

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 74/2023 OF 6TH OCTOBER 2023

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED APPLICANT

AND

THE DIRECTOR GENERAL,

PARLIAMENTARY JOINT SERVICES 1ST RESPONDENT

PARLIAMENTARY JOINT SERVICES 2ND RESPONDENT

OCCIDENTAL INSURANCE

COMPANY LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Parliamentary Joint Services in relation to Tender No. PJS/004/2023-2024 for the Provision of Group Personal Accident Insurance Cover for Members of Parliament.

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCI Arb - Chairperson
2. QS Hussein Were - Member
3. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

- Mr. Philemon Kiprop - Secretariat
- Mr. Anthony Simiyu - Secretariat

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PRESENT BY INVITATION

APPLICANT - GEMINIA INSURANCE CO. LIMITED

Mr. Anthony Kiprono -Advocate, A.E. Kiprono & Associates
Advocates

**RESPONDENTS DIRECTOR GENERAL, PARLIAMENTARY
JOINT SERVICES
PARLIAMENTARY JOINT SERVICES**

Mr. Huka Mamo - Advocate, Parliamentary Joint Services
Ms. Olivia Ngige - Advocate, Parliamentary Joint Services

**INTERESTED PARTY OCCIDENTAL INSURANCE COMPANY
LIMITED**

Mr. Michael Gichia Wanyoike -Head of Business Development and
Marketing, Occidental Insurance Company
Limited

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/004/2023-2024 for the Provision of Group Personal Accident Insurance Cover for Members of Parliament using an open national

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competitive tender method. The subject tender submission deadline was Friday, 8th September 2023 at 11:00a.m.

Addendum

2. On 1st September 2023, the Procuring Entity issued an Addendum through a Daily Nation publication of 1st September 2023 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 12th September 2023 under the Confidential File submitted by the Procuring Entity, the following 14 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. | Hp Insurance Brokers Limited |
| 2. | Geminia Insurance Kenya Limited |
| 3. | Occidental Insurance Company Limited |
| 4. | Cannon General Insurance (K) Limited |
| 5. | Liaison Group Insurance Brokers Limited |
| 6. | Old Mutual General Insurance Kenya Limited |
| 7. | Corporate Insurance Company Limited |
| 8. | Zamara Risk and Insurance Brokers Limited |
| 9. | Madison General Insurance |

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|------------|---|
| 10. | First Assurance |
| 11. | CIC Group |
| 12. | APA Insurance |
| 13. | Jubilee General Insurance |
| 14. | Britam General Insurance Company (Kenya) 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 16 tenders in the following 4 stages as captured in the Evaluation Report
- i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Stage
 - iv. Due Diligence

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 24 to 25 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.

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7. At the end of the evaluation at this stage, 11 tenders were found unresponsive with only 3 tenders including that of the Applicant and the Interested Party 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 Evaluation under Section III –QUALIFICATION CRITERIA AND REQUIREMENTS on pages 26 to 27of the Tender Document. Tenderers were required to garner a minimum score of 80marks 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, 1 tender was found unresponsive with only 2 tenders including that of the Applicant and the Interested Party qualifying 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 Section III–QUALIFICATION CRITERIA AND REQUIREMENTS on page28 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.

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12. The Evaluation Committee determined that the Interested Party's tender sum of Kshs. 34,445,050.00 was the lowest evaluated tender. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party for a period of two years at its quoted premium of **Kenya Shillings Thirty-Four Million, Four Hundred and Forty-Five Thousand and Fifty (Kshs. 34,445,050.00) inclusive of taxes.**

Evaluation Committee's Recommendation

13. 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

14. In a Professional Opinion dated 13thSeptember 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 1stRespondent concurred with said Professional Opinion.

Due Diligence

15. According to the Due Diligence Report signed and dated on 19thSeptember 2023, 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. All the Interested Party's

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clients gave positive responses and thus the Evaluation Committee recommended the award of the subject tender to the Interested Party.

Notification to Tenderers

16. 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

17. On 6th October 2023, the Applicant filed a Request for Review dated 4th October 2023 supported by an Affidavit sworn on 6th October 2023 by Ms. Roselyne Mose, the Applicant's Branch Manager-CBD Branch, seeking the following orders from the Board in verbatim:

- 1) An order annulling and setting aside the 1st Respondent's letter to the Applicant dated 22nd September 2023.***
- 2) An order annulling and setting aside the 1st Respondent's decision to award Tender No. PJS/005/2023-2024 to the Interested Party.***
- 3) An order directing the 1st Respondent to reconsider the Interested Party's tender price and in particular whether it meets the requirements of clause 37.1, 37.2 and 37.3 of the tender document.***
- 4) In the alternative to 3 above, the Review Board be pleased to declare that the Interested Party's tender sum of Kshs. 17,779,948/- is abnormally low.***
- 5) An order directing the 1st Respondent to consider the Applicant's bid for the award of the tender taking into***

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consideration the Board's directions/determination in this Request for Review.

6) In the alternative to 5 above, the Review Board be pleased to declare the Applicant the lowest evaluated tenderer.

7) Costs of the Request for Review to the Applicant.

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

18. In a Notification of Appeal and a letter dated 6th 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 6th October 2023.
19. On 11th October 2023, the 1st Respondent filed a Response dated 9th October 2023.
20. Vide letters dated 12th 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

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submit to the Board any information and arguments concerning the subject tender within 3 days from 12th October 2023.

21. None of the tenderers filed any response in respect of the Request for Review.
22. On 19th October 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 18th October 2023, notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 24th October 2023 at 2:30 p.m. through the link availed in the said Hearing Notice.
23. On 19th October 2023, the Applicant filed Written Submissions dated 19th October 2023.
24. On 23rd October 2023, the Respondents filed Written Submissions and List of Authorities both dated 20th October 2023.
25. During the online hearing, all the parties save for the Interested Party herein were represented by their respective Advocates. Accordingly, the Board gave directions on the order of address of the Board as follows: The parties would each submit their respective cases in 10 minutes with the Applicant starting followed by the Respondents. Subsequently, the Applicant would offer a rejoinder to the parties' responses in 3 minutes.

PARTIES SUBMISSIONS

Applicant's Case

26. During the online hearing, Counsel for the Applicant, Mr.Kiprono placed reliance on the Applicant's filed documents i.e. Request for Review dated

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6th October 2023 as well as the Supporting Affidavit of Roselyne Mose sworn on 6th October 2023 and Written Submissions dated 19th October 2023.

27. Counsel invited the Board to review the Evaluation Committee's evaluation of the tenders in the subject tender.
28. Mr. Kiprono indicated that the Applicant upon receipt of a letter of regret that it was unsuccessful at the financial stage, it sought a debriefing session with the Respondents but the Respondents declined to respond to the Applicant's concerns citing provisions of the Data Protection Act.
29. It was argued for the Applicant that the Evaluation Committee did not conduct an evaluation of the tenders on the basis of the criteria set out in the Tender Document.
30. Counsel argued that the Interested Party did not meet mandatory requirements set out under paragraph 11 of the Tender Document which required tenderers to provide a current letter of comfort from the insurer addressed to the Procuring Entity. He argued that the Interested Party ought to have been disqualified at the Preliminary Stage of Evaluation. In the alternative he pointed out that if the Interested Party complied then its information was either incomplete or inaccurate and therefore contrary to clauses 17.9 and 29.1 of the tender document.
31. Counsel further argued that though both the Applicant and Interested Party were led by the same re-insurer, the tender sum submitted by the Interested Party was way below the rates provided by the re-insurer. He therefore concluded that it was not possible for the same insurer to issue

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insurance rates that were far apart. The Interested Party submitted a tender sum of Kshs. 34,445,050 for 2 years and yet the re-insurer recommended Kshs. 40,038,551 per annum.

32. Counsel invited the Board to consider the letter of comfort forming part of the Interested Party's tender document.
33. Mr. Kiprono submitted that it was therefore no surprise that subsequent to the issuance of the Notification of intention to award, the Interested Party purported to amend its tender sum. The Interested Party indicated that its previous tender sum of Kshs. 34,445,050.00 covering 2 years was erroneous as it was intended to only cover 1 year.
34. Counsel submitted that it was not possible for the Interested Party to make errors in the schedule of prices as well as the Tender Document. He indicated that the Applicant quoted a low price in the hope of negotiating a higher price with the Respondents.
35. He added that the correspondence between the Respondents and the Interested Party as to whether or not the Interested Party's tender sum covered a year or two confirms that the tender sum was abnormally low.
36. Mr. Kiprono submitted that the above infractions on the part of the Respondents were in contravention of section 79 of the Act as the Interested Party's tender was not the lowest evaluated tender.

Respondent's Case

37. Counsel for the Respondents, Mr. Mamo and Ms. Ngige placed reliance on the Respondents' filed documents i.e. Response dated 9th October 2023 and Written Submissions and Authorities dated 20th October 2023.

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38. Counsel submitted that tenders submitted in the subject tender were properly evaluated at 4 stages i.e. Preliminary Evaluation, Technical Evaluation, Financial Evaluation and Post-Qualification Due Diligence Stages.
39. It was the Respondents' Submission that only 3 tenders including that of the Applicant and Interested Party made it to the Financial Evaluation Stage. Further, the Interested Party was found the lowest evaluated tenderer at its tender price of Kshs. 34,445,050 against the Applicant's Kshs. 80,077,062.
40. It was argued on behalf of the Respondents that throughout the procurement process, the Respondents complied with the Constitution, Act and the Regulations 2020.
41. The Respondents faulted the Applicant's argument that the fact that the Applicant and Interested Party were led by the same re-insurer then their quoted tender sums ought to have been similar.
42. It was the Respondent's further contention that the Interested Party met the qualification criteria in the Preliminary Evaluation Stage as it provided a letter of comfort from African Reinsurance Corporation and the said letter was responsive in all material respects.
43. It was argued that there is no objective criterion of establishing a materially low tender price because no standard threshold is prescribed in the law.

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44. Additionally, it was pointed out that Clause 37 of the Tender Document provided that the Procuring Entity would only seek clarification from a tenderer when it detected an abnormally low tender. Further, even when clarification is sought, the rejection of such a tender should only occur where the tenderer has failed to demonstrate the capacity to perform the contract.
45. It was argued at the Technical Evaluation Stage the capacity of both the Applicant and Interested Party to perform the contract was weighted and both tenderers met the minimum capital adequacy requirement and each had a gross written premium of over Kshs. 1 Billion for 3 years as per their audited financial statements.
46. It was argued that to find the Interested Party's tender as unresponsive merely because they quoted a lower tender price than the Applicant would be tantamount to the introduction of a new evaluation criteria and in contravention of section 80(2) of the Act.
47. It was also argued that the Applicant failed to plead and disclose with precision how the Respondents breached duties imposed on them by the Act or Regulations 2020.
48. It was pointed out that subsequent to the issuance of Notification of Intention to Award, the Interested Party sent out an acknowledgment letter bearing an annual premium of Kshs.34,445,050 contrary to the awarded annual premium of Kshs. 17,222,525 indicated in the Notification letter and in the Interested Party's tender document. On 28th September 2023, the 1st Respondent wrote to the Interested Party restating the correct annual premium of Kshs. 17,222,525. The Interested Party would

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then write another letter explaining that they had made a typographical error.

49. It was submitted that the Interested Party was informed of its obligations to undertake the services or refuse to sign the contract. The Interested Party was to communicate its decision by 5th October 2023.

Applicant's Rejoinder

50. In a brief rejoinder, Mr. Kiprono reiterated that the Procuring Entities are required to conduct themselves in a particular manner under both the Act and the Constitution. Counsel therefore urged that this raised a legitimate expectation on the part of tenderers that their tenders will be evaluated in accordance with the Tender Document.
51. He pressed on that Interested Party's tender was non-compliant at the Preliminary Evaluation Stage and that it also submitted an abnormally low tender.

CLARIFICATIONS

52. The Board sought to know from the Applicant how it came about information that the Interested Party did not submit a letter of comfort as part of its tender documents. Mr. Kiprono told the Board the source was circumstantial evidence since the Interested Party and Applicant were led by the same reinsurer who according to the Interested Party was willing to reinsure the Interested Party's cover at away lower rate. The Applicant therefore surmised that the letter of comfort from the common reinsurer was non-existent or incorrect.

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53. The Board also sought clarity as to why the Respondents disallowed the Interested Party's premium correction. Ms. Ngige indicated that Section 82 of the Act mandates that the tender sum as read out and recorded in the tender opening minutes shall be final and not subject to correction and thus it was not possible to effect any correction.
54. The Board directed the Secretariat to read out the contents of Mandatory Requirement No. 11 under the Tender Document and to verify whether both the Applicant and Interested Party's tender documents contained a letter of comfort. The said requirement was read out aloud and the Secretariat confirmed to the Board that both parties had submitted letters of comfort in their original tender documents whose addressees were also read out aloud.
55. Thereafter the Board sought parties' address on whether from what had been read out there was compliance with Requirement No. 11. Mr. Mamo responded indicating that the Evaluation Committee did not consider the addressee of the letter of comfort a material deviation. On his part, Mr. Kiprono responded that the Interested Party was non-compliant while the Applicant's tender was compliant.
56. The Board also noted that subsequent to the Respondents' issuance of a Letter of Notification of Intention to Award to the Interested Party, the latter wrote back seeking to review its tender sum and in response the Respondents gave the Interested an ultimatum to accept the award as per the letter of notification by 5th October 2023. The Board sought clarity as to whether the Interested Party ever responded to the ultimatum. Mr. Mamo confirmed that the Respondents did not receive any response from the Interested Party.

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57. The Board also sought to know how the Respondents intended to proceed with the Interested Party's request for revision of its tender sum. Mr. Mamo indicated that under Section 135(4) of the Act no contract is formed until a written agreement is signed. He indicated that if the Interested Party as the successful tenderer failed to sign the contract they would forfeit their tender security and an award would be made to the next lowest tender. On his part, Mr. Kiprono reiterated that under Section 82 of the Act, the tender sum read out and recorded during the tender opening was absolute and incapable of revision.
58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 6th October 2023 had to be determined by 27th October 2023. Therefore, the Board would communicate its decision on or before 27th October 2023 to all parties via email.

BOARD'S DECISION

59. 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 Procuring Entity's Evaluation Committee properly evaluated the Interested Party's submitted tender at the Preliminary Evaluation in compliance with the provisions of Section 80 of the Act and Regulation 74 of the Regulations 2020 and the Tender Document?

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II. Whether the Interested Party submitted an abnormally low tender in the subject tender?

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

Whether the Procuring Entity's Evaluation Committee properly evaluated the Interested Party's submitted tender at the Preliminary Evaluation in compliance with the provisions of Section 80 of the Act and Regulation 74 and the Tender Document?

60. The Applicant took issue with the manner in which the Evaluation Committee undertook an evaluation process which culminated in the Interested Party being identified as the successful tender in the subject tender. Specifically, Counsel for the Applicant, Mr. Kiprono pointed out that the Interested Party failed to comply with Mandatory Requirement No. 11 under the Preliminary Evaluation Stage of the Tender Document.
61. Mr. Kiprono argued that Mandatory Requirement No. 11 required tenderers to submit current letters of comfort by a reinsurer and that the same were to be addressed to the Procuring Entity but in deviation of this the Interested Party submitted a letter of comfort addressed to itself
62. Counsel for the Respondents, Mr. Mamo and Ms. Ngige argued that the Interested Party complied with Mandatory Requirement No. 11 at the Preliminary Evaluation Stage. They pointed out that the Interested Party submitted a letter of comfort that was in substance in compliance with the tender requirement and that is why the Interested Party qualified to the last stage of evaluation that saw it emerge as the successful tenderer.

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63. This Board is therefore being invited to interrogate whether the Evaluation Committee properly evaluated the Interested Party's tender at the Preliminary Evaluation Stage.

64. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"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 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."

65. Regulation 74 of the Regulations 2020 provides guidance on how the Preliminary Evaluation should be undertaken:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

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(c) any tender security submitted is in the required form, amount and validity period, where applicable;
(d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;
(e) the required number of copies of the tender have been submitted;
(f) the tender is valid for the period required;
(g) any required samples have been submitted; and
(h) all required documents and information have been submitted."

66. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"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."

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67. This Board is further 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:

"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

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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.

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."

68. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any

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requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

69. Turning to the instant case, the Applicant took issue with the Interested Party's letter of comfort which it alleges failed to comply with Mandatory Requirement No. 11 at the Preliminary Evaluation Stage in the subject tender.
70. The Requirement under clause 11 of the Preliminary Evaluation Stage is to be found at page 25 of the Tender Document and the same provides as follows:

"STAGE 1: PRELIMINARY EVALUATION

MANDATORY REQUIREMENTS

a) Tenderers must meet all the Mandatory requirements. Failure to meet any of the Mandatory Requirements will lead to automatic disqualification of the bidder.

b) All documents provided may be verified for authenticity. Any document found not to be authentic will lead to automatic disqualification of the bidder

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11. A current letter of comfort from the Reinsurer on the premium rates used. The letter must be addressed to the Director General, Parliamentary Joint Services.

71. From the wording of Clause 11 above, the letter of comfort to be submitted in the subject tender had to be current and addressed to the Director General, Parliamentary Joint Services.

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72. The Board had a chance to look at the Interested Party's original tender document and located the Interested Party's submitted letter of comfort from Africa Reinsurance Corporation at page 57 of its tender. The said letter is herein reproduced for ease of reference:

"Nairobi, September 07th, 2023

Occidental Insurance Company Limited

Nairobi, Kenya

***RE: TENDER FOR PARLIAMENTARY SERVICE COMMISSION-
GPA/MPS/STAFF CONFIRMATION OF REINSURANCE TERMS***

Dear Sir/Madam,

We hereby confirm that we are participating in Occidental Insurance Company Ltd, Treaty program for 2023 and do hereby support the insurance terms of the PARLIAMENTARY SERVICE COMMISSION tender for the Provision of GPA Cover for MPs & STAFF submitted to us as per below annual premium excluding levies:

***GROUP PERSONAL ACCIDENT/422 MEMBERS OF
PARLIAMENT KES 40,038,551***

***GROUP PERSONAL ACCIDENT/1816 Staff Members: KES
20,830,660***

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If awarded the same will be ceded to their reinsurance program subject to comply with the recommended rates attached to the same treaties.

We would like also to confirm to you that African Reinsurance Corporation (Africa Re) is rates A- Strong/Stable Outlook by S&P and A Excellent/Stable Outlook by A.M Best.

Yours faithfully,

Signed

Ms. Chaya RAMCHURN

Manager-Underwriting & Marketing

Nairobi Regional Office."

73. The letter itself was a current letter considering that it bears the date of 7th September 2023. However, from the face of the letter, the Interested Party has been indicated as its addressee and not the Director General, Parliamentary Joint Services.
74. A tender responsive to Mandatory Requirement No.11 above, was required to among others contain a current letter of comfort addressed to the Director General, Parliamentary Joint Services. The Interested Party's Letter of Comfort did not comply with this requirement and was thus unresponsive in this regard.
75. The Tender Document was clear as to the fate of tenders that were unresponsive on any of the requirements under the Preliminary Evaluation Stage: The tender was to be disqualified from any further evaluation.
76. From the Evaluation Report submitted to this Board as part of the Confidential Documents, the Evaluation Committee did not pick up this

infraction on the part of the Interested Party's tender with the result that the Interested proceeded to further stages of evaluation. The Evaluation Report indicates that the Interested Party was responsive to this requirement. The Board finds that it was erroneous for the Evaluation Committee to allow the Interested Party's tender to qualify for further evaluation of their tender in view of its non-responsiveness to Mandatory Requirement No. 11.

77. The Board has also sampled the letters of comfort submitted by the other tenderers in the subject tender and notes that tenderers of the sampled original tender submitted letters correctly addressed to the Director General, Parliamentary Joint Services. Accordingly, it would be against the constitutional dictate under Article 227 of the Constitution for public tenders to be competitive, when certain tender requirements for which some tenderers have complied with are overlooked during evaluation.
78. The Board therefore finds that the Procuring Entity's Evaluation Committee failed to properly evaluate the Interested Party's submitted tender at the Preliminary Evaluation Stage in compliance with the provisions of Section 80 of the Act and Regulation 74 of the Regulations 2020 and the Tender Document.

Whether the Interested Party submitted an abnormally low tender in the subject tender?

79. The Applicant also took issue with the Interested Party's tender sum of Kshs. 19,779,948.00. During the hearing Counsel for the Applicant, Mr. Kiprono argued that the said tender sum was abnormally low since it was at variance with the rates offered by the Interested Party's reinsurer.

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80. Counsel argued that it was therefore no surprise that subsequent to the issuance of the Notification of intention to award, the Interested Party purported to amend its tender sum.
81. The Respondents were of a different view. They took the position that the Interested Party's tender sum could not be termed as abnormally low as there was no objective criterion for establishing a materially low tender price because no standard threshold is prescribed in the law. They also argued that Clause 37 of the Tender Document provided that the Procuring Entity would only seek clarification from a tenderer when it detected an abnormally low tender. Further, even when clarification is sought, the rejection of such a tender should only occur where the tenderer has failed to demonstrate the capacity to perform the contract. However, in the present case both the Applicant and Interested Party had demonstrated capacity to perform the contract at the Technical Stage of evaluation.
82. The Board shall at this stage inquire into whether the Interested Party's tender sum was abnormally low.
83. Clause 37 of the Tender Document under Section I- INSTRUCTIONS TO TENDERERS speaks to abnormally low tenders in the following words:

Abnormally Low Tenders

37.1 An abnormally Low Tender is one where the Tender Price, in combination with other constituent elements of the Tender, appears unreasonably low to the extent that the Tender Prices raises material concerns as to the capability of the Tenderers to perform the contract for the Offered Tender price or that genuine competition between Tenderers is compromised.

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37.2 In the event of identification of a potentially Abnormally Low Tender by the evaluation committee, the Procuring Entity shall seek written clarifications from the Tenderer, including detailed price analysis of its Tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the tendering document.

37.3 After evaluation of the price analyses, in the event that the Procuring Entity determines that the Tenderer has failed to demonstrate its capability to perform the Contract for the offered Tender Price, the Procuring Entity shall reject the Tender.

84. From the above provision, an abnormally low tender in the subject tender is one that appears unreasonably low to the extent of raising material concerns about a tenderer's capability to perform at its tendered sum. Further, in the event the Procuring Entity detected an abnormally low tender they would seek clarifications from the tenderer and it is on the basis of the clarification offered that the Procuring Entity could determine if the tendered sum was abnormally low.
85. It would therefore follow a tender sum cannot be said to be abnormally low just because it passes off as a low. An inquiry has to be made with the Procuring Entity seeking clarifications on the pricing of the tender sum before it can be established that the tendered price materially raises concerns about the tenderer's ability to perform the contract at that price.

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86. In respect of the subject tender, the Interested Party's tender sum of Kshs. 19,779,948.00 was found as the lowest evaluated tender. However, the Procuring Entity did not seek any clarification from the Interested Party on its pricing of the tender sum as the Procuring Entity did not find that the tendered price was too low as to raise concerns over the capability of the Interested Party to perform the contract at its tendered price. Absent any clarifications on pricing being sought from the Interested Party on its pricing of the tender sum and an assessment made of the responses thereto, it cannot be objectively established whether the Interested Party's tender sum was abnormally low.
87. The Board finds that it is not possible to objectively establish whether the Interested Party submitted an abnormally low tender in the subject tender when no clarifications were sought from the Interested Party on the pricing of its tender sum.

What orders the Board should grant in the circumstances?

88. The Board has found that the Procuring Entity's Evaluation Committee failed to properly evaluate the Interested Party's submitted tender at the Preliminary Evaluation Stage in compliance with the provisions of Section 80 of the Act and Regulation 74 and the Tender Document.
89. The Board has also found that it is not possible to establish whether the Interested Party submitted an abnormally low tender when no clarifications were sought from the Interested Party on the pricing of its tender sum.

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90. The upshot of our finding is that the Request for Review dated 6th October 2023 in respect of Tender No. PJS /004/2023-2024 for the Provision of Group Personal Accident Insurance Cover for Members of Parliament succeeds in the following specific terms:

FINAL ORDERS

91. 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 6th October 2023:

- 1. The Letter of Notification of Intention to Award dated 22nd September 2023 in respect of Tender No. PJS /004/2023-2024 for the Provision of Group Personal Accident Insurance Cover for Members of Parliament and addressed to the Interested Party be and is hereby cancelled.**
- 2. The Letters of Notification of Intention to Award dated 22nd September 2023 in respect of Tender No. PJS /004/2023-2024 for the Provision of Group Personal Accident Insurance Cover for Members of Parliament and addressed to the Applicant and all the other unsuccessful tenderers be and are hereby cancelled.**
- 3. The 1st Respondent is hereby directed to reconvene the Procuring Entity's Evaluation Committee within 7 days of this Decision for purposes of re-evaluating tenders that qualify for evaluation at the Financial Evaluation Stage while taking into consideration the Board's finding in this Request for Review.**
- 4. The Procuring Entity's Evaluation Committee be and is hereby directed to re-evaluate the tenders that qualify for evaluation at the Financial Evaluation Stage while taking into consideration**





the Board's finding in this Request for Review and issue an award to the lowest evaluated tender within 14 days from the date of this Decision

5. Given the Board's finding above and the procurement proceedings are not complete each party shall bear its own costs.

Dated at NAIROBI, this 27thDay of October2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB

