded in respect of the notification of award was admitted.
40. He relied on the authority of ***R V PPARB [2008]eKLR*** and pleaded to the Board to allow the Request for Review in view of the Respondent's failure to comply with the provision of the tender document.

Respondent's Case

41. Counsel for the Respondent, Mr. Njuguna, placed reliance on the Respondent's filed documents i.e. Memorandum of Response, Replying Affidavit sworn on 25th September 2023 by Dr Parmian Ole Narikae as well as the Written Submissions dated 3rd October 2023. He also associated himself with the Interested Party's filed Written Submissions.

42. Counsel argued that under Section 170(c) of the Act, a successful tenderer is a relevant party to any Request for Review filed before the Board. Accordingly, the Interested Party was not required to file any application as argued by Counsel for the Applicant.
43. He added that Regulation 209 of the Regulations 2020 requires that a Notice of Preliminary Objection should be filed within 3 days upon receipt of the Hearing Notice and that in the present case, the hearing notice was issued on 26th September 2023 and thus the Preliminary Objection issued on 29th September 2023 was issued in good time.
44. He added that the need for an individual to have proper authorization to represent a company was emphasized by this Board in ***PPARB Application No. 18 of 2021.***
45. Mr. Njuguna submitted that though the Applicant takes issue with the technical evaluation of its tender, it fails to state with precision how the various provisions of the law have been violated.
46. He added that under Section 80 of the Act, evaluation has to be as per the Tender Document and that the Respondent had pointed out in paragraphs 12 to 19 of the Respondent's Replying Affidavit, numerous instances where the Applicant's tender did not comply with the provisions of the Tender Document.
47. In particular, he specified that the Applicant failed to comply with the cover limits set out in the tender document including prematurity congenital conditions and ailment, inpatient dental and optical hospitalization, psychiatric illness, counseling and psychological

treatment, and vaccines. Counsel argued that the Applicant gave sub-limits when the specific cover was expressly stated in the tender document.

48. Further, he argued that there was an evaluation criterion for the evaluation of the financials of the tenderers participating in the subject tender. Upon evaluating the Applicant, it was apparent that the Applicant had a negative cash and cash equivalent for the years 2020 and 2021. For the year 2022, the Applicant had a positive but weak cash flow position, which raised concerns as to the Applicant's ability to honour any payments under the cover.
49. Counsel further submitted that it was a requirement for tenderers to provide an implementation plan. In this regard, the Applicant provided a contradictory plan i.e. on the one hand it provided that the cover would be rolled out immediately while also providing that the cover would only be available within 7 days of the Applicant being awarded the tender. This constituted a justification for the Applicant getting a lower mark.
50. Mr. Njuguna argued that flowing from the above shortcomings, the Applicant garnered 62 marks which led to its disqualification for failing to meet the 85 marks threshold for which tenderers were to qualify for further evaluation. The Applicant's tender was thus not responsive.
51. Counsel further submitted that the Letter of Notification of Award disclosed the reasons why the Applicant was unsuccessful as well as its score and that this was in substantial compliance with Section 87 of the

Act. He argued that the Board had power to remedy any defect in the circumstance and sought the dismissal of the Request for Review.

Interested Party's Case

52. Counsel for the Interested Party, Ms. Jemator, submitted that the Board invited the Interested Party to participate in the present proceedings on 26th September 2023 and that on 29th September 2023, the Interested Party filed its Notice of Preliminary Objection dated 29th September 2023 and Replying Affidavit sworn on 29th September 2023 by Ms. Njeri Jomo.
53. Counsel indicated that the Interested Party was abandoning ground 2 of its Notice of Preliminary Objection dated 29th September 2023 i.e. that the Request for Review was incompetent having been executed by Counsel for the Applicant without lawful authority.
54. Ms. Jemator argued that the Applicant lacked the locus to file the instant request for Review under Section 167(1) of the Act as it did not plead having suffered or being at the risk of suffering loss or damage. Counsel argued an Applicant under Section 167 had to surmount 3 hurdles i.e. (i) they ought to be a candidate or tenderer; (ii) they should plead having suffered or at the risk of suffering loss due to breach of a duty imposed on a Procuring Entity; and (iii) the Request for Review ought to be brought within 14 days of the occurrence of the breach or issuance of a notification of award. She pointed out that the Applicant in the instant request failed to plead having suffered or at the risk of suffering loss or damage flowing from the breach of a statutory duty imposed on the Procuring Entity.

