

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 69/2023 OF 5TH OCTOBER 2023

BETWEEN

ABSA LIFE ASSURANCE KENYA LIMITED.....APPLICANT

AND

DIRECTOR GENERAL,

PARLIAMENTARY JOINT SERVICES.....RESPONDENT

APA LIFE ASSURANCE LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Parliamentary Joint Services in relation to Tender No. PJS/003/2023-2024 for the Provision of Group Life Insurance Cover for Staff of Parliamentary Service Commission.

BOARD MEMBERS PRESENT

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|----------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Mrs. Irene Kashindi, FCI Arb. | - | Member |
| 3. Mr. Alexander Musau | - | Member |
| 4. Mr. Daniel Langat | - | Member |
| 5. Ms. Alice Oeri | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

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Mr. Anthony Simiyu

- Secretariat

PRESENT BY INVITATION

APPLICANT - ABSA LIFE ASSURANCE KENYA LIMITED

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

**RESPONDENT DIRECTOR GENERAL, PARLIAMENTARY
JOINT SERVICES**

Mr. Huka Mamo - Advocate, Parliamentary Joint Services

Ms. Olivia Ngige - Advocate, Parliamentary Joint Services

INTERESTED PARTY APA LIFE ASSURANCE LIMITED

Mr. Austin Ayisi - Advocate, Matheka & Oketch Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Parliamentary Joint Services, the Procuring Entity together with the Respondent herein, invited sealed tenders in response to Tender No. PJS/003/2023-2024 for the Provision of Group Life Insurance Cover for Staff of the Parliamentary Service Commission using an open national competitive tender method. The subject tender submission deadline was Friday, 8th September 2023 at 11:00 a.m.



Addendum

2. On 1st September 2023, the Procuring Entity issued an Addendum notifying all interested candidates that the tender document had been revised and that the revised document could be obtained on the Procuring Entity's website www.parliament.go.ke as well as the Public Procurement Information Portal www.tenders.go.ke.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes dated and signed on 11th September 2023 under the Confidential File submitted by the Procuring Entity, the following 13 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.	ABSA Life Assurance Kenya Limited
2.	Liberty Life Assurance Kenya Limited
3.	Jubilee Life Assurance Limited
4.	Sanlam Life Insurance Limited
5.	Madison Life Assurance Kenya Limited
6.	Zamara Risk and Insurance Brokers Kenya
7.	Pioneer Assurance Company Limited
8.	CIC Life Assurance Limited
9.	Geminia Life Insurance Company Limited
10.	Old Mutual Life Assurance Kenya Limited
11.	APA Life Assurance Limited
12.	Liaison Group (Insurance Brokers) Limited
13.	Cannon Life Assurance (K) Limited

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 13 tenders in the following 4 stages as captured in the Evaluation Report
 - i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage
 - iv. Due Diligence Stage

Preliminary Evaluation

5. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Stage 1: Preliminary Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 25 to 26 of the Tender Document.
6. 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.
7. At the end of the evaluation at this stage, 5 tenders were found unresponsive with the other 8 tenders qualifying for further evaluation.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 2: Technical

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Evaluation under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on pages 27 to 29 of the Tender Document. Tenderers were required to garner a minimum score of 80 marks at this stage in order to qualify for further evaluation at the Financial Evaluation Stage.

9. At the end of the evaluation at this stage, all the 8 tenders evaluated at this stage, including those of the Applicant and the Interested Party, were found responsive and thus qualified for further evaluation at the Financial Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 3: Financial Evaluation under ITT 36.1 under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS on pages 27 to 29 of the Tender Document.
11. Tenderers were required to adhere to the recommended IRA ratings and price and the tenderer determined to be the Lowest Evaluated Tender price would be selected for award of the tender. In the event of a tie on the lowest evaluated tender, the successful tenderer would be that with the highest score at the Technical Stage of Evaluation.
12. The Evaluation Committee found that there was a tie in the lowest evaluated tender between 4 tenderers, including the Interested Party's tender. Upon assessing the technical scores, the Interested Party's tender was found as the successful tenderer as it garnered the highest technical score of the 4 tenderers.

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13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party for a period of two years at its quoted annual premium of **Kenya Shillings Forty-Seven Million, Three Hundred and Eighty-One Thousand, Seven Hundred and Thirty (Kshs. 47,381,730.00) inclusive of taxes.**

Evaluation Committee's Recommendation

14. 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

15. In a Professional Opinion dated 13th September 2023 (hereinafter referred to as the "Professional Opinion"), the Chief Procurement Officer, Mr. Keith Kisinguh, 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 subject to the Interested Party being subjected to due diligence. The Respondent concurred with said Professional Opinion.

Due Diligence

16. According to a Due Diligence Report signed and dated on 22nd September 2023, and submitted to the Board as part of the Confidential Documents, the Evaluation Committee wrote confidential letters to 3 of the Interested Party's provided major clients to confirm similar contracts undertaken by the Interested Party. Only 2 of the Interested Party's responded, while the third did not. The received responses were both positive and thus the



Evaluation Committee recommended the award of the subject tender to the Interested Party.

Notification to Tenderers

17. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 22nd September 2023, which were sent through email.

REQUEST FOR REVIEW

18. On 5th October 2023, the Applicant filed a Request for Review dated 4th October 2023 supported by an Affidavit sworn on 4th October 2023 by Mr. Githanji Waiguru, the Applicant's Managing Director and Principal Officer, seeking the following orders from the Board in verbatim:

a) The Respondent's decision that the Interested Party's tender was responsive at the preliminary stage be substituted with the Board's decision that the Interested Party's tender was non-responsive at the preliminary examination stage.

b) The Respondent's decision that the Interested Party's tender was the lowest evaluated at the financial evaluation stage be substituted with the Board's decision that the Interested Party's tender was not the lowest evaluated.

c) The Respondent's award of the Tender for Provision of Group Life Insurance Cover for Staff of Parliamentary Service Commission (Tender No. PJS/003/2023-2024) to the Interested Party be annulled and set aside.

d) The Respondent's notification of award of the Tender for Provision of Group Life Insurance Cover for Staff of

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Parliamentary Service Commission (Tender No. PJS/003/2023-2024) to APA Life Assurance dated 22nd September, 2023 be annulled and set aside.

e) The Respondent's decision that the Applicant's tender was not the lowest evaluated be substituted with the Board's decision that the Applicant's tender was the lowest evaluated.

f) The Respondent be directed to award the Applicant's tender in accordance with the law and the tender document.

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

19. In a Notification of Appeal and a letter dated 5th October 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 5th October 2023.
20. On 6th October 2023, the Applicant filed an Amended Request for Review dated 6th October 2023.
21. On 9th October 2023, the Respondent filed a response dated 6th October 2023 in response to the Request for Review. The Respondent also

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submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act. The Respondent would later on, on 11th October 2023 file a Further Response dated 9th October 2023 in response to the Amended Request for Review

22. Vide letters dated 11th October 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 11th October 2023.
23. On 13th October 2023, the Respondent filed a Consolidated Memorandum of Response consolidating its earlier responses dated 6th October 2023 and 11th October 2023 respectively.
24. Also, on 13th October 2023, the Interested Party, through the law firm of Matheka Oketch & Company Advocates, filed a Notice of Appointment of Advocates dated 13th October 2023 as well as a Replying Affidavit sworn on 13th October 2023 by Ms. Catherine Karimi, the Interested Party's Chief Executive Officer.
25. On 16th October 2023, the Acting Board Secretary, through a Hearing Notice of even date notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 18th October 2023 at 11.00 a.m. through the link availed in the said Hearing Notice.

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26. On 17th October 2023, the Applicant filed a Further Affidavit sworn on 16th October 2023 by Mr. Githanji Waiguru in response to the Interested Party's Replying Affidavit.
27. On the morning of the hearing of 18th October 2023, the Applicant filed Written Submissions dated 18th October 2023.
28. During the online hearing at 11.00 a.m. all the parties herein none of the parties save for the Applicant were represented. The Board adjourned the hearing to allow the Secretariat to contact the Respondent to remind them to join the online hearing session.
29. As at 11.30 a.m. the Respondent had not joined the session. The Board satisfied itself that both the Respondent and Counsel for the Interested Party had been served with the Hearing Notice through the email dated 16th October 2023 and directed the hearing to proceed as scheduled. Counsel for the Applicant was assigned 10 minutes to present his Client's case.
30. Counsel for the Respondent, Mr. Gachuba began his address to the Board but midway in to his address, Counsel for the Respondent, Mr. Mamo interjected and informed the Board that the Respondent had just been served with the Hearing Notice while the online hearing was underway. He also told the Board that the Applicant served its Written Submissions upon the Respondent on the morning of the hearing denying it adequate time to prepare its Submissions in response. In view of the foregoing, Mr. Mamo sought an adjournment.

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31. Mr. Gachuba opposed the adjournment application pointing out that the Respondent was served with the Hearing Notice for 18th October 2023 as the Respondent's email was part of the addressees to the Secretariat's email dispatching the Hearing Notice.
32. The Board retreated to consider the application made on behalf of the Respondent before returning a Ruling. In its Ruling, the Board allowed the Respondent's application on account service of Written Submissions on the morning of the hearing.
33. Additionally, the Board cautioned Counsel for the Respondent against his attempt at misleading the Board on service of the Hearing Notice upon the Respondent. The Board was satisfied that the Respondent was served with the Hearing Notice for 18th October 2023 as its email address dg@parliament.go.ke was among the addressees under the email the Hearing Notice was sent to all parties and tenderers who participated in the subject tender.
34. Consequently, the online hearing was adjourned to 23rd October 2023 at 12.00 noon with directions that the Respondent and Interested Party were at liberty to file their Written Submissions on or before 19th October 2023.
35. Shortly after the adjournment of the hearing session, the Secretariat sent out a new online hearing link for 23rd October 2023.
36. On 19th October 2023, the Respondent and the Interested Party filed their separate Written Submissions each dated 18th October 2023.
37. During the online hearing, all the parties herein were represented by their respective Advocates.

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38. 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

39. During the online hearing, Counsel for the Applicant, Mr. Gachuba, relied on the Applicant's filed documents i.e. Request for Review dated
40. Counsel argued that the Amended Request for Review was competent as it was filed on 6th October 2023, which was the last day of the statutory 14 days within which it could bring the Request for Review.
41. Counsel further argued that none of the parties suffered any prejudice following the amendment as they filed responses to the Amended Request for Review. The Respondent filed a Further Response to the Request for Review as well as a Consolidated Memorandum of Response. The Interested Party also filed a response to the Amended Request for Review.
42. Mr. Gachuba argued that the amendment was brought under Order 8 Rule 1 of the Civil Procedure Rules 2010.
43. Counsel further argued that the Amended Request for Review did not need to be supported by a Supporting Affidavit since the face of the Amended Request for Review indicated that it was supported by the

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affidavit sworn on 4th October 2023 by Githanji Waiguru. He placed reliance on the case of ***Jackline Njambi Kinyanjui v Margaret Wairimu [2012]eKLR***

44. On the competency of the Request for Review as to whether it disclosed loss and damage, Mr. Gachuba argued that the Applicant claims to have suffered a financial loss of Kshs. 47,500,224.00 attributable to the Respondent's breaches. He argued that the breaches occasioned the disqualification of the Applicant at the financial stage while the tender was awarded to the Interested Party who according to the Applicant did not submit a responsive tender.
45. Regarding the substance of the Request for Review, Counsel argued that ITT 15.4 of the Tender Document required duties, taxes and levies payable by insurers to be included in the tender price.
46. Mr. Gachuba further argued that Mandatory Requirement No. 5 under the Preliminary Evaluation Stage required that the price schedule forms indicate the workings by the tenderers. It was his contention that the Respondent ought to have been guided by the Debit Note template in the Policyholders Compensation Fund Presentation attached to the Request for Review, which then should have required tenderers to indicate in their price schedule a computation that clearly outlined the basic premium, stamp duty as well as the contribution to the Policyholders Compensation Fund.
47. Counsel argued that Section 81 of the Act and ITT 28 of the Tender Document placed a duty on the Respondent to seek clarification from the Interested Party on whether its tender sum of Kshs. 47,381,730.00 was

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the minimum of basic premium. He argued that this was because the Interested Party did not indicate in its price schedule that the tender sum was inclusive of the stamp duty and contribution to the Compensation Fund.

48. Mr. Gachuba therefore contended that by failing to seek the clarification and assuming that the Interested Party's tender sum included the stamp duty and contribution to the Compensation Fund, the Respondent breached articles 47 and 227 of the Constitution. According to the Applicant, this created a façade that the Interested Party had clearly shown its workings of its total premiums when in fact no workings had been presented.

Respondent's Case

49. Counsel for the Respondent, Ms. Ngige submitted that the Request for Review dated 4th October 2023 did not state how the Respondent breached a statutory duty as well plead having suffered loss or risk of suffering loss and damage as required under section 167 (1) of the Act. She placed reliance on the case ***of James Oyundu t/a Betoyo Contractors & another v Elroba Enterprises Limited*** to argue that the Request for Review was incompetent and that the amendment was an afterthought to ensure mechanical compliance
50. Counsel also argued that the amendment was irregular as there is no provision for amendment of the Request for Review under the Act or Regulations 2020. She argued that the Board was not governed by the provisions of the Civil Procedure Rules.

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51. Counsel further argued that the amended Request for Review was also not supported by an affidavit as required by Regulation 203 (1) of the Regulations 2020.
52. Additionally, it was argued that the amendment was also vague and lacking in specificity. She argued it did not specify the duties the Respondent had breached.
53. Counsel faulted the Applicant for pleading financial loss on the basis of anticipated income on a tender that it was not awarded. She argued that a tender sum submitted by a tender does not automatically convert to a financial loss if the tenderer does not emerge successful.
54. Ms. Ngige argued that the Respondent complied with the Constitution, Act and Regulations 2020. She submitted that upon evaluation of the submitted tenders the Interested Party's tender emerged the lowest evaluated tender.
55. Counsel further faulted the Submissions made on behalf of the Applicant for bringing up the issue of workings during submissions when the same was neither pleaded in the Amended Request for Review nor the Request for Review dated 4th October 2023. For this reliance was placed on the case of ***Kenya Commercial Bank Ltd v Mwau Nzau Mbaluka & Anor [1998] eKLR.***
56. The Respondent also questioned how the Applicant managed to peruse through the Interested Party's tender document.

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57. Ms. Ngige argued that ITT 15.4 required levies and taxes to be included in the total tender price and that the Interested Party's Price Schedule and Financial Proposal showed how the Interested Party arrived at its premiums.
58. Counsel for the Respondent, Mr. Mamo submitted that the obligation to pay taxes and levies is on the bidders. The tender document required that the submitted tenders to be deemed as inclusive of taxes and levies.
59. He argued that taxes include VAT, which tax the Applicant did not mention as it only made reference to stamp duty and the contribution to the Compensation Fund. He argued that the Applicant in its own workings did not capture VAT.
60. He referred board to ***R v PPARB & 2 Others Industrial & Commercial Development Corporation [2017]eKLR*** where court stated that Procuring Entity has no power to invoke clarification where the terms of the tender document are clear.
61. He also indicated that seeking clarification from the Interested Party alone would be unfair as there were other bidders who submitted the same bid amount.
62. He further submitted that it was not correct as alleged by the Applicant that the Interested Party quoted their premium below the recommended IRA rating.

Interested Party's Case

63. Counsel for the Interested Party, Mr. Ayisi submitted that the Interested Party's tender was responsive. He referred to Financial Proposal by the





Interested Party which bears the workings leading to the submitted tender price.

64. Mr. Ayisi submitted that all the tenderers have their tender prices listed and that the premiums quoted by the Interested Party met the criteria under the Tender Document as it included all taxes and levies.
65. Counsel pointed out that Financial Evaluation under the Tender Document was clear that tenderer's quoted prices were not subject to correction and the Applicant's suggestion for clarification on their tender price would amount to correction.
66. Counsel relied on the case of ***R v PPARB & 20rs Ex Parte Industrial & Commercial Development Corporation [2017]eKLR*** for the argument that there was no need for clarification when the tender document was clear.
67. He also referred to case of ***Kenya Civil Aviation v Indra Limited & another [2016] eKLR*** for the argument that placing an obligation on the Procuring Entity to look at payable taxes separately from the tendered sum would be contrary to the retirement of the tender document.
68. He submitted that under Regulation 32 of the Regulations 2020, the financial evaluation should be as per the tender document and that following the evaluation of the Interested Party's tender document, its tender emerged as the lowest evaluated tender.
69. Mr. Ayisi also pointed out that the law that governs the Procuring Entity in the procurement process is the Act as read with the Regulations and





the Constitution. He posited that issues of taxation are not within the purview of the Board or the Procuring Entity.

Applicant's Rejoinder

70. In a brief rejoinder, Mr. Gachuba reiterated that Civil Procedure Act and Rules apply to proceedings before the Board.
71. He further added that none of the parties stated the prejudice it suffered following the amendment of Request for Review.
72. Counsel submitted that the ***R v PPARB & 20rs Ex Parte Industrial & Commercial Development Corporation [2017] eKLR*** case was inapplicable as the Respondent had not complied with Mandatory Requirement No. 5 on showing of workings.
73. Counsel further indicated that the Applicant's case related to the Respondent seeking clarification and not the correction of any errors.
74. Mr. Gachuba also refuted that there were other additional taxes in respect of life assurance covers in addition to stamp duty and contribution to the Compensation Fund.
75. He added that compliance by the Procuring Entity is on the basis of multiple laws including taxation, company law etc. Applicant was denied award because it was compliant with the law.

CLARIFICATIONS

76. The Board sought clarification on whether the Procuring Entity observed the requirement in the tender document for showing workings in respect





of Interested Party's tender. Mr. Mamo indicated that this was to be found on the Financial Proposal included in the Interested Party's form of tender.

77. The Board also sought clarity on whether the Respondent had filed their response as at the time of receipt of the Amended request for Review. Ms. Ngige confirmed that the Respondent was yet to file their response.
78. The Board also sought clarity on what law would be considered in case of amendment. Ms. Ngige responded that the Act and the Regulations do not provide for amendment of requests for review.
79. The Board also sought clarity on whether the policy compensation fund levy was mandatory in the tender document and whether it was included in the calculation of the IRA rating of the premium. Mr. Mamo indicated that the levy could be included in the IRA rating.
80. The Board sought clarity on how the Applicant knew that the Interested Party had not submitted its workings. Mr. Gachuba submitted that the Respondent's annexure did not indicate workings.
81. The Board sought to clarify as to when the levies and stamp duty due, who is responsible for collection, what consequence follows the non-collection. The Applicant's counsel stated that both fall due after issuance of policy, collection is on the Insurer, non-collection attracts penalties and policy holders would be exposed in the event insurance collapse
82. At the conclusion of the hearing, the Board notified the parties that instant Request for Review having been filed on 5th October 2023 had to be determined by 26th October 2023 since the statutory timeline of 21 days





was ending on 26th October 2023. Therefore, the Board would communicate its decision on or before 26th October 2023 to all parties via email.

BOARD'S DECISION

83. 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 Applicant's Amended Request for Review is a competent Request for Review?

In answering this question, the Board will have to determine:

- i. Whether the Applicant's amendment of its Request for Review was proper?***
- ii. Whether the Amended Request for Review needed to be supported by an additional statement?***
- iii. Whether the Amended Request specified the Respondent's breach of statutory duties that allegedly led to the Applicant's loss or risk of suffering loss?***

II. Whether the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's bid in compliance with the provisions of Section 80 of the Act and Regulation 76 and the Tender Document?

III. What orders should the Board issue in the circumstance?

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Whether the instant Request for Review is a competent Request for Review?

84. The Respondent assailed the Applicant's Amended Request for Review on multiple fronts which shall be addressed as below:

i. Whether the Applicant's amendment of its Request for Review was proper?

85. Counsel for the Respondent, Ms. Ngige, was categorical that the Act and the Regulations 2020 do not provide for the amendment of Requests for Review filed before the Board. She argued that provisions of the Civil Procedure Act and Civil Procedure Rules, 2010 were inapplicable to proceedings before the Board and thus the Applicant could not purport to amend its Request for Review on the basis of Order 8 of the Civil Procedure Rules, 2010.

86. On the other hand, Counsel for the Applicant Mr. Gachuba affirmed that the Order 8 of the Civil Procedure Rules, 2010 was applicable to proceedings before the Board. He even indicated that this Board and the High Court in various decisions had affirmed the applicability of Civil Procedure Act and Civil Procedure Rules to proceedings before the Board.

87. The Board is therefore called upon to adjudicate on the applicability of the Civil Procedure Act on amendments of Requests for Review and generally whether a party can amend their pleadings before this Board.

88. This Board is aware that the Act and Regulations 2020 do not expressly refer to amendment of Requests for Review. The Board has, however, in its past decisions addressed the amendment of pleadings before it as



well as the applicability of certain procedures under the Civil Procedure Act and Rules.

89. In ***PPARB Application No. 9 of 2023; Asal Frontiers Limited v Accounting Officer, Kenya National Highways Authority*** the Board made the following comments on amendment of pleadings:

"We are alive to the fact that the Act and Regulations do not expressly mention amendment of pleadings. However, in practice this Board has permitted parties to amend their pleadings in adherence to article 48 of the Constitution of Kenya, 2010 that safeguards the right of access to justice...

...Guided by the above authorities, this Board holds that amendment of pleadings is as is done before the mainstream courts is also permitted in proceedings before this Board. Accordingly, we find no merit in the Respondents' Notice of Preliminary Objection dated 27th February 2023."

90. In ***Application No. 50 of 2023; Trident Insurance Company Limited v Secretary to the Independent Electoral and Boundaries Commission & anor*** the Board affirmed the applicability of the doctrine of res judicata, a legal doctrine provided for under the Civil Procedure Act:

102. While the Board is ordinarily mandated to follow the rules and procedures contained in the Act and Regulations 2020, it can also be guided by other legal propositions such as those derived from the Common Law and the Evidence Act while reviewing, hearing and determining tendering and disposal disputes. In any event, tendering and asset disposal

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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.....”

91. The High Court in ***Nairobi Judicial Review Application No. E113 of 2023; R v PPARB & 20rs Ex parte Trident Insurance Company Limited*** agreed with the above decision on the applicability of the Civil Procedure Act to proceedings before the Board.
92. The Applicant in the present case amended its Request for Review on 6th October 2023, which was also the deadline for its filing of a Request for Review challenging the proceedings in the subject tender. The Respondent and the Interested Party were also served with the Amended Request for Review before any of them had filed their responses and thus they were not prejudiced.
93. In view of the foregoing, the Board is satisfied that the Applicant's amendment of its Request for Review was proper.

ii. Whether the Amended Request for Review needed to be supported by an additional statement?

94. The Respondent attacked the Amended Request for Review for not being supported by an affidavit.
95. Mr. Gachuba in response argued that it was not necessary for the Amended Request for Review to be supported by a Request for Review





since the amendment did not of itself supplant the existing affidavit. He argued that the Amended Request for Review had a clause that indicated that it was supported by the affidavit sworn on 4th October 2023 by Githanji Wambugu.

96. Regulation 203 of the Regulations 2020 provides as follows:

203. Request for a review

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

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

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

97. From Regulation 203 above, it is clear that a Request for Review must be supported by a statement and that the Board will not hesitate to strike out a Request that is unsupported.

98. This Board has keenly studied the Amended Request for Review dated 6th October 2023 and notes the following paragraph appears at page 3 of the Request:

WHICH AMENDED REQUEST FOR REVIEW is supported by the affidavit sown by GITHANJII WAIGURU on 4th October 2023.

99. From the above, it is clear that the Applicant intended to incorporate the affidavit of Githanji Waiguru in support of its Amended Request for

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Review. Accordingly, this Board finds that the Amended Request for Review was supported by an Affidavit which qualifies as a statement under Regulation 203 of the Regulations 2020.

Whether the Amended Request specified the Respondent's breach of statutory duties that allegedly led to the Applicant's loss or risk of suffering loss?

100. The Respondents attacked the Amended Request for Review as vague for failing to disclose with specificity the duties the Respondent had breached as well as an outline of how the alleged breach occasioned loss to the Applicant.
101. The Board has keenly studied the 5 Grounds appearing in Amended Request for Review and notes that Applicant has outlined various provisions of the Constitution, the Act and Regulations 2020 and Tender Document for which it alleges the Respondent has breached in awarding the subject tender to the Interested Party. A reproduction of Grounds 1 and 5 would suffice:

1. The Respondent treated the Applicant unfairly by failing to disqualify the Interested Party's tender at the Preliminary Examination Stage as required under Article 47(1) and 227(1) of the Constitution of Kenya 2010; Section 79(1) of the Public Procurement and Asset Disposal Act, 2015; Regulation 74 and 75 of the Public Procurement and Asset Disposal Regulations 2020 and ITT 15.4 and Section III 2(b) and Stage 3 (a) of the Tender Document.



5.The Applicant, a tenderer under Section 2 and 167(1) of the Public Procurement and Asset Disposal Act, 2015 by virtue of submitting a responsive tender at the Preliminary examination stage, a technically qualified tender at the technical evaluation stage after attaining 99 points and a compliant tender price (premium) that included all taxes and levies applicable to group life insurance policy as required under ITT 15.4, Section III 2 Stage 1(5)(11) and Stage 3(a) and Clause 1.8 of the General Conditions of Contract of the Tender Document and stood the best chance of being the winning tenderer has suffered financial loss of Kshs. 47,500,224.00 and damages due to the Respondent's breach of the duty imposed upon him and or procuring entity to evaluate and award its tender in accordance with the Constitution of Kenya, 2020, the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2010; Regulations 9(3)(4)(6) of the Insurance (Policy Holders' Compensation Fund (Amendment) Regulations, 2020; Section 82 and 83 of the Stamp Duty Act and the criteria and procedures in the tender document.

102. The above allegations taken alongside the averments in the supporting affidavit by Githanji Waiguru disclose with specificity the Applicant's complaint against the Respondent and the alleged loss suffered by the Applicant. The Respondent contended that the alleged loss was not proven by the Applicant. It is the board considered view that the loss and damage envisaged under section 167 is not of the nature as contended

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by the Respondents. It does not need to be actual pecuniary loss as contended by the Respondents.

103. Accordingly, we do not agree with the Respondent's argument that the Amended Request does not specify the Respondent's alleged breach of statutory duties that culminated in what the Applicant now claims to have suffered loss.
104. In view of the foregoing analysis, the Board is satisfied that the Amended Request for Review is competent. The Board will now address itself on the merit of the Request.

Whether the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's bid in compliance with the provisions of Section 80 of the Act and Regulation 76 and the Tender Document?

105. The Applicant challenged the Procuring Entity's Evaluation of the Interested Party's tender document. According to the Applicant, the Interested Party's tender ought not to have been disqualified Preliminary Evaluation Stage as the Interested Party did not supply workings for its tender priced as Requirement No. 5 under the Tender Document. It was argued for the Applicant that the Interested Party's tender having been unresponsive at the Preliminary Stage of Evaluation could not have been the lowest evaluated tender at the Financial Evaluation Stage.
106. It was argued on behalf of the Respondent that the evaluation process was conducted as per the terms of the Tender Document and in



compliance with the Act and Regulations 2020. It was the Respondent's position that the question of workings in the Interested Party's tender was only brought out during submission stage as this was not raised in the Amended Request for Review. Further, Counsel for the Respondent argued that the Amended Request for Review was predicated on the Interested Party's alleged non-inclusion of stamp duty and contribution to the Compensation Fund Contribution levy.

107. The Respondent maintained that the tender document required all the tenderers to quote an annual premium that was inclusive of all levies and duties and that from the Interested Party's quote, it was the lowest evaluated tender.
108. On its part, the Interested Party took the position that it submitted a responsive tender and that from the evaluation process its tender emerged as the lowest evaluated tender.
109. From the above arguments, this Board is invited to interrogate whether the Respondent's Evaluation Committee, properly awarded the subject tender to the Interested Party.
110. Section 80 of the Act provides as follows:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in

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the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

111. Section 79 of the Act on the other hand provides:

"79. Responsiveness of tenders

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

(2) A responsive tender shall not be affected by—

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders."

112. This Board is also guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

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"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

113. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation.
114. At the heart of the Applicant's Amended Request for Review is the allegation that the Interested Party's quoted premium did not include stamp duty and the compensation fund contribution levy contrary to the requirements of the Tender Document. Added and related to that was the allegation that the Interested Party's bid did not show workings as required by the tender document.

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115. The Board shall now examine the various provisions on the tender document for which the Procuring Entity relied upon to award the subject tender to the Interested Party and disqualify the Applicant.

116. ITT 15.4 of the Tender Document reads:

"All duties, taxes, and other levies payable by the Insurance Provider under the Contract, or for any other cause, as of the date 28 days prior to the deadline for submission of Tenders, shall be included in the Total tender price submitted by the Tenderer."

117. Mandatory Requirement No. 5 at page 25 of the Tender Document provides that tenderers were to provide the following:

"Duly filled, signed and stamped Schedule of Prices Form in the prescribed manner in the tender Document by the person with the power of attorney. (Clearly show your workings)"

118. Page 45 of the Tender Document provided the Schedule of Prices Form which is herein reproduced for ease of reference

SCHEDULE OF PRICES FORM

Refer to the Schedule of Requirements and fill all the Columns

1	2	3	4	5	6	7	8
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<i>No. of item to be insured</i>	<i>Description of item to be insured</i>	<i>Value of item to be insured</i>	<i>Major contingencies requiring insurance</i>	<i>Insurance period</i>	<i>Insurance Premium Year 1</i>	<i>Insurance Premium Year 2</i>	<i>Total Tender Price for Insurance Services (Col 6+7) (To be carried to the form of tender)</i>
<i>No 1</i>	<i>Group life Insurance Cover for Staff of Parliament</i>	<i>Kshs. 1,722,972,000</i>					
<i>No 2</i>							
<i>No 3</i>							

Name of Tenderer[insert complete name of Tenderer]




Signature of Tenderer..... [signature of the person signing the Tender]

Date..... [insert date]

119. From the above provisions, it is apparent that tenderers in the subject tender were required to quote tender sums that were inclusive of levies and taxes that would be due and payable upon award. Further, in terms of the workings, a tenderer was required to fill the Schedule of Price Form at page 45 of the Tender Document.
120. The Schedule of Price Form at page 45 of the Tender Document shows that the items to be filled included (i) Major contingencies requiring insurance (ii) Insurance Premium Year 1 (iii) Insurance Premium Year 2 and (iv) Total Tender Price for Insurance Service. There was no requirement to make an entry on stamp duty or any levy.
121. Further, Clause 1.8 of the General Conditions of Contract made it a requirement that tenderers tender sum shall be presumed to be inclusive of all applicable taxes and levies:

"The Insurance Provider shall pay such taxes, duties, fees, levies and other impositions as may be levied under the Applicable Law, the amount of which is deemed to have been included in the Contract Price"

122. From the foregoing, it is therefore clear that the tender document did not call for Tenderers to specifically outline the levies and taxes that would become payable but each tender sum would be deemed to be inclusive of the applicable taxes and levies. The Interested Party filled the Schedule

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of Price Form as part of its tender document and thus complied with the Mandatory Requirement No. 5 of the Tender Document.

123. During the evaluation at the Financial Stage, the Evaluation Committee observed that the Interested Party's tender sum was compliant with the IRA rating and was also the least evaluated tender. Accordingly, the Board finds no fault on the part of the Evaluation Committee in respect of the evaluation leading to the award of the subject tender to the Interested Party.
124. The Board therefore finds that the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's form of tender at the Preliminary and Financial Evaluation Stages in compliance with the provisions of Section 80 of the Act and Regulation 76 of the Regulations 2020 and the Tender Document.

What orders the Board should grant in the circumstances?

125. The Board has found that the Amended Request for Review as filed is a competent Request for Review.
126. The Board has also found that the Procuring Entity's Evaluation Committee properly evaluated the Interested party's form of tender at both the Preliminary and Financial Evaluation Stages.
127. The upshot of our finding is that the Amended Request for Review dated 6th October 2023 in respect of Tender No. PJS/003/2023-2024 for the Provision of Group Life Insurance Cover for Staff of the Parliamentary Service Commission fails.



FINAL ORDERS

128. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Amended Request for Review dated 6th October 2023:

- 1. The Amended Request for Review dated 6th October 2023 be and is hereby dismissed.**
- 2. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 26th Day of October 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB