

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 77/2023 OF 12TH OCTOBER 2023

BETWEEN

SEDGWICK KENYA INSURANCE BROKERS LIMITED APPLICANT

AND

MANAGING DIRECTOR,

KENYA PIPELINE COMPANY LIMITED1ST RESPONDENT

KENYA PIPELINE COMPANY LIMITED 2ND RESPONDENT

FOUR M INSURANCE BROKERS LIMITED INTERESTED PARTY

Review against the (in)decision of the Managing Director, Kenya Pipeline Company Limited with respect to the All Risks Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025

BOARD MEMBERS PRESENT

- | | |
|------------------------|-----------------|
| 1. Ms. Alice Oeri | Panel Chairlady |
| 2. Dr. Susan Mambo | Member |
| 3. Eng. Lilian Ogombi | Member |
| 4. Mr. Joshua Kiptoo | Member |
| 5. CPA Alexander Musau | Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop
2. Evelyn Weru

Holding brief for Board Secretary
Secretariat

PRESENT BY INVITATION

APPLICANT

**SEDGWICK KENYA INSURANCE
BROKERS LIMITED**

Ms. Desma Nungo

Advocate, NOW Advocates LLP

RESPONDENTS

**MANAGING DIRECTOR,
KENYA PIPELINE COMPANY LIMITED &
KENYA PIPELINE COMPANY LIMITED**

Ms. Karen Muriithi

Advocate, Kenya Pipeline Company Limited

INTERESTED PARTY

FOUR M INSURANCE BROKERS LIMITED

Mr. Austin Ayisi

Advocate, Matheka Oketch & Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Pipeline Company Limited, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. Tender No. KPC/PU/OT-

298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive tendering method and the invitation was by way of an advertisement in My Gov newspaper pull-out on 28th March 2023 and on the 2nd Respondent's website www.kpc.co.ke/e-procurement and where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') was available for download. The subject tender contained twenty-four (24) different insurance policies and tenderers were allowed to bid for any or for all of the twenty-four (24) insurance policies. The Insurance Broker was required to recommend only one underwriter per policy and each class of insurance would be quoted for separately for award except for Group Personal Accident (GPA) which was required to be combined with WIBA and Employers Liability (EL).

2. Completed tenders were to be submitted electronically in PDF format and uploaded in the Supplier Relationship Management (SRM) Collaboration Folder and were required not to exceed 100 mbs for each upload. Tenders were to be quoted in Kenya Shillings except for the Industrial All Risks, Aviation Refueling Liability, Terrorism and Sabotage, Public Liability and Aviation Hull and liability policies which were to be quoted in United States Dollars (USD) and would include all taxes. The applicable exchange rate was the Central Bank of Kenya mean rate as at the date of the tender opening.

3. The subject tender's submission initial deadline was 19th April 2023 at 10.00 a.m. with a tender validity period of 182 days from the opening of tenders.

Addendum and Clarifications

4. The 2nd Respondent issued (a) Clarification No. 1 dated 11th April 2023 addressed to all bidders which clarified some provisions of the Technical Evaluation Criteria for Underwriters, (b) Clarification No. 2 dated 14th April 2023 addressed to all bidders which clarified some provisions of the Technical Evaluation Criteria for Brokers, (c) an Extension of Closing Date dated 18th April 2023 which extended the submission deadline for the subject tender from 19th April 2023 at 10.00 a.m. to 26th April 2023 at 10.00 a.m. and (d) Addendum 1 dated 19th April 2023 which amended the insurance period for the subject tender to being a tender for the provision of insurance services for a period of two (2) years; 1st July 2023 -30th June 2025.

Submission of Tenders and Tender Opening

5. Tender opening was to take place virtually through the availed link in in ITT 26.1 of Section II- Tender Data Sheet (TDS) at page 30 of 122 of the Tender Document.
6. According to the Minutes of the subject tender's opening held on 26th April 2023 and signed by members of the Tender Opening Committee

on even date (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of thirty two (32) tenders were submitted in response to the subject tender. The said thirty-two (32) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	Sedgwick Kenya Insurance Brokers
2.	Canopy Insurance Brokers Limited
3.	Zamara Risk and Insurance Brokers Limited
4.	Acentria Insurance Brokers Limited
5.	Modern Insurance Brokers Limited
6.	Pelican Insurance Brokers Limited7.
7.	HP Insurance Brokers Limited
8.	Paladin Insurance Brokers Limited
9.	Macly Insurance Brokers Limited
10.	Disney Insurance Brokers Ltd
11.	Plan & Place Insurance Brokers Limited
12.	Maj Insurance Brokers Limited
13.	Aris Insurance Brokers Ltd
14.	A-Plan Insurance Brokers Ltd

15.	Kenbright Insurance Brokers Limited
16.	Sapon Insurance Brokers Limited
17.	Peace of Mind Insurance Brokers Ltd
18.	Four M Insurance Brokers Ltd
19.	Minet Kenya Insurance Brokers Limited
20.	Losagi Insurance Brokers Limited
21.	Amro Insurance Brokers Limited
22.	Liaison Group (I.B) Limited
23.	Trustmark Insurance Brokers
24.	Reval Insurance Brokers Limited
25.	ICK Insurance Brokers Limited
26.	Utmost Insurance Brokers Limited
27.	Amana Insurance Brokers
28.	AMS Insurance Brokers Limited
29.	Boma Insurance Brokers Limited
30.	Goldfield Insurance Brokers Limited
31.	Victoria Insurance Brokers Limited
32.	Clarkson Kenya Insurance Brokers Limited.

Evaluation of Tenders

7. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the thirty-two (32) tenders as captured in Minutes for Evaluation of the subject tender signed by the Secretary and Chairman of the Evaluation Committee on 26th May 2023 and an Evaluation

Report for the subject tender signed by members of the Evaluation Committee on 26th May 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation.

Preliminary Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause 1. Preliminary/Mandatory Evaluation Criteria – Insurance Brokers of Section III- Evaluation and Qualification Criteria at page 33 of 122 of the Tender Document and Clause 2. Mandatory Evaluation Requirements for Underwriters of Section III- Evaluation and Qualification Criteria at page 34 of 122 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage for both Insurance Brokers and Underwriters to proceed to the Technical Evaluation stage.
9. At the end of evaluation at this stage, five (5) tenders were determined non-responsive while twenty-seven (27) tenders were found responsive which included the Applicant's tender and the Interested Party's tender. All the underwriters fronted by the tenderers complied

with all the mandatory requirements and were listed at page 4 of 27 of the Evaluation Report as follows:

<i>SN</i>	<i>Underwriter's Name</i>
<i>1.</i>	<i>APA-General</i>
<i>2.</i>	<i>APA- Life</i>
<i>3.</i>	<i>Britam -General</i>
<i>4.</i>	<i>CIC- General</i>
<i>5.</i>	<i>CIC- Life</i>
<i>6.</i>	<i>GA Insurance - General</i>
<i>7.</i>	<i>Heritage Insurance - General</i>
<i>8.</i>	<i>ICEA LION - General</i>
<i>9.</i>	<i>Jubilee Insurance - Life</i>
<i>10.</i>	<i>Liberty - Life</i>
<i>11.</i>	<i>Old Mutual/UAP - General</i>
<i>12.</i>	<i>Old Mutual/ UAP – Life Assurance</i>

10. Only the responsive tenders proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Technical Evaluation Criteria for Brokers of Section III- Evaluation and Qualification Criteria at page 35 of 122 to page 37 of 122 of the Tender Document and

Technical Evaluation Criteria for Underwriters of Section III- Evaluation and Qualification Criteria at page 38 of 122 of the Tender Document;

12. Tenderers were required to score a minimum of 75% under Technical Evaluation Criteria for Brokers and comply with all the requirements under Technical Evaluation Criteria for Underwriters to proceed to the Financial Evaluation stage.
13. At the end of evaluation at this stage nine (9) tenders were determined non-responsive while seventeen (17) tenders were found responsive which included the Applicant's tender and the Interested Party's tender. and therefore proceeded to the Financial Evaluation stage.

Financial Evaluation

14. At this stage of evaluation, the Evaluation Committee was required to apply the criteria provided under Clause 3 Tender Evaluation (ITT 35) Price evaluation of Section III- Evaluation and Qualification Criteria at page 38 of 122 of the Tender Document and the provisions under Part II – Schedule of Insurance Requirements at page 73 of 122 to page 75 of 122 of the Tender Document. The tender with the lowest evaluated price would be considered for award in the respective twenty-four (24) insurance policies of the subject tender.
15. Price comparison was carried out for all the twenty-four (24) insurance policies of the subject tender.

16. For the All Risk Industrial Policy, tenders were ranked as can be discerned at page 10 of 27 of the Evaluation Report as follows:

<i>BROKER/UNDERWRITER</i>	<i>PREMIUM FY 2022/24</i>	<i>PREMIUM FY 2022/24</i>	<i>RANKING</i>
	<i>USD</i>	<i>USD</i>	
<i>Sedgwick K. Insurance Brokers</i>	<i>1,601,458.98</i>	<i>1,601,458.98</i>	<i>1</i>
<i>Zamara Risk & Insurance</i>	<i>1,640,344.24</i>	<i>1,859,056.35</i>	<i>2</i>
<i>Macly Insurance Brokers</i>	<i>1,754,055.81</i>	<i>1,987,929.46</i>	<i>3</i>
<i>Four M Insurance Brokers</i>	<i>1,819,653.91</i>	<i>1,819,653.91</i>	<i>4</i>
<i>Acentria Insurance Brokers Ltd</i>	<i>1,985,365.68</i>	<i>2,283,161.33</i>	<i>5</i>
<i>Plan and Place Insurance Brokers</i>	<i>1,988,922.37</i>	<i>2,254,108.07</i>	<i>6</i>
<i>Liason Insurance Brokers</i>	<i>2,017,547.28</i>	<i>2,286,553.13</i>	<i>7</i>
<i>Amro Insurance Brokers</i>	<i>2,129,283.00</i>	<i>2,503,318.56</i>	<i>8</i>
<i>Paladin</i>	<i>2,208,810.91</i>	<i>2,503,318.58</i>	<i>9</i>
<i>Minet Kenya Insurance Brokers</i>	<i>2,208,811.00</i>	<i>2,503,318.58</i>	<i>10</i>

Disney Insurance Brokers	2,237,279.40	2,694,470.29	11
Peace of Mind Insurance Brokers	2,237,279.40	2,694,470.29	12
Maj Insurance Brokers	2,290,018.89	2,290,058.89	13
Goldfield	3,873,472.13	3,873,471.73	14
Losagi Insurance Brokers	4,622,183.74	4,622,183.40	

17. The Evaluation Committee noted that the premium charged, rates and excesses/deductibles remained comparatively the same to the previous year's insurance tender for FY 2021/22 to 2022/23 save for GPA/EL/WIBA and Group Life where there was significant reduction.

Due Diligence

18. Vide a letter dated 10th May 2023 addressed to the Commissioner of Insurance, Insurance Regulatory Authority (IRA), the Respondents conducted due diligence and sought to confirm whether the bidders in the subject tender had valid 2023 IRA certificates and had continuously operated as insurance brokers for the last ten (10) years.

19. The Evaluation Committee conducted due diligence with Britam General Insurance (K) Limited and Old Mutual Life Assurance Kenya Limited and visited their respective offices on 23rd May 2023 to confirm their quotations in the subject tender. Vide their respective letters

dated 24th May 2023 and 25th May 2023, Britam General Insurance (K) Limited and Old Mutual Life Assurance Kenya Limited provided the quotation for the policies quoted and the Evaluation Committee noted that the underwriters' letters on premiums and deductibles was conditional/not conclusive as it was subject to broker discounts and commission which could not be determined by the Evaluation Committee.

Evaluation Committee's Recommendation

20. The Evaluation Committee recommended award of the twenty-four (24) policies in the subject tender to the lowest evaluated tenderers in each policy. **First Professional Opinion**
21. In a Professional Opinion dated 6th June 2023 (hereinafter referred to as the "First Professional Opinion"), the General Manager Supply Chain, Ms. Maureen Mwenje, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.
22. The Professional Opinion was approved and signed off on 7th June 2023 by the Managing Director of the 2nd Respondent, the 1st Respondent herein.

Notification to Tenderers (First Letter of Award)

23. Tenderers were notified of the outcome of evaluation of the twenty-four insurance policies in the subject tender vide letters of Notification of Intention to Award dated 7th June 2023.

24. Sedgwick Kenya Insurance Brokers Limited was notified vide letter of Notification of Intention to Award dated 7th June 2023 as being the successful tenderer with respect to The All Risks Industrial Insurance Policy, the Aviation Refuelling Liability Policy and the Combined Aviation Hull and Liability – and Group Person Accident (GPA) Aviation Policy (hereinafter referred to as 'the three insurance policies') in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025.

Acceptance of Award by Sedgwick Kenya Insurance Brokers Limited

25. Vide a letter dated 8th June 2023 addressed to the 1st Respondent, Sedgwick Kenya Insurance Brokers Limited acknowledged receipt of the notification of intention to award the three insurance policies in the subject tender and indicated their eagerness to sign the contract after the 14 standstill period.

26. Vide letter dated 21st June 2023 (hereinafter referred to as 'further letter') addressed to Sedgwick Kenya Insurance Brokers Limited, the 1st Respondent informed it of its award of the three insurance policies

in the subject tender and requested for the said broker to provide a separate performance bond from its underwriters for each policy in the amount of 10% of the annual premium valid for the period of the policy and its CR12 form from the Registrar of Companies within 3 days from the date of the said letter.

27. The 1st Respondent further informed it that the contract documents were under preparation and would be signed as soon as the requested documents had been received and asked it to signify its acceptance of the award by signing the duplicate of the further letter and return the same by 26th June 2023.
28. Vide email dated 26th June 2023, Sedgwick Kenya Insurance Brokers Limited intimated acceptance of the award by attaching a signed copy of the further letter in its email and indicated that the hard copy of the said letter would be delivered via normal delivery.

Confirmation Adjustment of the All Risks Industrial Insurance Policy award in the subject tender

29. Vide email dated 30th June 2023 addressed to the General Manager Supply Chain of the 2nd Respondent under the subject *"FW:KPC/SEDWICK TENDER AWARD INSURANCE CONFIRMATION ADJUSTMENT / DECLINE – INDUSTRIAL ALL RISK POLICY"* Mr. Sammy Kiragu – Managing Director Sedgwick Kenya Insurance Brokers Limited referred to communication from Old Mutual General Insurance Company about their inability to confirm the All Risks Industrial

Insurance Policy in the subject tender due to inability to get reinsurance support. He apologized for the unforeseen circumstances and proposed for the Respondents to consider extension of the existing policy with the existing underwriter CIC General Insurance Co. Limited for a minimum 3 months to avoid exposure and to allow time to plan.

Extension of the All Risk Industrial Insurance Policy

30. The existing All Risk Industrial Insurance Policy was extended for three months with the current underwriters CIC Insurance Co. Ltd but the said underwriters came off cover on 6th July 2023, on the instructions of the Respondents as their extension terms for a period of 3 months was unacceptable to the Procuring Entity due to provisions of the Act and the tripartite contract signed between the Procuring Entity, Sedgwick Kenya Insurance Brokers Limited and CIC Insurance Co. Ltd dated 1st July 2022.

Letters to other tenderers ranked in the All Risk Industrial Bids Policy in the subject tender

31. Vide letters dated 30th June 2023, the 1st Respondent wrote to the 2nd, 3rd, and 4th ranked tenderers in the All Risk Industrial Bids Policy in the subject tender informing them that the broker awarded the said policy at USD 1,601,458.98 for Year 1 and Year 2 was unable to place the policy with its underwriter. The 1st Respondent requested the said tenderers to issue a confirmation that if awarded, the said tenderer

would place cover at their quoted tender prices as seen from the ranking at the Financial Evaluation stage.

32. The said tenderers were requested to give feedback before 12:00 PM on 30th June 2023 and informed that a failure to respond would be deemed as inability to place the cover.

Acceptance by Four M Insurance Brokers Ltd of the terms in the Respondents' letter dated 30th June 2023

33. In an email dated 30th June 2023 addressed to the General Manager-Supply Chain of the 2nd Respondent, Ms. Hellen Mumbe indicated acceptance of the terms in the Respondents' letter dated 30th June 2023 by attaching the acceptance letter by Four M Insurance Brokers Ltd.
34. In a letter dated 30th June 2023 addressed to the 1st Respondent, Mr. Fredrick B.O. Ochieng, General Manager Four M Insurance Brokers Ltd confirmed that APA Insurance had accepted the award of the All Risk Industrial Policy of the subject tender and were holding the Respondents covered with effect from 1.7.2023 to 30.6.2024 as per the terms agreed upon in the Respondents letter of 30th June 2023 and enclosed the cover confirmation letter from APA Insurance dated 3rd July 2023.

Second Letter of Award

35. Vide a Letter of Award dated 30th June 2023 (hereinafter referred to as "the Second Letter of Award"), the 1st Respondent informed Four M Insurance Brokers Ltd of its purported award of the All Risk Industrial Insurance Policy of the subject tender and requested for the said broker to provide a separate performance bond from its underwriters for the said policy in the amount of 10% of the annual premium valid for the period of the policy, its CR12 form from the Registrar of Companies, and a signed Beneficial Ownership Information Form immediately upon receipt of the said notification in the said letter.
36. Vide a letter dated 6th July 2023 addressed to the Managing Director, Four M Insurance Brokers Ltd, the 1st Respondent confirmed that the said tenderer could hold the 2nd Respondent under cover from 7th July 2023 to 30th June 2024 premiums of USD 1,819,653.91 to be pro-rated.
37. The 1st Respondent further informed it that the contract documents were under preparation and would be signed as soon as the requested documents had been received and asked it to signify its acceptance of the award by signing the duplicate of the Second Letter of Award and return the same by Close of Business on 30th June 2023.

All Risk Industrial Insurance Policy Cover Cancellation by APA Insurance and Four M Industrial Brokers Ltd

38. Vide a letter dated 7th July 2023 addressed to the 1st Respondent, APA Insurance informed the 1st Respondent that they had encountered a

challenge with their re-insurer due to the minimum premium demanded for the All Risk Industrial Insurance Policy and urged the 1st Respondent to seek directions from the Commissioner of Insurance, Insurance Regulatory Authority (hereinafter referred to as "IRA").

39. Subsequently, the 1st Respondent wrote to the Director General IRA and gave a chronology of events that had followed with regard to the procurement proceedings of the All Risk Industrial Insurance Policy in the subject tender and sought directions on the way forward.

40. Vide letters dated 12th July 2023 addressed to the 1st Respondent, both Four M Insurance Brokers Ltd and APA Insurance communicated their cancellation of the All Risk Industrial Insurance Policy awarded in the subject tender effective midnight of the same day of 12th July 2023 leaving the 2nd Respondent exposed and without ample notice and time to seek cover.

Communication from IRA

41. Following the advisory from IRA contained in a letter dated 17th July 2023, the 2nd Respondent procured the All Risk Industrial Insurance Policy from Sedgwick Kenya Insurance Brokers Limited and CIC Insurance Co. Ltd and entered into a contract dated 12th July 2023 for four (4) months effective 12th July 2023 to 11th November 2023.

Communication from Four M Insurance Brokers Ltd on Capacity to place cover for the All Risk Industrial Insurance Policy in the subject tender.

Vide a letter dated 19th July 2023 addressed to the 1st Respondent, Four M Insurance Brokers Ltd informed the 1st Respondent that they had confirmation from APA Insurance Ltd as communicated in their letter dated 19th July 2023 that they were in a position to place cover for the All Risk Industrial Insurance Policy in the subject tender with effect from 11th November 2023 to 10th November 2025 at an annual premium of USD 1,819,653.19 with an understanding that APA Insurance undertook to carry out a detailed Risk Survey for underwriting purposes within the next 4 months.

42. According to APA Insurance Ltd, they had managed to obtain reinsurance support from Barents Re, a reputable A rated market (AM Best) in the international energy Insurance market (foreign reinsurer).
43. In a letter dated 11th August 2023, the Respondents sought various clarifications from Four M Insurance Brokers Ltd which were unsatisfactorily responded to by APA Insurance Ltd vide letters dated 22nd and 24th August 2023. Some of the clarifications sought were with respect to IRA's approval to place Kenya insurance business with foreign reinsurance; lack of comprehensive coverage of the subject tender because Barents Re had only confirmed reinsurance of 7.5% of the risk or written line leaving the 2nd Respondent exposed to 92.5%

of the risk; disclosure of reinsurer and the re-insured because the name of the re-insured had not been disclosed by Barents Re.

Second Professional Opinion

44. In a Professional Opinion dated 7th September 2023 (hereinafter referred to as the "Second Professional Opinion"), the General Manager Supply Chain, Ms. Maureen Mwenje, reviewed the manner in which the procurement process was undertaken with regard to evaluation and award of the All Risks Industrial Insurance Policy, including inability by awarded bidder to place cover and subsequent bidders contacted to place cover and the resultant bidder, Four M Brokers Ltd, who managed to confirm capability of placing cover for the said policy. She indicated that the appropriateness of the award was in compliance with Section 136 of the Act, funds were available and requested the 1st Respondent to consider and award the All Risks Industrial Insurance Policy in the subject tender to Four M Insurance Brokers Ltd at premiums for FY1 at USD 1,819,653.91 and FY2 USD 1,819,653.91.

45. The Second Professional Opinion was approved and signed off on 7th September 2023 by the Managing Director of the 2nd Respondent, the 1st Respondent herein.

Third Letter of Award

46. Vide a Letter of Award dated 7th September 2023 (hereinafter referred to as "the Third Letter of Award"), the 1st Respondent informed Four M Insurance Brokers Ltd of its award of the All Risk Industrial Insurance

Policy of the subject tender and requested for the said broker to provide a separate performance bond from its underwriters for the said policy in the amount of 10% of the annual premium valid for the period of the policy, its CR12 form from the Registrar of Companies, and a signed Beneficial Ownership Information Form immediately by Close of Business on 15th September 2023.

47. Four M Insurance Brokers Ltd accepted the award of the All Risk Industrial Insurance Policy in the subject tender on 8th September 2023, signed the Contract on 8th September 2023 and forwarded the Contract signed by it to the Respondents vide a letter dated 8th September 2023.

REQUEST FOR REVIEW NO. 77 OF 2023

48. On 12th October 2023, Sedgwick Kenya Insurance Brokers Limited, the Applicant herein, filed a Request for Review dated 11th October 2023 together with an Applicant's Statement in Support of the Request for Review signed on 11th October 2023 by Sammy Kiragu, its Managing Director through the firm of NOW Advocates LLP (hereinafter referred to as the 'instant Request for Review') seeking the following orders:

a) Any procurement contract with respect to Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy that the Respondents may

have entered into with any other bidder other than the Applicant herein be nullified and set aside.

b) The 1st Respondent be directed to prepare a procurement contract in line with award decision in Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy;

c) The 1st Respondent be directed to furnish a procurement contract in line with award decision in Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy to the Applicant for the Applicant's signing;

d) Further to Order (b) above, the 1st Respondent be directed to enter into a written procurement contract with the Applicant based on the Tender Document and any clarifications that emanated from the procurement proceedings in Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th

June 2025 with respect to the All Risks Industrial Insurance Policy within seven (7) days from the date of the Public Procurement Administrative Review Board's decision in this Request for Review;

e) The 1st Respondent be directed to extend the tender validity period of Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy for a period of thirty (30) days from the date of its expiry in line with Section 88 of the Public Procurement and Asset Disposal Act, 2015 pending;

i the preparation of a procurement contract in line with the award decision in favour of the Applicant in Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy by the 1st Respondent;

ii the entering into a written procurement contract through the signature of the 1st

Respondent and the Applicant based on the Tender Document and any clarifications that emanated from the procurement proceedings in Tender No. KPC/PU/OT-298/FINANCE/NBI/22-23 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 with respect to the All Risks Industrial Insurance Policy;

f) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

g) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

49. In a Notification of Appeal and a letter dated 12th October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12th October 2023.

50. On 16th October 2023, the Respondents filed via email through Karen Muriithi Advocate a Notice of Preliminary Objection dated 13th October 2023.
51. On 18th October 2023, the Respondents filed via email through Karen Muriithi Advocate a Background to the Matter Under Review dated 18th October 2023, a Replying Affidavit sworn on 18th October 2023 by Maureen Mwenje, General Manager of the 2nd Respondent's Supply Chain Division together with confidential documents concerning the subject tender submitted pursuant to section 67(3)(e) of the Act.
52. On 19th October 2023, the Respondents filed hard copies of the Notice of Preliminary Objection dated 13th October 2023, the Background to the Matter Under Review dated 18th October 2023, the Replying Affidavit sworn on 18th October 2023 by Maureen Mwenje, General Manager of the 2nd Respondent's Supply Chain Division, Certificate of Production of Electronic Evidence dated 18th October 2023, together with confidential documents concerning the subject tender submitted pursuant to section 67(3)(e) of the Act.

53. Vide letters dated 23rd 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 three (3) days from 23rd October 2023.
54. Vide a Hearing Notice dated 23rd October 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 26th October 2023 at 11.00 a.m., through the link availed in the said Hearing Notice.
55. On 25th October 2023, the Interested Party filed through Matheka Oketch & Co. Advocates a Notice of Appointment dated 25th October 2023, a Replying Affidavit sworn on 25th October 2023 by Dennis Nyongesa, its Chief Executive Officer and Interested Party's Written Submissions dated 25th October 2023.
56. On 25th October 2023, the Applicant filed an Applicant's Further Statement in Support of the Request for Review dated 25th October 2023 signed by Sammy Kiragu, its Managing Director together with a Certificate of Production of Electronic Evidence dated 25th October 2023.

57. On 26th October 2023, the Applicant filed a List and Bundle of Authorities dated 26th October 2023.

58. At the hearing of the instant Request for Review, the Board directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.

59. Accordingly, the Board directed the Respondents would be heard first on their Preliminary Objection, followed by the Interested Party and the Applicant would then be heard on its response to the Respondents' preliminary objection and the substantive request for review, thereafter the Respondents would be heard on its rejoinder to its preliminary objection and its response to the substantive request for review followed by the Interested Party and lastly the Applicant who would be heard on its rejoinder on points of law only.

60. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents submission on their preliminary objection

61. In her submissions, counsel for the Respondent Ms. Muriithi, relied on the Notice of Preliminary Objection dated 13th October 2023, the Background to the Matter Under Review dated 18th October 2023, the Replying Affidavit sworn on 18th October 2023 by Maureen Mwenje, General Manager of the 2nd Respondent's Supply Chain Division, Certificate of Production of Electronic Evidence dated 18th October 2023, together with confidential documents concerning the subject tender submitted pursuant to section 67(3)(e) of the Act that were filed with the Board.
62. Ms. Muriithi submitted that the Notice of Preliminary Objection dated 13th October 2023 was filed with the Board via email on 16th October 2023 which was within 3 days of receipt of the instant Request for Review and as such had been filed within the period stipulated in the Act taking note of the fact that the Respondents do not work over the weekend.
63. She further submitted that the Board lacks jurisdiction to entertain the instant Request for Review on the basis that a contract dated 2nd October 2023 was in existence having been signed in accordance with Section 135 of the Act.
64. Counsel pressed on that the Applicant was aware of the existence of the said contract as admitted at paragraph 11 of the Applicant's

Statement in Support of the Request for Review and from the prayers sought in the Request for Review.

65. Ms. Muriithi referred the Board to the holdings in *R v Public Procurement Administrative Review Board Ex parte Madison General Insurance Kenya Limited and others* (hereinafter referred to as "the Madison case") and *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR* and urged the Board to uphold the Notice of Preliminary Objection owing to the fact that the Board lacks jurisdiction.

Interested Party's submission on the preliminary objection

66. Counsel for the Interested Party, Mr. Ayisi, aligned himself with the submissions by the Respondents and submitted that jurisdiction of the Board emanates from statute and according to section 167(4) of the Act, the Board is divested of jurisdiction where a contract is signed per section 135 of the Act.

67. Counsel referred the Board to the holding in the Madison case and submitted that once it has been demonstrated that a contract is signed per Section 135 of the Act, then it is deemed to be a valid contract and marks the end of the procurement proceedings.

68. Mr. Ayisi further submitted that the Board lacks jurisdiction and on the basis of the preliminary objection, the instant Request for Review ought to be dismissed with costs.

Applicant's Response to the Respondents' preliminary objection and submission on the Request for Review

69. In her submissions, counsel for the Applicant, Ms. Nungo, relied on the Request for Review dated 11th October 2023 together with an Applicant's Statement in Support of the Request for Review signed on 11th October 2023 by Sammy Kiragu, its Managing Director, Applicant's Further Statement in Support of the Request for Review dated 25th October 2023 signed by Sammy Kiragu, its Managing Director, Certificate of Production of Electronic Evidence dated 25th October 2023, and List and Bundle of Authorities dated 26th October 2023 that were filed with the Board.

70. With regard to the preliminary objection, counsel submitted that she was opposed to the same since the main issue being raised was that the Applicant was aware of the contract dated 2nd October 2023 and that the said contract had been signed in accordance with Section 135 of the Act.

71. Ms. Nungo referred the Board to paragraphs 3 and 4 of the Applicant's Further Statement in Support of the Request for Review and submitted

that the preliminary objection was not a proper preliminary objection in law since it was based on contested facts requiring to be ascertained by the Board.

72. Counsel pointed out that the Applicant was the successful tender in the subject tender and not the Interested Party and that no contract was prepared for the Applicant's signing by the Procuring Entity which were contested facts and as such, the preliminary objection as raised was not proper. In support of her argument, she referred the Board to the holding in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA*.
73. Ms. Nungo submitted that the Applicant only came to learn that a contract had been signed during the proceedings in the instant Request for Review.
74. She further submitted that the provisions of Section 167(4) of the Act are only applicable once a contract has been signed in accordance to Section 135 of the Act and as such, the contract in contest had not been signed in accordance with Section 135 of the Act.
75. Ms. Nungo referred the Board to its decision in *Application No. 85 of 2022 Babs Security Services Ltd v Managing Director, Ruiru-Juja Water and Sewerage Company and Canon Security Services Kenya Ltd* where the Board considered a similar complaint and stated at page 42 of its decision that the mere act of signing a contract does not oust the jurisdiction of the Board.

76. Counsel referred the Board to the holding in *Nairobi Judicial Review No. E113 of 2023 R v Public Procurement Administrative Review Board and 2 others Ex parte Trident Insurance Company Limited* and the case of *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 other [2018] eKLR* and urged the Board to find the preliminary objection unmerited and to dismiss the same.
77. On the substantive issues raised in the instant Request for Review, Ms. Nungo submitted that the same was grounded on the Procuring Entity's breach of Section 134(1) and 135 of the Act. Ms Nungo further submitted that no contract was entered into with the Applicant notwithstanding the fact that the Applicant was the successful tenderer in the subject tender as notified in the letter dated 7th June 2023 which was issued in accordance with Section 87 of the Act and accepted by the Applicant.
78. Counsel submitted that this communication of award was not cancelled and there is no evidence of such communication before the Board. She further submitted that there is no evidence that the Applicant refused to sign a contract with the Procuring Entity and is therefore entitled to the reliefs sought in the instant Request for Review.
79. Ms. Nungo submitted that vide the email of 30th June 2023, the Applicant communicated to the Procuring Entity of the challenge it faced and on what could be done in the meantime and was not a

cancellation or refusal. She pointed out that in fact, the advice given by the Applicant was taken up by the Procuring Entity as it tried to solve the pending issues. Counsel further pointed out that as at the time this was going on, it appeared that the Procuring Entity was in communication with the Interested Party and the Procuring Entity was avoiding/ignoring to commit with the Applicant with the intention that validity period would lapse.

80. Ms. Nungo submitted that the award to the Interested Party allegedly issued on 7th September 2023 was unlawful and that the Applicant was not aware of the same as no notification was issued per Section 87 of the Act and that the contract which was allegedly signed was not proper as it was not signed in accordance to Section 135 of the Act.

81. Counsel further submitted that as much as it was alleged that the Interested Party was awarded, the acceptance was conditional compared to the Applicant's acceptance which was unconditional. Counsel pointed out that the Applicant had the lowest evaluated price compared to the Interested Party's tender prices.

82. To show the (in) decision of the Respondents in entering a contract with the Applicant, counsel further pointed out that the Respondents admitted that they only thought of responding to the Applicant's letter dated 7th September 2023 over a month later on 9th October 2023 when they allegedly sought confirmation from Swiss Re on the cover to be placed by the Applicant and to date, no response had been received by

the Applicant pertaining their letters dated 7th September 2023, email of 25th September 2023 and letter dated 28th September 2023. Further that there is no proof of the email communication alleged by the Respondents with Swiss Re.

83. On the issue of tender validity period, counsel submitted that the validity period was due to expire on 25th October 2023 and time stopped running upon filing of the instant Request for Review on 12th October 2023 and according to Section 88 of the Act, the validity period can be extended. In support of her argument, counsel referred the Board to the holding in *Civil Appeal E510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Ltd & 2 others* and *Mombasa Judicial Review No. E002 of 2021 Republic v Public Procurement Administrative Review Board and another Ex parte The Kenya Ports Authority and Another*.

84. Ms. Nungo urged the Board to allow the Request for Review in terms of the reliefs sought and to dismiss the Preliminary Objection with costs.

Respondents rejoinder on their preliminary objection and submission on the Request for Review

85. In a rejoinder its preliminary objection, Ms. Muriithi submitted that the contract was signed as per the Act and within the tender validity period. She further submitted that the Interested Party signed the contract as

a result of the Applicant's communication that it was unable to place cover and that the cancellation emanated from the Applicant.

86. Counsel reiterated the holding in the Madison case and urged the Board to be guided by the same.

87. With regard to the substantive application, counsel submitted that the Applicant was issued with an award letter on 21st June 2023 and via email of 30th June 2023, the Applicant informed the Respondents that they were unable to place contract with Old Mutual Insurance, their underwriter because it was unable to get reinsurance support since the underwriter required the policy to be placed at the full gross premium of USD 1,911,756.66 meaning that the Applicant was unable to place contract because of rebating their commission/undercutting which is illegal per Section 73 of the Insurance Act.

88. Counsel submitted that due to the fact that parties could not formalize a contract, in compliance with provisions of Section 136 of the Act, the 2nd Respondent engaged the second lowest evaluated tenderer and this was done in compliance with Section 87 of the Act.

89. Ms. Muriithi submitted that the Applicant communicated of its inability to place cover on 30th June 2023 knowing that the previous cover was to expire on 1st July 2023. She pointed out that there were facilities that cannot stay without being covered hence the 2nd Respondent had to comply per Section 136 of the Act.

90. Counsel urge the Board to note that the Respondents sought for extension of the previous cover which was with the Applicant with CIC Insurance Co. Ltd as its underwriter but the said underwriter intended to apply a higher premium leading the Respondents to inform them that the variation was too high and was contrary to Section 139 of the Act.
91. Counsel pressed on that the 2nd and 3rd lowest evaluated tenderers underwriter was Britam which had already indicated that the premiums quoted were low and it would not place cover.
92. She submitted that the 4th lowest evaluated tenderer, being the Interested Party's confirmed that it was able to hold cover but it later communicated that it was unable to unlock insurance capacity. Counsel further submitted that in view of the emerging circumstance, the Procuring Entity sought guidance from IRA which advised it to engage direct procurement resulting to the cover in place at the moment.
93. Ms. Muriithi submitted that the stalemate resulted from the actions of the Applicant which led the Respondents to incur loss when it procured the four month cover with the Applicant and CIC Insurance Co. Ltd as it was subjected to a penalty of 25% being USD \$373,508 premium loading for procuring a short term cover.

94. She further submitted that on the issue of the foreign reinsurer, the Interested Party's underwriter sought approval from IRA which was granted vide letter dated 22nd August 2023.
95. Counsel submitted that the Applicant had not communicated by the time of award of the Interested Party and that after the IRA approval, the 1st Respondent approved the Professional Opinion recommending the Interested Party for award. She pointed out that as notifications of intention to award the subject tender had been sent out earlier, the law does not anticipate for notification of award to be sent out a second time.
96. Counsel submitted that a letter of award was issued to the Interested Party on 7th September 2023 and a contract executed on 2nd October 2023 while the Applicant's communication was received on via email on 8th September 2023 when it had already completed the procurement process wherein the Interested Party had already accepted a letter of award and deposited its performance bond with the 2nd Respondent.
97. Counsel pressed on that entering into a contract with the Applicant would expose critical assets due to the underquoted premiums and that the Respondents could not withdraw the contract that had been signed.
98. In conclusion, Ms. Muriithi submitted that the Applicant was motivated by financial greed and that the contract with the Interested Party was valid and urged the Board to dismiss the Request for Review with costs.

99. When asked by the Board on why the 1st Respondent chose to communicate concurrently to all the three lowest evaluated bidders and if the challenges faced by the Applicant were unique to it only, Counsel submitted that this was done due to the urgency and sensitivity of the matter as it dealt with critical assets. She pointed out that the issue of difficulty to place cover with the underwriters was not unique to the Applicant only since a due diligence undertaken had revealed that there was a lot of undercutting hence the reason underwriters were refusing to place cover.

100. Upon enquiry by the Board on whether the Respondents communicated to the Applicant their intention to cancel the award, counsel submitted that the Respondents complied with Section 135 of the Act which does not envision a situation where a bidder does not take up award and refuses to sign a contract. She further added that the Applicant was not making full disclosure since when it accepted the award, it had four days to say that it was unable to place cover and by communicating on 30th June 2023, this was done in bad faith as it knew the period of the previous tender was expiring.

101. When asked to clarify on the duration taken between award of the policy to the Interested Party and signing of contract, counsel submitted that the Interested Party accepted the award on 8th September 2023 and the contract was signed on 2nd October 2023 and

in view of Section 136 of the Act, the law does not envisage a second notification.

102. When asked by the Board about the variance in figures in the cover to be given by the Applicant's reinsurer Swiss Re, counsel submitted that there was a variance and that the email from Swiss Re informed them to keep it in confidence as it was part of due diligence. She further submitted that if the same was not in the confidential file, it could be submitted together with other documents to the Board and pointed out that at the point of receiving the communication by Swiss Re, the instant Request for Review had been filed. This email was ultimately never availed by the Respondents to the Review Board.

Interested Party's submission on the Request for Review

103. In his submissions, counsel for the Interested Party, Mr. Ayisi, relied on a Replying Affidavit sworn on 25th October 2023 by Dennis Nyongesa, its Chief Executive Officer and Interested Party's Written Submissions dated 25th October 2023 filed before the Board.

104. Mr. Ayisi submitted that the Applicant has not disputed that the Request for Review was filed after the contract has been signed and referred to prayer 1 of the instant Request for Review. He maintained that the Applicant was aware of the existing contract at the time of filing the Request for Review.

105. Counsel submitted that the provisions of Section 167(4) of the Act are triggered as the question becomes when the contract was signed which is way before the Request for Review was filed.
106. On lack of Board's jurisdiction, counsel referred the Board to Section 135 of the Act and submitted that the said provision embodies the general principles of a contract.
107. Counsel pressed on that the Interested Party became a successful tenderer on failure pf the Applicant to meet the requirements of a successful bidder.
108. He submitted that once a contract is entered, it not only binds the Interested Party but third parties come into play and breach of such contracts exposed the Interested Party to damages.
109. Mr. Ayisi further submitted that it is not disputed that on being declared successful, the Interested Party contacted APA, its underwriter and the resultant contract signed which is binding and a failure to perform where new obligations have arisen exposes the Interested Party. He pointed out that the Interested Party has issued a performance guarantee and there are 3rd party commitments which expose the Interested Party to loss if not met. Counsel further pointed out that there are international re-insurers who have been brought on board.

110. Counsel submitted that the performance of the contract has little to do with the procurement process as it has already ended and that should the Board go into examining how the contract was entered into, it would be exceeding its jurisdiction.
111. Mr. Ayisi submitted that due to the existing relationship by the Interested Party and 3rd parties, failure to perform the contract would lead to its Professional Indemnity Cover being called because of the breaches and potential claims of professional negligence by the Respondents and underwriters leading to a great risk and causing damages.
112. Counsel submitted that the contract in place was in compliance with the provisions of Section 135 of the Act in that it had been signed and was in written form, it had been demonstrated that the Interested Party was the successful tenderer, contract had been entered into after the period of notification of 14 days had lapsed and the 1st Respondent gave authority for signing of contract between the Interested Party and the Procuring Entity.
113. Mr. Ayisi referred to the holding in the Madison case and submitted that upon signing a contract, the question of validity of such contract was not within the purview of the Board to determine.
114. Counsel pointed out that the Applicant is a beneficiary of the tender it seeks to stop and this conduct cannot allow the Applicant to cherry

pick on which contracts to challenge and which ones not to challenge in view of the doctrine of approbation and reprobation.

Applicants rejoinder

115. In a rejoinder, Ms. Nungo submitted that per the email of 30th June 2023, the Applicant stated challenge it was facing and said it was working on a plan. She pointed out that what was unique is that the delay was not unique to the Applicant only as even the Interested Party faced a similar challenge as it also cancelled the award for the same reasons as the Applicant. Counsel further pointed out that it is important to note that the recommendation made to the Procuring Entity on extension of the previous policy was taken onboard.

116. Counsel further pointed out that this notwithstanding, the Procuring Entity went ahead and contracted with the Interested Party yet unlike the Interested Party, the Applicant accepted the award unconditionally.

117. She submitted that there was no evidence that the Applicant was aware that a contract had been entered into on 2nd October 2023 and the prayers in the Request for Review do not make reference to the contract of 2nd October 2023 but to any contract as the Applicant had only heard word from the industry.

118. On exposure to be faced by the Interested Party, counsel submitted that what is a nullity is a nullity and there was no contract in place and that matters on exposure ought not to be visited upon the Applicant.

119. Ms. Nungo submitted that the instant Request for Review was within the Board's jurisdiction and this is not a novel application before the Board as numerous review applications have been filed as such and considered by the Board.

120. Counsel concluded by stating that the instant Request for Review is with respect to specifically the All Risks Industrial Insurance Policy awarded to the Applicant being one of the twenty-four (24) insurance policies in the subject tender and that save for the All Risks Industrial Insurance Policy, all other insurance policies in the subject tender are not subject to review.

121. She urged the Board to allow the Request for Review as prayed.

122. When asked by the Board to refer it to documents showing that the Applicant was now able to place cover, counsel submitted that the Applicant was able to place cover as demonstrated by the Applicant's annexures 10 to 14 on communication of 7th September 2023, the letters from Old Mutual, the letter from Swiss Re, and Africa Re.

123. When asked by the Board whether the Applicant refused to sign contract due to failure to meet requirements by the 2nd Respondent, counsel submitted that this was not the case as no contract was presented to the Applicant. She pointed out that the Applicant only indicated the challenge being faced and said it was giving a plan and there was no period when the Procuring Entity was exposed.

124. Upon further enquiry by the Board on why the Applicant waited until 30th June 2023 to communicate its inability to place cover, counsel submitted that there was no malice on the Applicant's part as the communication was done immediately it received word from the underwriter.

125. When asked by the Board about the variance in figures in the cover to be given by the Applicant's reinsurer Swiss Re, counsel submitted the alleged email from Swiss Re was not furnished to the Board yet the Procuring Entity had been open enough to serve it with all confidential documents in the subject tender and there was no explanation on why they would lock out such key information noting the principles of transparency and accountability.

126. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12th October 2023 was due to expire on 1st November 2023 (*meant 2nd November 2023*) and that the Board would communicate its decision on or before 1st November 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

127. The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the

Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

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

In determining the first issue, the Board will make a determination on the following sub-issues:

- i Whether the Notice of Preliminary Objection by the Respondents dated 13th October 2023 is a proper preliminary objection in law;
- ii Whether the contract with respect to the All Risks Industrial Insurance Policy in the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act

Depending on the determination of the first issue;

B. Whether the Award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party was issued in accordance with the provisions of the Tender Document, the Act and the Constitution;

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

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

i Whether the Notice of Preliminary Objection by the Respondents dated 13th October 2023 is a proper preliminary objection in law;

128. On 16th October 2023, the Respondents filed via email a Notice of Preliminary Objection dated 13th October 2023 seeking for the instant Request for Review to be struck out for reasons that (a) the Board lacks jurisdiction to entertain the application as per Section 167(4)(c) of the Act on the basis that there was an already signed contract dated 2nd October 2023 and (b) the Request for Review contained an admission that the Applicant was fully aware that the 2nd Respondent had since entered into a contract with a third party.

129. On its part, the Interested Party at paragraph 5 of the Replying Affidavit sworn on 25th October 2023 by Dennis Nyongesa, its Chief Executive Officer deponed that pursuant to Section 167(4) of the Act, the Board lacks jurisdiction to entertain the instant Request for Review.

130. On the other hand, the Applicant in opposition of the preliminary objection contends at paragraph 3 of the Applicant's Further Statement in Support of the Request for Review that the preliminary objection was

not proper as it was not on a pure point of law because (a) the facts of the instant Request for Review are disputed and (b) the Board will have to examine the evidence placed before it before making a determination on the objection raised.

131. Having carefully studied the instant Request for Review, the Board notes that the same is premised on the alleged breach by the Respondents of Sections 134(1) and 135 of the Act read with Clause 46 of Section I-Instructions to Tenderers at page 26 of 122 of the Tender Document and Articles 10, 27, and 227(1) the Constitution. The Applicant faults the Respondents for failure to prepare and enter into a written contract with it being the lowest evaluated tenderer for the All Risks Industrial Insurance Policy in the subject tender and instead entering into a contract with the Interested Party without recalling and or cancelling the letter of notification of Award issued to it on 21st June 2023 and despite the fact that the tender by the Interested Party was not the lowest evaluated tender.

132. We are therefore called upon to determine whether any of the evidence presented before the Board leading to the Applicant's allegation of breach by the Respondents is contested to render the preliminary objection by the Interested Party as not proper.

133. The parameters of consideration of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits or

otherwise of the Notice of Preliminary Objection by the Interested Party were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

134. At page 701 Sir Charles Newbold, P added:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."

135. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any

fact has to be ascertained or if what is sought is the exercise of judicial discretion.

136. We have already established that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. In our considered view, the order in which the events mentioned by parties in the Request for Review and the dates when these events happened leading to award of the All Risk Industrial Insurance Policy in the subject tender to the Applicant and later on to the Interested Party and the chronology of events leading to issuance of the various letters of award and subsequent signing of the contract dated 2nd October 2023 between the Respondents and Interested Party to prompt the Applicant's allegation of breach of duty by the Respondent have not been contested by parties in their pleadings. The contest herein is on whether the contract signed on 2nd October between the Respondents and Interested Party was signed in accordance with Section 135 of the Act. There will be no need for the Board to inquire into evidence presented to ascertain whether the chronology of events leading to signing of the said contract are correct since the documents presented by all parties have not been contested.

137. In the circumstances, we find that the preliminary objection by the Respondents and Interested Party is a proper preliminary objection in law.

- ii Whether the contract with respect to the All Risks Industrial Insurance Policy in the subject tender has been signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act***

138. It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

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

140. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

141. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It

is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

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

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

144. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We

agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

145. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

146. Further, Section 28 of the Act provides for the functions of the Board as:

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

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

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

147. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

***PART XV — ADMINISTRATIVE REVIEW OF
PROCUREMENT AND DISPOSAL PROCEEDINGS***

167. Request for a review

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

(2)

(3)

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

(a) the choice of a procurement method;

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

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

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement

proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

148. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act though limited under the provisions of Section 167(4) of the Act. The Board exercises its powers under Section 172 and 173 of the Act with respect to reviewing an administrative review of procurement proceedings filed before it. It therefore follows that where a matter is not subject to review of procurement proceedings under Section 167(1) of the Act, then the Board is divested of jurisdiction to hear and determine an administrative review presented before it since its

jurisdiction flows from the Act and it can only exercise powers as granted by the Act.

149. The Respondents and Interested Party objected to the hearing of the instant Request for Review on what we understand to be the fact that a contract dated 2nd October 2023 had been entered into by the said parties with regard to the All Risk Industrial Insurance Policy in the subject tender. The Interested Party submitted that the signing of a contract signifies the end of the procurement process hence the Board is divested of jurisdiction to entertain the instant Request for Review as per Section 167(4)(c) of the Act and the Applicant is therefore before the wrong forum.

150. On the other hand, the Applicant disputed the legality of the said contract dated 2nd October 2023 entered into between the Respondents and the Interested Party contending that the same was in breach of Section 134(1) of the Act and Section 135 of the Act pointing out that it emerged as the lowest evaluated tenderer and was issued with a letter of notification of award on 7th June 2023, a further letter dated 21st June 2023 which it accepted the award on 26th June 2023 and as such, both notification and further letter remained valid and binding and were never recalled or cancelled by the 1st Respondent prior to awarding the Interested Party the All Risk Industrial Insurance Policy in the subject tender and subsequently signing a contract on the same.

151. A question then arises for our determination on whether the jurisdiction of the Board is automatically ousted when parties to a procurement proceeding have signed a contract.

152. We have already noted hereinbefore that the jurisdiction of this Board flows from Section 167(1) of the Act. However, such jurisdiction of the Board is ousted by Section 167(4) of the Act which provides as follows:

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

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

153. A reading of Section 167(4)(c) above clearly shows that the mere act of signing a procurement contract does not automatically oust the jurisdiction of the Board as it is conditional on the procurement contract being signed in accordance with Section 135 of the Act.

154. Section 135 of the Act provides for creation of procurement contracts. Once a procurement contract is signed in accordance with Section 135

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

155. Section 135 of the Act provides as follows:

"135. Creation of procurement contracts

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

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

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

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

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

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

(a) Contract Agreement Form;

(b) Tender Form;

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

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

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

156. The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* (a) such a procurement contract must be in writing;

(b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and; (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

157. It is our considered view that this Board is required to inquire as to whether a contract has been entered into and signed in accordance with Section 135 of the Act when making a determination on whether it is vested with jurisdiction to hear a Request for Review. In saying so, we are guided by the holding by Justice Justice R.E. Aburili in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** upheld by the Court of Appeal in **Civil Appeal No. 35 of 2018 Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR** (hereinafter referred to as "the Lordship Africa Limited case") where the court stated as follows:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In

other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction.....

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

158. The Respondents and the Interested Party in their arguments that the Board is divested of jurisdiction to hear and determine the instant Request for Review relied on the holding of the High Court in **Misc. Civil Application No. E005 of 2022 R v Public Procurement Administrative Review Board Ex parte Madison General**

Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (hereinafter "the Madison case") where Justice Jairus Ngaah held that:

"...in consideration of provisions of Section 167(4)(c) of the Act, once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is the High Court...."

It is our considered view that the holding of the Court of Appeal in the Lordship Africa Limited case is distinguishable from the holding of the High Court in the Madison case relied upon by the Respondents and the Interested Party in terms of judicial hierarchy since the holding in Lordship Africa Limited case is by a superior court and is thus binding on the High Court in terms of precedent. We say so because Article 165(6) of the Constitution states in plain language that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court, which in terms of Article 162(1) of the Constitution consist of the Supreme Court, the Court of Appeal, the High Court and courts of equal status being the Employment and Labour Relations Court and the Environment and Land Court. This therefore means that the Court of Appeal has jurisdiction to hear and determine appeals from the High Court (as it happened in the Lordship Africa Limited case) and its decisions are binding on the High Court and all courts equal and inferior to it. As such, the Board and the High Court are bound by the decision of the Court of Appeal.

159. In view of the foregoing, it is important for us to determine whether the 1st Respondent and the Interested Party signed the contract dated 2nd October 2023 with respect to the All Risk Industrial Insurance policy in the subject tender in accordance with Section 135 of the Act, which determination can only be made by interrogating the said contract and establishing whether or not the Respondents and Interested Party satisfied the statutory pre-conditions of signing a contract as outlined under Section 135 of the Act.

160. Section 135(3) of the Act is instructive on procurement contracts being entered into within the period specified in the notification but not before fourteen days have lapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

161. Section 87 of the Act is instructive on how notification of intention to enter into a contract ought to be conducted by a procuring entity and provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

162. In essence, notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

163. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.**
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."**

164. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, we observe that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of

public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

165. Turning to the circumstances of the instant Request for Review, we note that the Respondents in their submissions argued vehemently that they were under no obligation/were not required in law to issue a second letter of notification when complying with the provisions of Section 136 of the Act having already issued letters of notifications to the successful tenderers in the subject tender. Section 136 of the Act provides:

" 136. Refusal to sign contract

(1) If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 64 of the Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.

(2) This section does not apply if the period during which tenders shall remain valid has already expired."

166. In essence where the successful tenderer refuses to enter into a written contract in accordance with Sections 64 and 135 of the Act, that tenderer shall forfeit its tender security and the procurement process

shall proceed with the next lowest evaluated tenderer provided that the period of tenderer validity has not lapsed.

167. We note from the confidential documents that in issuing the award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party, what the 1st Respondent simply did was to issue it with a Letter of Award dated 7th September 2023 following approval of the Second Professional Opinion to award the said insurance policy to the Interested Party.

168. Evidently, there was no letter of notification of award as provided for under Section 87 of the Act following approval of the second professional opinion recommending award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party and the decision by the Respondents to award the Interested Party the said insurance policy which was contrary to the procurement process which took place upon approval of the First Professional Opinion recommending award of the twenty-four (24) insurance policies in the subject tender to the various successful tenderers.

169. As such, the purported unsuccessful tenderers under the All Risk Industrial Insurance Policy in the subject tender, including the Applicant, were not notified of award of the said policy contrary to Section 87(3) of the Act which requires notification to the unsuccessful tenderers to be issued at the same time the successful tenderer is notified that its tender has been accepted. The reason for this is for the statutory period of 14 days under Section 167(1) of the Act to start

running at the same time for both the successful tenderers and unsuccessful tenderers. Secondly, when the 14 days' statutory period starts running, there is a standstill period when a contract can't be signed so as not to defeat the essence of filing a Request for Review under Section 167(1) of the Act by an aggrieved tenderer.

170. Taking into consideration that the standstill period provided in Section 135(3) of the Act could only commence from the date of notification of both the successful and unsuccessful tenderers in the All Risk Industrial Insurance Policy in the subject tender, the earliest a contract with respect to the All Risk Industrial Insurance Policy could be signed would be 14 days from the date of the purported letter of notification of the award of the All Risk Industrial Insurance Policy to the Interested Party and purported unsuccessful tenderers, including the Applicant.

171. In view of the foregoing, we find that the contract dated 2nd October 2023 signed by the Respondents and the Interested Party with respect to the All Risk Industrial Insurance Policy in the subject tender was signed contrary to Section 135(3) of the Act for having been signed in the absence of a notification of intention to enter into a contract being issued to the purported successful and purported unsuccessful tenderers under the All Risk Industrial Insurance Policy following the decision to award the same to the Interested Party as recommended in the Second Professional Opinion pursuant to Section 87 of the Act. This therefore means that any action undertaken by the Respondents

and the Interested Party under the said contract in view of performance of the subject tender is a nullity.

172. We are guided by the Lordship Africa Limited case where the High Court held that:

"It must be emphasized that contracts that are pedigree of a flawed process must be rendered null and void ab initio. The right to file a request for review against the decision of the procuring entity accrues after an unsuccessful bidder is notified that its bid was not successful, and with reasons.

.....

Notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity."

173. Secondly, upon perusing the confidential document, we note that vide a letter dated 8th September 2023, a day after the Interested Party purports to have been awarded the subject tender, the Interested Party forwarded the contract for the subject tender signed by it to the Respondents.

174. In the circumstances, the contract dated 2nd October 2023 with respect to the All Risk Industrial Insurance Policy in the subject tender

was not signed in accordance with Section 135 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(c) of the Act.

175. The upshot of our finding on the first issue for determination is that this Board has jurisdiction to hear and determine the instant Request for Review.

Whether the Award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party was issued in accordance with the provisions of the Tender Document, the Act and the Constitution;

176. We understand the Applicant's case on this issue to be that it was awarded the All Risk Industrial Insurance Policy in the subject tender having emerged as the lowest evaluated tenderer, and having been issued with the letter of Notification of Intention to Award dated 7th June 2023 and a further letter dated 21st June 2023 of the said insurance policy. The Applicant contends that the said letter of Notification of Intention to Award and the letter of Award have not been recalled and/or cancelled by the 1st Respondent and the same remain valid and binding meaning that it is the only bidder with capacity to enter into a contract with the Respondent with respect to the All Risk Industrial Insurance Policy in the subject tender.

177. The Applicant further contends that it has demonstrated that it was and still is the tenderer that submitted the lowest evaluated tender,

that it unconditionally accepted the award of the said insurance policy and that it is not true that it was unable to place cover as it has obtained an unconditional confirmation from its underwriter and the local reinsurers unconditional approval of placing cover at its tender price of USD 1,601,458.98 being the same price it was awarded the All Risk Industrial Insurance Policy in the subject tender.

178. On the other hand, the Respondents acknowledges that upon conclusion of the evaluation of the subject tender, the Applicant together with its underwriter, Old Mutual Insurance, emerged as the lowest evaluated bidder for the All Risk Industrial Insurance Policy and were notified of award of the same at their tender price. However, via an email of 30th June 2023, the Applicant informed the 2nd Respondent that it was unable to place cover with Old Mutual Insurance because the underwriter was unable to get reinsurance support and in its view, this was because the Applicant's rebating on its commissions/undercutting.

179. According to the Respondents' as a result of the Applicant's inability to place cover, they engaged the next evaluated bidders as per the ranking at the Financial Evaluation stage and received acceptance of the award by the Interested Party at its tender price whose underwriter, APA Insurance Co. Ltd, took up cover from 1st July 2023 but later informed it on 12th July 2023 that was unable to unlock the reinsurance capacity and were coming off cover. However, on 19th July 2023, the Interested Party confirmed that it was able to take up the said

insurance policy since APA Insurance Co. Ltd had been granted approval by IRA to place the cover with overseas re-insurers. Subsequently that a Second Professional Opinion was prepared recommending award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party which accepted award on 8th September 2023 and both parties signed a contract on 2nd October 2023.

180. The Respondents contend that the Applicant failed to communicate with the Respondents for two (2) months since informing them that it was unable to place cover with its reinsurer and it was only until 8th September 2023 that they confirmed that they were in a position to place a cover as from 12th November 2023 having obtained support from Swiss Re, African Re and Zep Re which was too late in the day as the procurement process had been concluded.

181. On its part, the Interested Party contends that it entered into a contract with the 2nd Respondent following award of the subject tender had been made to it on 7th September 2023 and it had taken steps in performance of the said contract and should the instant Request for Review be allowed, it will suffer enormous losses and prejudices. It further contends that the execution of the contract brought the procurement process to an end and that the tender validity period having expired on 25th October 2023 cannot be extended.

182. The Board is cognizant of the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which reads:

"227. Procurement of public goods and services

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

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

- a)***
- b)***
- c) and***
- d)"***

183. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness."

184. Further to the provisions of Article 227 of the Constitution, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 of the Constitution reads:

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

(a) applies or interprets this Constitution;

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

(c) makes or implements public policy decisions.

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

(a);

(b);

(c) good governance, integrity, transparency and accountability" [Emphasis ours].

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

186. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).

(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."

187. Having carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act, it is not in contest that the All Risk Industrial Insurance Policy in the subject tender was to be awarded to the lowest evaluated responsive tenderer.

188. We have carefully studied the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act including the Evaluation Report and the Applicant's annexures to the Applicant's Statement in Support of the Request for Review and the Applicant's Further Statement in Support of the Request for Review and note that it is not in contest that the Applicant emerged as the lowest evaluated responsive tenderer.

189. By way of a brief background, the Applicant and Interested Party were amongst thirty (30) other tenderers who submitted bids in Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 which consisted of twenty-four (24) insurance policies and one of the policies being the All Risk Industrial Policy.

190. Upon evaluation, the Applicant's tender was ranked No. 1 at the Financial Evaluation stage being the lowest evaluated tender price while the Interested Party's tender was ranked as No. 4. Subsequently, the Evaluation Committee recommended the Applicant for award of the

All Risk Industrial Insurance Policy in the subject tender in addition to two other insurance policies. This was a recommendation that was upheld in the First Professional Opinion and approved by the 1st Respondent.

191. Following the approval, the Applicant was issued by the 1st Respondent with a letter dated 7th June 2023 of Notification of Intention to Award the three insurance policies including the All Risk Industrial Policy which is in contest in the instant Request for Review. After lapse of the 14 days' standstill period, the 1st Respondent issued the Applicant with a further letter dated 21st June 2023 and the Applicant confirmed acceptance of the award and the terms therein by signing and returning a duplicate of the said letter to the 1st Respondent on 26th June 2023. The further letter read in part as follows:

".....

Following detailed evaluation of the tenders received, KPC is pleased to advice you that you have been awarded the following policy:

NO.	POLICY	UNDERWRITER	CURRENCY	FY2023/2024	FY2024/2025
1.	All Risk Industrial	Old Mutual	US\$	1,601,458.98	1,601,458.98
2.
3.

Kindly provide us with a separate performance bond from the underwriters for each policy in the amount of 10% of the annual

premium valid for the period of the policy and your CR12 form from the registrar of companies within three days of receipt of this notification.

.....

The contract documents are currently under preparation and will be signed as soon as the above documents are received.

Kindly signify your acceptance of the award by signing the duplicate of this letter and return to the undersigned by 26th June 2023.

Yours faithfully

....."

192. From the contents of the above letter, it is important to note that at the point of issuance of the further letter, no contract had been forwarded to the Applicant by the Respondents since according to the letter of award, the contract was currently under preparation and would be signed as soon as the documents requested were received.

193. As at 26th June 2023, it is clear from the letter forwarding a copy of the acceptance of award letter that the Applicant had not submitted the separate performance bond from the underwriters for each policy in the amount of 10% of the annual premium valid for the period of

the policy and its CR12 form noting that it had only three (3) days from 23rd June 2023, being the date it indicated it had received the said further letter to submit the same. The forwarding letter dated 26th June 2023 reads in part:

".....
We acknowledge receipt of your letter dated 21st June 2023 but received in our offices on 23^d June 2025.
We hereby return a copy of the award letter signifying our acceptance of the award.
The performance bond(s) are under preparation and will be forwarded together with the CR12 form. We look forward to the signing of the contract.
We take this opportunity to thank Kenya Pipeline Company Limited for the award and give assurance for the best professional services.
....."

194. In sudden turn of events, the Applicant via email dated 30th June 2023 informed the Respondents that its underwriter, Old Mutual General Insurance Company was unable to confirm cover as at then due to difficulties in getting reinsurance support. The said email reads:

".....
Subject: FW:KPC/SEDWICK TENDER AWARD
INSURANCE CONFIRMATION ADJUSTMENT/DECLINE-
INDUSTRIAL ALL RISK POLICY
Good afternoon,

Kindly find below communication from OLD Mutual General Insurance Company about inability to confirm the IAR Cover since up to now they have not be able to get reinsurance support. We are extremely sorry for this unfortunate and unforeseen circumstances. We have been in constant engagement with the underwriter who seem are stuck to Reinsurance full gross premium.

In view of the prevailing circumstances, we propose you consider policy extension with the existing underwriter CIC General Insurance Co. Limited for a minimum 3 months to avoid exposure and allow time to plan. Kindly let us feedback and instructions."

195. The Board notes the chronology of events following the Applicant's communication of 30th June 2023 of its inability to take up the All Risks Industrial Insurance Policy in the subject tender and the resultant award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party issued vide a purported letter of award dated 7th September 2023 and accepted by the Interested Party on 8th September 2023 resulting into a contract dated 2nd October 2023. We have hereinabove found that the said Contract dated 2nd October 2023 between the Respondents and the Interested Party is null and void.

196. The question that the Board needs to answer at this juncture is whether the award issued to the Applicant by the Respondents with

respect to the All Risk Industrial Insurance Policy was alive and remained valid in view of the request by the Applicant for the Respondents to allow time to plan and in view of the provisions of Section 135 and 136 of the Act.

197. Our understanding of the Applicant's email of 30th June 2023 is that from the subject of the said email, the Applicant communicated a confirmation adjustment of award of the All Risk Industrial Insurance Policy in the subject tender. In simple terms, the Applicant varied its acceptance of award which had been issued on 26th June 2023 to the Respondent with respect to the All Risk Industrial Insurance Policy in the subject tender. The Applicant pointed to the inability of its reinsurer to get reinsurance support and proposed two things to the Respondents as a result of this inability (a) to extend the policy with the existing underwriter CIC General Insurance Co. Ltd to avoid exposure, and (b) to allow time to plan.

198. The proposal on allowing time to plan was not clearly expounded on how much time was required or what was entailed in the planning. This takes us to the law of contract which gives effect to consensual agreements entered into by particular individuals in their own interests and the three essential elements that must exist for a valid contract to exist being an offer, acceptance and consideration. In saying so we are cognizant of the Court of Appeal pronouncement in **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited and Another (2014) eKLR** where it was held that *'it is trite that there are three*

essential elements for a valid contract. That is an offer, an acceptance and consideration.'

199. Notably Section 87(4) of the Act dictates that

"For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

200. We note that the aforementioned Letter of Award accepted by the Applicant on 26th June 2023 when read together with Section 87(4) of the Act makes it clear that the same did not form a contract and that the said letter of award was issued by the 1st Respondent on the condition that the documents requested were provided by the Applicant within three (3) days from the date of receipt of the said letter.

201. Following the Applicant's email of 30th June 2023, it is evident that due to the challenges being faced, the Applicant was not in a position to meet the conditions set out in the further letter which it had accepted on 26th June 2023, within the stipulated timeline of three (3) days and as such, the contract documents in relation to the All Risk Insurance Policy in the subject tender, if prepared, could not be signed within the anticipated timelines provided in the further letter.

202. We have hereinbefore established that creation of procurement contracts is provided for under Section 135 of the Act. Section 135 (2) and (3) provides:

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

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

203. The import of the above provision in regard to entering of a written contract between a procuring entity and a successful tenderer is that a procurement contract must be signed within the tender validity period but not earlier than the lapse of 14 days following giving a notification of award. This therefore means that there is no cut off period within which a procurement contract can be created provided that it is signed within the tender validity period and not before the lapse of 14 days from the date of receipt of notification of intention to enter into a contract. As such, in view of the provisions of Section 135 of the Act, it is our opinion that it was not mandatory for the Applicant to sign the procurement contract within the timelines stipulated in the further letter. In any case, the timelines to sign the contract were never indicated in the further letter. What was indicated is timelines for providing certain documents.

204. In view of the foregoing, and the request by the Applicant for the Respondents to allow more time to plan, we now need to establish whether the Applicant's communication meant that it was refusing to enter into a written contract as per provisions of Section 136 of the Act.

205. Section 136 of the Act provides:

"136. Refusal to sign contract

(1) If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 64 of the Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.

(2) This section does not apply if the period during which tenders shall remain valid has already expired."

206. In essence, where a successful tenderer refuses, **in writing,** to enter into a written contract as per Section 135 and 64 of the Act, the said tenderer forfeits its tender security and the procurement process proceeds to the next lowest evaluated tenderer. A reading of Sections 86 and 87 of the Act makes it clear that a successful tender is, *inter alia*, (a) the tender with the lowest evaluated price, and (b) the person notified in writing as per Section 87 of the Act that his/her tender has been accepted.

207. Having hereinbefore established that the Applicant was the successful tenderer and that a notification of intention to enter into a contract to this effect was issued pursuant to Section 87 of the Act to it and to other tenderers in the subject tender vide letters dated 7th June 2023, one would expect that if the communication of 30th June 2023 was interpreted to be a refusal to enter into a contract by the Respondents, then the Applicant was under an obligation to forfeit its tender security and the procurement process would proceed to the next lowest evaluated tenderer.

208. Having carefully perused the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have neither had sight of (a) a contract prepared by the Respondents in favour of the Applicant, (b) a contract forwarded to the Applicant for signing, (c) a written refusal by the Applicant to enter into a written contract with respect to the All Risk Industrial Insurance Policy in the subject tender nor (d) a forfeiture of the Applicant's tender security. It is therefore our considered opinion that the Applicant's communication of 30th June 2023 did not transmit to a refusal to sign contract as anticipated under Section 136 of the Act but was only a communication regarding its confirmation adjustment of award of the All Risk Industrial Insurance Policy in the subject tender.

209. It is not in contest that the same challenge experienced by the Applicant was also experienced by the Interested Party following its acceptance of award of the All Risk Industrial Insurance Policy in the

subject tender on 12th July 2023 when the underwriter of the Interested Party communicated that they were unable to unlock the reinsurance capacity and they came off cover only to later take up the award issued on 19th July 2023. It is also not in contest that at this juncture, the Respondents had not responded to the Applicant's email of 30th June 2023 pertaining to its proposal on allowing time to plan. What the Respondent had instead resulted to do was concurrently communicate to the next three lowest ranking tenderers for the All Risk Industrial Insurance Policy in the subject tender without receipt of the Applicant's (a) written refusal to enter into a written contract for the said policy and (b) forfeited tender security as per Section 136 of the Act which insinuates that the Applicant's email communication of 30th June 2023 was interpreted by the Respondents to be a refusal to accept the award of the All Risk Industrial Insurance Cover in the subject tender as issued under Section 87 of the Act.

210. In view of the foregoing, the Board finds that by resulting to then award the Interested Party the All Risk Industrial Insurance Policy in the subject tender, the Respondents breached the provisions of Section 44(1), 86(1)(a), 87, 134(1), 135, and 136 of the Act read with Regulation 23(a) of Regulations 2020.

211. Section 44(1) of the Act provides:

"An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act."

212. Section 134(1) of the Act provides:

"The accounting officer shall be responsible for preparation of contracts in line with the award decision."

213. Regulation 23(a) of Regulations 2020 provides:

"In addition to responsibilities provided for under section 44(2) and in accordance with section 44(2)(j) of the Act, an accounting officer shall-
(a) ensure that procurement and asset disposal contracts are entered into lawfully and implemented accordingly."

214. We fault the Respondents for purporting to proceed with awarding the Interested Party on 7th September 2023 with the All Risk Industrial Insurance Policy in the subject tender when the award of the same made by the 1st Respondent to the Applicant on 7th June 2023 was still valid and in place and had not been cancelled or revoked and tenderers notified of revocation of the same

215. The procurement proceedings with regard to the All Risk Industrial Insurance Policy in the subject tender that was carried out by the Respondents leading to the Professional Opinion of 7th September 2023 and purported award to the Interested Party cannot suffice since the letter of notification of intention to enter into a contract with the Applicant dated 7th June 2023 and notified to other tenderers was still

valid and had not been cancelled or recalled in writing by the 1st Respondent while also notifying in writing all other tenderers in the All Risk Industrial Insurance Policy in the subject tender of the cancellation of the award to the Applicant to give effect to the provisions of Section 87 of the Act.

216. It should be noted that such cancellation of the notification of award would be different from termination of procurement proceedings envisioned under Section 63 of the Act since only the award would be cancelled and not the entire procurement proceedings of the said insurance policy.

217. It is only once the notification of award to the Applicant has been lawfully cancelled/revoked/ recalled and the tender security forfeited that the Respondents can proceed with award to the next lowest evaluated tender within the tender validity period.

218. In the circumstances, we find that the Respondents did not issue the award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party in accordance with the provisions of the Tender Document, the Act, and the Constitution.

What orders should the Board grant in the circumstances?

219. We have found that the Board has jurisdiction to hear and determine the instant Request for Review and proceeded to entertain and make

determination on the substantive issues raised in the instant Request for Review.

220. We have held that the contract entered into between the Respondents and the Interested Party with respect to the All Risk Industrial Insurance Policy in the subject tender was not signed in accordance with Section 135(3) of the Act. This therefore means that the same is null and void and we hereby nullify it. We are guided by the holding in the case of **Macfoy v United Africa Co. Ltd (1961) 3 All E.R 1169**, where Lord Denning stated as follows concerning an act which is a nullity:

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado."

221. We have established that Respondents did not issue the award of the All Risk Industrial Insurance Policy in the subject tender to the Interested Party in accordance with the provisions of the Tender Document, the Act, and the Constitution. What this means, there is no valid award of the subject tender that has been issued to the Interested Party. We therefore find it just and fair to (a) nullify the award of the All Risk Industrial Insurance Policy in the subject tender issued to the Interested Party pursuant to the letter of purported award dated 7th September 2023 and (b) order the Respondents to make good anything procedurally done wrong the procurement process of the All Risk

Industrial Insurance Policy in the subject tender taking into consideration the Board's findings in this decision.

222. We have established that the Applicant was the successful tenderer in the subject tender and has not forfeited its tender security. Accordingly, it is not just for the Respondents to proceed to the next lowest evaluated tenderer when the Applicant still holds a valid award issued to it pursuant to Section 87 of the Act.

223. A prayer for extension of the tender validity period has been made by the Applicant. We have established that the subject tender's validity period was due to lapse on 25th October 2023. The instant Request for Review was filed on 12th October 2023 which was thirteen (13) days before the lapse of the subject tender's validity period. Upon filing the instant Request for Review, the procurement proceedings of the subject tender stood suspended by virtue of section 168 of the Act which reads:

"168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the

procurement proceedings in such manner as may be prescribed."

224. The Board's Acting Secretary issued via email a Notification of Appeal of the subject tender dated 12th October 2023 to the Respondents whose import is that procurement proceedings in the subject tender were immediately suspended on filing of the instant Request for Review by the Applicant and the tender validity period effectively stopped running on 12th October 2023. The Board is guided by the holding of Justice Nyamweya in **HC Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** where the Learned Judge held as follows:

"..... the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point”[Emphasis ours]

225. Consequently, the procurement proceedings in the subject tender will resume at the point they were once the Board renders its decision in the instant Request for Review.

226. Section 173 of the Act donates wide discretionary powers to the Board and being guided by the holding of the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** which referred to the decision of **Onyiego, J. in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another [2021]** in addressing the power of the Board to direct a procuring entity to extend the validity period of the tender, the court held as follows:

"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once.

Section 88 of the Act (PPDA) provides for the extension of the tender validity period...

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...

49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.*[Emphasis ours]*

227. The import of the aforementioned Court of Appeal case is that the Board has the powers to extend the tender validity period to avert situations where an accounting officer of a procuring entity misuses the powers under section 88 of the Act to frustrate tenderers or to frustrate the procurement process. As such, to enable the Respondents comply with orders of the Board in the instant Request for Review, we find that there is need for extension of the subject tender's validity period.

228. In light of the foregoing, we hereby direct the 1st Respondent to extend the subject tender's validity period by a further thirty (30) days from the date of its expiry (noting that it is set to expire 13 days after the date of this decision taking into consideration that the same stopped running on 12th October 2023 after this review was filed). Effectively, the 1st Respondent is hereby directed to issue written notifications to tenderers in the All Risk Industrial Insurance Policy in the subject tender notifying them of extension of the All Risk Industrial Insurance Policy in the subject tender's validity period for a further thirty (30) days as directed herein.

229. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. Integrity is the firm adherence to moral and ethical values in one's behavior and is not only about an individual's or institution's own perception about the correctness or

appropriateness of their conduct but also a fundamental social and public quality.

230. Section 8 of the Act establishes the Public Procurement Regulatory Authority (hereinafter referred to as "Authority") whose functions are laid out in Section 9 of the Act and include, *inter alia*, to investigate and act on complaints received on procurement and asset disposal proceedings. Pursuant to Section 35 of the Act, the Authority has the power to investigate and examine records of a procuring entity relating to procurement or disposal proceedings for the purposes of determining whether there has been a breach of the Act. Such investigation may be initiated by the Authority or on request in writing by a public institution or any other person.

231. The Board is a public institution by dint of its establishment under Section 27(1) of the Act and by virtue of its powers stipulated in Section 173 of the Act, we deem it fit and just to, through the Acting Board Secretary, share this decision with the Director General of the Authority to ensure that orders of the Board have been complied with in view of our findings herein.

232. The upshot of our finding is that the Preliminary Objections fail and the instant Request for Review dated 11th October 2023 and filed on 12th October 2023 succeeds with respect to the following specific orders:

FINAL ORDERS

233. 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 11th October 2023 and filed on 12th October 2023:

- A. The Respondents Notice of Preliminary Objection dated 13th October 2023 and filed on 16th October 2023 and the preliminary objection raised in the Interested Party's Replying Affidavit sworn on 25th October 2023 by Dennis Nyongesa and filed on 25th October 2023 be and are hereby dismissed.**
- B. The Contract dated 2nd October 2023 for the All Risk Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 signed between the Respondents and the Interested Party be and is hereby nullified and set aside.**
- C. The Letter of Award to the Interested Party dated 7th September 2023 with respect to the All Risk Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance**

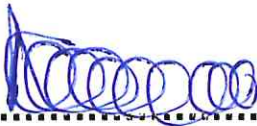
Brokerage Services for the Period 1st July 2023 to 30th June 2025 be and is hereby nullified and set aside.

D. The 1st Respondent is hereby directed to extend the tender validity period of the All Risk Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 for a further thirty (30) days from the date of its expiry.

E. The 1st Respondent is hereby directed to make good the anomalies that the Board has pointed out and proceed to conclude the procurement proceedings and to execute a contract with the successful tenderer for the All Risk Industrial Insurance Policy in relation to Tender No. KPC/PU/OT-298/FINANCE/NBI/23-26 for Provision of Insurance Brokerage Services for the Period 1st July 2023 to 30th June 2025 in accordance with provisions of section 135 of the Act taking into consideration the findings herein and the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution within 14 days of this Decision.

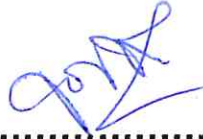
F. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 2nd Day of November 2023.

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PANEL CHAIRLADY

PPARB

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SECRETARY

PPARB