55. Relying on the case of ***James Oyondi t/a Betooyo Contractors & Anor v Elroba Enterprises Limited & 8 Ors*** Counsel urged the Board to strike out the Request for Review.
56. Counsel further submitted that the 2 affidavits sworn in the matter by Ms. Mercy Kamau i.e. Supporting Affidavit sworn on 18th September 2023 and Further Affidavit sworn on 27th September 2023 did not comply with Section 37 of the Companies Act, 2015, which requires validly executed company documents to be signed by 2 authorized signatories or a director.
57. Ms. Jemator pressed on that Ms. Mercy Kamau did not have the authority to swear the affidavits in support of the Request for Review and thus leave the Request for Review unsupported since Regulation 203 requires that a Request for Review be supported by an affidavit. She argued that the absence of the affidavit left the request for Review incompetent.
58. Counsel argued that from the Procuring Entity's response in the proceedings the evaluation of tenders submitted in the subject tender was in compliance with the law. Counsel argued that the Applicant was inviting the Board to re-evaluate its submitted tender, which power is a preserve of the Procuring Entity's Evaluation Committee under section 80 of the Act.
59. She argued that its Notice of Preliminary Objection dated 29th September 2023 was filed in good time having been served with hearing notice on 26th September 2023.

60. Additionally, she submitted that a Preliminary Objection can be filed at any time and that the Applicant had not pleaded any prejudice that it stood to suffer. Counsel indicated that the nature of the Notice of Preliminary Objection dated 3rd October 2023 was that which could not be filed in advance as it would give time for the Applicant to remedy that which the Preliminary Objection was raising.
61. Counsel contended that the alleged Power of Attorney granting Ms. Mercy Kamau the authority to represent the Applicant in the present proceedings was a nullity as it could not have been contemplated at the time of tender submission that the instant Request for Review would be filed.

Applicant's Rejoinder

62. In a brief rejoinder, Mr. Gachuba reiterated that the Interested party was not a proper party before the Board in the present proceedings as it never made an application to participate in the proceedings.
63. He added that assuming the Interested Party was served on 26th September 2023, then the only valid Notice of Preliminary Objection by the Interested Party would be that dated 29th September 2023 and thus the one dated 3rd October 2023 ought to be struck out.
64. Mr. Gachuba pointed out that the Interested Party had not seen the Power of Attorney and Minutes granting authority to Ms. Mercy Kamau to represent the Applicant in the present proceedings since they formed part of the Applicant's submitted tender. He invited the Board to look at pages MK004 and MK005 of its original submitted tender which had been forwarded to the Board.

65. Counsel further pointed out that Regulation 203 does not require that a Request for Review must be supported by an affidavit and that a statement would equally suffice.
66. Mr. Gachuba submitted that if there was any misunderstanding in the Applicant's submitted tender the Evaluation Committee needed clarity on they would have resorted to ITT 28 through which the Procuring entity would have sought clarification from the Applicant.
67. He further pressed that the Applicant suffered loss as it was unfairly disqualified having garnered less than deserved marks. Reliance was placed on ***R v PPARB [2008]eKLR*** for the argument that there cannot be greater prejudice on the part of a tenderer than for the Procuring Entity to fail to adhere to the law. He therefore sought the Request for Review to be allowed.

CLARIFICATIONS

68. The Board sought clarification on whether it could validly substitute the marks awarded to the Applicant by the Procuring Entity's Evaluation Committee, to which Mr. Gachuba answered in the affirmative.
69. The Board inquired on the loss that the Applicant suffered following its evaluation by the Procuring Entity's Evaluation Committee. Mr. Gachuba affirmed that the Applicant lost on the commercial opportunity to be awarded the subject tender.
70. The Board sought clarity from the Interested Party as to whether its Notice of Preliminary Objection dated 3rd October 2023 was filed within

time. Ms. Jemator indicated that the Objection raised therein was special as it could have been defeated in the event it was brought earlier. Counsel argued that the objection related to the authority of Ms. Kamau signing documents on behalf of the Applicant and that had it been brought earlier, the Applicant would defeat it by filing a letter of authority for Ms. Kamau to represent the Applicant.

71. The Board sought clarity from the Respondent as to whether its Letter of notification of Award was compliant with Section 87(3) of the Act. Mr. Njuguna made an admission that the notification failed to capture the identity of the successful tenderer but sought the Board exercise its powers under section 173 of the Act and order the rectification of any such omission.
72. The Board also sought clarity from the Applicant on the legal basis for the invitation for the re-evaluation of its submitted tender. Mr. Gachuba referred the Board to the definition of review under the Black's Law Dictionary as well as Valentines Law Dictionary.
73. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 19th September 2023 had to be determined by 11th October 2023 since the statutory timeline of 21 days was ending on 10th October 2023 which was a public holiday. Therefore, the Board would communicate its decision on or before 11th October 2023 to all parties via email.

BOARD'S DECISION

74. The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. Whether the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 are competent notices having been filed by a party who was not disclosed as the successful tenderer in the Procuring Entity's Letter of Notification dated 2nd September 2023?***
- II. Whether the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 are time-barred under Regulation 209(1) of the Regulations?***

Depending on the determination of the issues (I) and (II) above:

- III. Whether the Applicant lacks the locus standi to bring the instant Request for Review for failure to disclose it having suffered risk or risked suffering loss and damage?***
- IV. Whether the instant Request for Review is incompetent for being supported by Affidavits by an affiant who allegedly lacked the authority to depone the said affidavits?***

Depending on the determination of the Issues (III) and (IV) above:

- V. Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender at the Technical Evaluation Stage in compliance with the provisions of Section 80 of the Act and Regulation 76 and the Tender Document?***
- VI. Whether the Notifications of Intention to Award issued by the 1st Respondent in respect of the subject tender conform with the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?***
- VII. What orders should the Board issue in the circumstance?***

Whether the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 are competent notices having been filed by a party who was not disclosed as the successful tenderer in the Procuring Entity's Letter of Notification dated 2nd September 2023?

75. When the Board's Secretariat served the Request for Review upon the Interested Party, the Interested Party filed a Replying Affidavit sworn by Ms. Njeri Jomo together with 2 Notices of Preliminary Objection i.e. one dated 29th September 2023 and the other 3rd October 2023. The Applicant objected to the said Notices of Preliminary Objection through 2 separate Grounds of Opposition i.e. one dated 3rd October 2023 and the other 5th October 2023. In both Grounds of Opposition, the Applicant was emphatic that the Interested Party was not a proper party before the Board in view of the fact that the Letter of Notification of Award by the Procuring Entity did not disclose the Interested Party as the successful tenderer.

76. During the hearing, Counsel for the Applicant made the argument that the Interested Party could only regularize its appearance as a party in the present proceedings upon making an application before the Board. Further, since no application was made the Interested Party was not properly before the Board and thus could not file responses including the 2 Notices of Preliminary Objection.
77. Counsel for the Interested Party, Ms. Jemator, in rebuttal submitted that the Interested Party was properly before the Board having been invited to participate in the present Request for Review as the successful tender in the subject tender.
78. Counsel for the Respondent, Mr. Njuguna supported the Interested Party arguing that the Interested Party was a relevant party to the present proceedings having been the successful tenderer in the subject tender. He contended that contrary to the argument by Counsel for the Applicant, that the Interested Party was required to make an application to participate in the instant proceedings, the Interested Party was not required to make any such application as a successful tenderer under section 170 of the Act.
79. This Board is therefore being invited to determine whether the Interested Party is a proper party in the present proceedings.
80. Section 170 of the Act identifies the parties to a Request for Review before the Board, in the following terms:

170. Parties to review

The parties to a review shall be—

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

81. From the above section, it is clear that parties to a Request for Review include: The Applicant making the request; the Accounting Officer of a Procuring Entity; the successful tenderer in the tender in question, and any such other party that the Board may determine.

82. In the present case, the Interested Party filed a Replying Affidavit sworn on 29th September 2023 by Ms. Njeri Jomo and paragraph 8 of the said affidavit indicates that the Interested Party was the successful tenderer in the subject tender. The Affidavit had an annexure marked "NJ-2", a Letter of Notification of Award which mirrors that submitted by the Procuring Entity as part of the Confidential Documents. The said letter is herein reproduced for ease of reference:

"Head of Business Development- Medical Scheme

M/s Jubilee Insurance Company Limited

P.O. Box 30376-00100

Nairobi

Dear Sir/Madam,

PROVISION OF MEDICAL SCHEME FOR KIE STAFF TENDER NO:

KIE/01/2023-2024

The above captioned item refers.

Kenya Industrial Estates (KIE) is a State Corporation with the mandate of promoting indigenous entrepreneurship by financing and developing Small Scale and Micro Enterprises (SMEs).

This is to notify you that your tender bid for Provision of Staff Medical Scheme, Tender No. KIE/01/2023-2024 for contract Premium of Kshs. 27,310,761.00 (Kenya Shillings Twenty-Seven Million, Three Hundred and Ten Thousand, Seven Hundred and Sixty-One Shillings Only, inclusive of taxes) being the lowest bidder in accordance with instructions to tenderers has been awarded to you. The contract shall be for a period of One (1) Year renewable subject to performance. It is our intention to proceed to make a written contract in accordance with the terms of section 134 of the Public Procurement and Asset Disposal Act, 2015 after the 14 day notification has expired. The contract shall be signed within 30 days of the date of this letter (sic) but not earlier than 14 days from the date of this letter.

Please acknowledge receipt of this letter of notification of acceptance by signing and returning the attached copy.

Yours faithfully,

Signed,

DR. P. NARIKAE, PhD, MBS

MANAGING DIRECTOR

83. The Applicant was emphatic in their argument that the Interested Party was not a proper party to the instant proceedings as they were neither

disclosed as the successful tenderer in the subject tender nor did they make an application to participate in the proceedings.

84. The Board has keenly studied the letter of notification addressed to the Applicant and the same is hereinafter reproduced for ease of reference:

"M/S TRIDENT ASSURANCE COMPANY LIMITED

P.O. BOX 55651-00200

NAIROBI

Dear Sir/Madam,

**PROVISION OF MEDICAL SCHEME FOR KIE STAFF TENDER NO.
KIE/TNO/01/2023-2024**

The above matter refers.

This is to inform you in accordance with Section 87(3) of the Public Procurement and Asset Disposal Act 2015 that your offer in relation to the Provision of Staff Medical Scheme has been determined to be unsuccessful upon completion of Technical Evaluation.

You were unsuccessful because your bid under technical score was 62% which is below the pass mark of 75% to qualify for further evaluation under financials.

Please note the original tender security bond will be sent to you via Postal Address as stipulated in the tender document.

We thank you for participating the tender.

Yours faithfully,

Signed

DR. P.NARIKAE, PhD, MBS

MANAGING DIRECTOR"

85. From the letters reproduced above it is apparent that the Interested Party was the successful tenderer in the subject tender but this fact was not communicated to the unsuccessful tenderers including the Applicant. Notwithstanding the foregoing, the Procuring Entity's failure to communicate the identity of the successful tenderer does not of itself take away from the Interested Party their claim as the successful tenderer in the subject tender. Accordingly, for all intents and purposes including the present proceedings, the Interested Party was the successful tenderer in the subject tender.
86. Section 170(c) recognizes successful tenderers as proper parties to Requests for Review before the Board. Accordingly, this Board does not hesitate to make a finding that the Interested Party as the successful tenderer in the subject tender was a proper party to the present proceedings and need not make an application to be made a party in the proceedings.
87. We say so because as the successful tenderer whose success is the subject of review, the Interested Party has a stake in the proceedings and should be accorded an opportunity to make a representation before any decision can be made on their award. This is in line with the right to fair hearing and fair administrative action as enshrined under Articles 50 and 47 of the Constitution.

88. Additionally, the Interested Party did not just find itself in the present proceedings. Its presence in the proceedings was prompted by an invitation by the Board to all tenderers in the subject tender to make their representations in respect of the Request for Review.
89. The Board therefore finds that the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 are competent notices having been filed by the Interested Party who despite being the successful candidate was not disclosed to the unsuccessful tenderers in the Procuring Entity's Letter of Notification dated 2nd September 2023.

Whether the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 are time-barred under Regulation 209(1) of the Regulations?

90. The Applicant also assailed the Interested Party's Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 respectively for being time-barred under Regulation 209(1) of the Regulations 2020. Counsel for the Applicant Mr. Gachuba argued that the Respondent and Interested Party having been served with the Board Secretary's Notification of Appeal on 19th September 2023 ought to have filed their Notices of Preliminary Objection by 22nd September 2023, which was 3 days from the date of receipt of the Notice of Appeal. Counsel argued that since both of the Interested Party's Notices of Preliminary Objection were filed after 22nd September 2023, they should be struck out as the Board had no jurisdiction to hear them.

91. The Respondent and Interested took a different view of the matter. They took the position that the Notices of Preliminary Objection were filed within the timelines provided under Regulation 209. Mr. Njuguna specifically pointed out that Regulation 209 gave parties 3 days from the date of receipt of a hearing notice to file their objections, if they so desired. He argued that in the instant case the hearing notice was issued on 26th September 2023 and thus this was the benchmark date in establishing whether the Notices of Preliminary Objection were time-barred and in his view, they were not.
92. Counsel for the Interested Party, Ms. Jemator, argued that having been served with the hearing notice on 26th September 2023, the Interested Party's Notice of Preliminary Objection dated 29th September 2023 was filed within the 3-day statutory timeline. As for the Notice of Preliminary Objection dated 3rd October, 2023 Counsel argued that this raised a special objection which could easily be defeated if it was filed in advance. Counsel pointed out that the Objection related to the authority of Ms. Mercy Kamau deponing affidavits on behalf of the Applicant and that in the event this was brought up at the outset, the Applicant would easily remedy this by subsequently filing the authorizing documents.
93. Preliminary Objections in proceedings before the Board are governed by Regulation 209 of the Regulations 2020 which provides as follows:

209. Preliminary objections

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review

to the Secretary of the Review Board within three days from the date of notification.

(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based and shall be served to the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations.

94. On its part Regulation 206 of the Regulations 2020 provides as follows:

206. Notice of Hearing

(1) The Review Board Secretary shall give reasonable notice of the date fixed for the hearing to all parties to the review.

(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations.

95. From the above Regulation it is apparent that (i) A party should file their Preliminary Objection within 3 days of their receipt of the hearing notice; (ii) the Preliminary Objection should on its face contain grounds of the objection and be served on the Applicant at least 1 day before the hearing; (iii) the Applicant may file a response to the Preliminary Objection any time before the hearing; (iv) the Board has the option of hearing the Preliminary Objection separately or together with the Request

for Review; and (v) the filing fees for the Preliminary Objection is as prescribed in the Regulations.

96. Turning to the instant case, the Board Secretary issued the original hearing notice for the present proceedings on 26th September 2023. It would therefore follow that the 3-day statutory timeline would be looked in to on the basis of this date.
97. Computing the dates, the statutory window for filing a Preliminary Objection against the hearing of the Request for Review would be between 26th September 2023 and 29th September 2023.
98. The above computation of the 14 days' statutory window is informed by the provisions under section 57 of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA") which directs:

57. Computation of time

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

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

99. Accordingly, the Board does not hesitate to find any Notice of Preliminary Objection filed after 29th September 2023 as having been filed outside the statutory timeline and therefore time-barred.
100. The Interested Party filed 2 Notices of Preliminary Objection dated 29th September 2023 and 3rd October 2023 respectively. The Notice of Preliminary Objection dated 29th September 2023 was filed on 29th September 2023 which happened to be the last day on which the Objection could be filed and thus was filed within time.
101. However, the Interested Party's Notice of Preliminary Objection dated 3rd October 2023 was filed on 4th October 2023, which was 5 days past the deadline for filing the Objection. Accordingly, the Board finds that the Notice of Preliminary Objection dated 3rd October 2023 was filed outside time and is time-barred.
102. In light of the foregoing, the Board finds that the Interested Party's Notice of Preliminary Objection dated 29th September 2023 is not time-barred under Regulation 209(1) of the Regulations 2020. However, the Notice of Preliminary Objection dated 3rd October 2023 is time-barred under Regulation 209(1) of the Regulations. The Board is of the view that the fear by the Interested party that the same could be defeated by filing of an authority is not sufficient or a cure for the late filing. Indeed it is proper that where there is no dispute on the authority of the deponent to swear any document in proceedings that fact is a relevant fact that should freely be brought before the Board and save judicial time.

Whether the Applicant lacks the locus standi to bring the instant Request for Review for failure to disclose it having suffered loss or risked suffering loss and damage?

103. The Interested Party challenged the locus standi of the Applicant to institute the instant proceedings through the Notice of Preliminary Objection dated 29th September 2023. Ground 1 of the said Objection indicated that the Applicant failed to meet the threshold provided under Section 167 of the Act i.e. failure to disclose having suffered or risked suffering loss or damage due to any breach of a duty imposed on a Procuring Entity by the Act or Regulations.
104. During the hearing, Counsel for the Interested Party, Ms. Jemator, submitted that this failure on the part of the Applicant effectively divested the Board of jurisdiction to hear the instant Request for Review. For this, she placed reliance on the Court of Appeal decision in ***James Oyondi t/a Betoyo Contractors & Anor v Elroba Enterprises Limited & 8 Ors.***
105. On his part, Counsel for the Applicant, Mr. Gachuba, submitted that the Applicant suffered great loss as it was unfairly disqualified from the subject tender at the technical stage when it ought to have qualified for further evaluation at the financial stage. Counsel, placed reliance on the High Court case of ***R V PPARB [2008] eKLR*** arguing the Evaluation Committee occasioned unfairness by failing to evaluate its submitted tender as per the requirements of the tender document.
106. Section 167 of the Act is instructive on who can institute a Request for Review before the Board in the following terms;

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.

107. The Court of Appeal in ***James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** considered an appeal against the decision of the High Court that had found that the Board erred by entertaining a Request for Review where the Applicant did not plead having suffered any loss. In dismissing this ground of appeal the Court of Appeal affirmed that the failure of a candidate or a tenderer to plead loss suffered or likely to be suffered flowing from breach of a Procurement Entity's duty divests the candidate or tenderer the *locus standi* to approach the Board:

It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

"(1) subject to the provisions of this part, a candidate or a tender, 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.”

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed to keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.

108. Equally, this Board in its Decision in ***PPARB Application No. 20 of 2023; Godfrey Musaina v The Accounting Officer, Information and Communication Technology (ICT) Authority*** affirmed that a candidate or tenderer who fails to plead having suffered or risks suffering

loss or damage lacks the locus to seek administrative review of a Procuring Entity's decision before the Board:

In view of the foregoing, the Board is inclined to find that the Request for Review failed to meet the threshold required for filing a competent Request for Review as provided under section 167(1) of the Act having failed to plead and disclose the risk or loss suffered or likely to be suffered. It therefore follows that the instant Request for Review is fatally defective.

Consequently, this ground of objection succeeds because the Applicant herein has failed to plead that that it has suffered or is likely to suffer loss or damage due to the alleged breach of duty impose on the Procuring Entity by the Constitution, the Act and Regulations 2020.

109. Guided by section 167(1) and the above decisions, this Board takes the view that in order for an Applicant to seek administrative review on a decision by a Procuring Entity, (i) the Applicant should be a candidate or a tenderer; (ii) the Applicant should claim having suffered or risk suffering loss or damage; (iii) the loss or damage must flow from the breach of a duty imposed on the Procuring Entity by the Act or Regulations and (iv) the Request for Review should be filed within 14 days of notification of award or occurrence of breach complained of.

110. In the present case, the Board has keenly studied the Request for Review dated 18th September 2023 and 2 affidavits sworn by Ms. Mercy Kamau in support thereof and observed that the Applicant never pleaded having

suffered or been at the risk of suffering loss or damage as a consequence of the breaches it alleged in its Request for Review.

111. It is only during the hearing that Counsel for the Applicant, Mr. Gachuba submitted that the Applicant suffered loss consequent to the breaches attributed to the Procuring Entity.
112. Guided by the Court of Appeal case of ***James Oyondi t/a Betoyo Contractors & Anor v Elroba Enterprises Limited & 8 Ors.*** this Board does not hesitate to affirm the position that failing to plead loss or risk of suffering loss and damages divests any Applicant the locus standi to file a Request for Review before the Board. Therefore, the Applicant failed to bring itself within the threshold contemplated under section 167(1).
113. In view of the foregoing, the Board finds that the Applicant lacks the locus standi to bring the instant Request for Review for failure to plead having suffered loss or risked suffering loss and damage by reason of the breach and thus this Board is divested the jurisdiction to hear the instant Request for Review.

Whether the instant Request for Review is incompetent for being supported by Affidavits by an affiant who allegedly lacked the authority to depone the said affidavits?

114. Having held that the Applicant lacks locus standi as above the Board will not address this issue.

Whether Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender at the Technical Evaluation

Stage in compliance with the provisions of Section 80 of the Act and Regulation 76 of the Regulations 2020 and the Tender Document?

115. Having found as above in regard to the Applicant's locus standi, the Board will not address this issue.

Whether the Notifications of Intention to Award issued by the 1st Respondent in respect of the subject tender conform with the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?

116. Having made the finding above in regard to the Applicant's locus standi in this matter, the Board will not address this issue.

What orders the Board should grant in the circumstances?

117. The upshot of our finding is that the Request for Review dated 18th September 2023 in respect of KIE/TNO.01/2023-2024 for the Provision of Staff Medical Scheme Cover fails and makes the following specific orders:

FINAL ORDERS

118. 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 18th September 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 3rd October 2023 be and is hereby struck out.**

2. The Interested Party's Notice of preliminary Objection dated 29th September 2023 be and is hereby upheld to the extent that the Applicant failed to disclose having suffered or risked suffering loss or damage due to an alleged breach of a statutory duty on the part of the Procuring Entity.
3. The Request for Review dated 18th September 2023 be and is hereby struck out.
4. Given the Board's finding above, each party shall bear its own costs.

Dated at NAIROBI, this 11th Day of October 2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB