

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 106/2023 OF 11<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**OCCIDENTAL INSURANCE COMPANY LIMITED.....APPLICANT**

**AND**

**CHIEF OFFICER, THE OFFICE OF THE GOVERNOR,  
COUNTY GOVERNMENT OF MAKUENI.....RESPONDENT**

**JUBILEE ALLIANZ GENERAL  
ASSURANCE KENYA LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, County Government of Makueni in relation to Tender No. 13666581-2023/2024 for Provision of General Insurance Cover (GPA, WIBA, GLA, Fire and Burglary Insurance)

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb. - Chairperson
2. Dr. Susan Mambo - Member
3. Mr. Daniel Langat - Member

**IN ATTENDANCE**

- Ms. Sarah Ayoo - Secretariat
- Mr. Anthony Simiyu - Secretariat





Cover (GPA, WIBA, GLA, Fire and Burglary Insurance) using an open competitive tender method. The subject tender's submission deadline was Tuesday, 14<sup>th</sup> November 2023 at 10.00 a.m.

### **Submission of Tenders and Tender Opening**

2. According to the signed Tender Opening Minutes for 14<sup>th</sup> November 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 13 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>Britam General Insurance Company Kenya Limited</b>
<b>2.</b>	<b>APA Insurance Limited</b>
<b>3.</b>	<b>Geminia Insurance Company Limited</b>
<b>4.</b>	<b>CIC General Insurance Limited</b>
<b>5.</b>	<b>Jubilee Allianz General Insurance (K) Limited</b>
<b>6.</b>	<b>Star Discovery Insurance Company Limited</b>
<b>7.</b>	<b>Madison General Insurance Kenya Limited</b>
<b>8.</b>	<b>Trident Insurance Company Limited</b>
<b>9.</b>	<b>Occidental Insurance Company Limited</b>
<b>10.</b>	<b>ICEA Lion General Insurance Company Limited</b>
<b>11.</b>	<b>Heritage Insurance Company Limited</b>
<b>12.</b>	<b>GA Insurance Limited</b>
<b>13.</b>	<b>Kenya Orient Insurance Company Limited</b>

### **Evaluation of Tenders**

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

### **Preliminary Evaluation**

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Preliminary Mandatory Requirements under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 24 of 68 of the Tender Document.
5. Tenderers were to be examined to ensure they meet in all respects the eligibility criteria and other requirements at this stage. Tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 12 tenders were found unresponsive with only 1 tender i.e. the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

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### **Technical Evaluation**

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 25 of 68 of the Tender Document.
8. Tenderers were to be examined and scored against the weighted marks assigned to each criterion at this stage. In order to qualify for further evaluation at the Financial Stage, a tenderer was required to garner at least 80 marks at this stage
9. At the end of the evaluation at this stage, the Interested Party garnered over 80 marks and thus qualified for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 25 of 68 of the Tender Document.
11. Consideration was to be given to the scope of the cover in relation to the premium, the Policy Excess amounts, exclusion clauses and other pertinent terms of the conditions of tender. According to the Tender Document, the successful tender would be one that is established as the lowest evaluated tender.

12. At the end of the evaluation at this stage, it was established that the Interested Party's tender, which was the only tenderer evaluated at this stage happened to have quoted a tender price within the Procuring Entity's budget for the subject tender.

### **Evaluation Committee's Recommendation**

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Twenty-Seven Million, Five Hundred and Thirty-Four Thousand, Nine-Hundred and Fifty-Four (Kshs. 27,534,954.00) only** inclusive of taxes

### **Professional Opinion**

14. In a Professional Opinion dated 9<sup>th</sup> November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Procurement, CM Fidel Muema, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party. The Respondent concurred with the Professional Opinion.

### **Notification to Tenderers**

15. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 27<sup>th</sup> November 2023.



## **REQUEST FOR REVIEW**

16. On 11<sup>th</sup> December 2023, the Applicant through the firm of Mwaniki Gachuba Advocates, filed a Request for Review dated 8<sup>th</sup> December 2023 supported by a Supporting Affidavit sworn on 8<sup>th</sup> December 2023 by Michael Gichiri Wanyoike, the Head of Business Development & Marketing at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The Respondent's decision to disqualify the Applicant's tender be annulled and set aside;***
- 2. The Respondent's decision that the Interested Party's tender was the lowest evaluated be annulled, set aside and be substituted with the decision that the Applicant's tender was the lowest evaluated;***
- 3. The Respondent's decision to award the Tender for Provision of General Insurance Cover (GPA, WIBA, GLA, Fire and Burglary Insurance) (Tender No. 1366581-2023/2024) to the Interested Party at the total premium of Kshs. 27,534,950.00 be annulled and set aside;***
- 4. The Respondent be directed to award Tender for Provision of General Insurance Cover (GPA,WIBA, GLA, Fire and Burglary Insurance) (Tender No. 1366581-2023/2024) to the Applicant at the total premium of Ksh. 23,747,786.00.***
- 5. Costs of the application be awarded to the Applicant.***

17. In a Notification of Appeal and a letter dated 11<sup>th</sup> December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the

Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 11<sup>th</sup> December 2023.

18. In response to the Request for Review, on 18<sup>th</sup> December 2023, the Respondents through the firm of Gichimu Mung'ata & Company Advocates filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 15<sup>th</sup> December 2023. The Respondents also filed a Replying Affidavit sworn on 15<sup>th</sup> December 2023 by Irene Nduku Makau, the Respondent and equally submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
19. Vide letters dated 18<sup>th</sup> December 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 18<sup>th</sup> December 2023.

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*[Signature]*

20. On 19<sup>th</sup> December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 19<sup>th</sup> December 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 21<sup>st</sup> December 2023 at 1.00 p.m. through the link availed in the said Hearing Notice.
21. On 20<sup>th</sup> December 2023, Counsel for the Applicant sent an email to the Board Secretary seeking an adjournment of the hearing from the 21<sup>st</sup> December date citing that he had earlier scheduled matters being MCSUCC/E163/2021 and MCSUCCMISC/E027/2023 and MCSU/E011/2022. On the same day, 20<sup>th</sup> December 2023, the Applicant filed a Further Affidavit sworn on 20<sup>th</sup> December 2023 by Michael Gichiri Wanyoike, the Applicant's Head of Business Development and Marketing.
22. On 20<sup>th</sup> December 2023, the Interested Party through the firm of Chepkuto Advocates filed a Notice of Appointment of Advocates and Notice of Preliminary Objection, both dated 20<sup>th</sup> December 2023 as well as a Replying Affidavit sworn on even date by Robert Maina Gathumbi, the Interested Party's Head of Broker and Direct Channels Business Development.
23. On the morning of the hearing date, 21<sup>st</sup> December 2023, Counsel for the Applicant sent an email to the Board Secretary indicating that he had just seen the Interested Party's Replying Affidavit sworn on 20<sup>th</sup> December 2023 by Robert Maina Gathumbi which he intended to share with the Applicant for further instructions on how to address it. Later on,

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the same day at 1.00 p.m. parties through their respective Counsel joined the online hearing session.

24. The Board noted the email sent by Counsel for the Applicant and sought to confirm if the Applicant was ready to proceed with the hearing in view of its email shared with the Board Secretary earlier in the day. Counsel for the Applicant stood by his email and sought for the matter to be adjourned on account of the Applicant's wish to offer a response on the Interested Party's documents.
25. Counsel for the Interested Party, Ms. Jemator, indicated that she joined the online session ready to proceed but was ready to indulge the Applicant's request for an adjournment.
26. Counsel for the Respondent, Mr. Mung'ata equally indulged the request for an adjournment. He also informed the Board that the Respondent had been served upon with the Applicant's unsigned, and uncommissioned Further Affidavit of 20<sup>th</sup> December 2023.
27. Counsel for the Applicant, Mr. Gachuba indicated that the Board ordinarily requires parties to file both word and physical versions of their filings and it was plausible that the Respondent's Counsel was referring to the word version shared to it by the Board's Secretariat.
28. The Board inquired from parties whether they were acceptable to have the Request for Review canvassed by way of documents and without

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the necessity of a subsequent online hearing when parties are present, to which the parties confirmed their acceptance.

29. Accordingly, the Board retreated for a deliberation before returning with the following directions:

- i. The Interested Party's Replying Affidavit sworn on 20<sup>th</sup> December 2023 by Robert Maina Gathumbi was properly on record;
- ii. The Applicant had an hour from the conclusion of the day's session to serve upon the parties its signed and commissioned Further Affidavit of 20<sup>th</sup> December 2023;
- iii. The Applicant had until 11:00 a.m. on 22<sup>nd</sup> December 2023 to file any responses alongside their Written Submissions;
- iv. Both the Respondent and Interested Party had until 6.00 p.m. on 22<sup>nd</sup> December 2023 to file and serve their Written Submissions;
- v. The Request for Review would be canvassed by way of Written Submissions.

30. At the conclusion of the online hearing session, the Board notified the parties that the instant Request for Review having been filed on 11<sup>th</sup> December 2023 had to be determined by 2<sup>nd</sup> January 2024. Therefore, the Board would communicate its decision on or before 2<sup>nd</sup> January 2024 to all parties via email.

31. On 22<sup>nd</sup> December 2023, the Applicant filed its Written Submissions and Grounds of Opposition, both dated 22<sup>nd</sup> December 2023 together with a Further Affidavit sworn o 22<sup>nd</sup> December 2023 by Michael Gichiri Wanyoike.
32. On the same day, 22<sup>nd</sup> December 2023, the Respondent and the Interested Party separately filed their Written Submissions of even date.

### **PARTIES SUBMISSIONS**

33. The Board directed with the concurrence of parties, that the instant Request for Review would be canvassed by way of Written Submissions and the filed documents. Below is a summary of the parties' respective cases as can be gleaned from the filed documents.

#### **Applicant's Case**

34. It was the Applicant's case that it appointed the firm of Mwaniki Gachuba Advocates pursuant to Regulations 208 of the Regulations 2020. Relying on ***Iway Africa Limited v Infonet Africa Limited & another [2019]eKLR*** it was argued that it was not necessary for the Applicant to file a Notice of Appointment of Advocates.
35. It was argued that Order 9 Rule 1 of the Civil Procedure Rules allowed Mwaniki Gachuba Advocates to sign the Request for Review. For this the Applicant relied on ***Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others [2013]eKLR***.





36. The Applicant therefore maintained that it had satisfied the requirements of Regulation 203 of the Regulations 2020.
37. Relying on Section 28(1)(a) of the Act and the case of ***Republic v Public Procurement Administrative Review Board & another [2008]eKLR***, the Applicant invited the Board to review the blank Tender Document alongside the Applicant's tender and determine whether the Applicant was justly disqualified from the subject tender.
38. The Applicant sought that the Request for Review be allowed with costs relying on ***Judicial Hints on Civil Procedure, 2<sup>nd</sup> Ed. (Nairobi: Law Africa, 2011)*** and the case of ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016]eKLR***.

### **Respondent's Case**

39. The Respondent made the argument that the Request for Review is incompetent and ought to be struck out or dismissed with costs having been signed by an agent without written authorization contrary to Regulation 203 of the Regulations 2020 as read with the Fourteenth Schedule.
40. It was argued that the Respondent received 13 tenders in response to the invitation to tender it made in respect of the subject tender and that the Applicant was disqualified at the Preliminary Evaluation Stage. According to the Respondent, the Applicant failed to meet the following mandatory requirements:

- i. Failure to submit a duly filled Form of Tender as required i.e. clause (d) on conformity, clause (e) on discounts, clause (j) on state ownership and clause (q) on ethical conduct not filled.
- ii. Failure to submit a duly filled, signed and stamped the Schedule of prices form i.e. the submitted form is dated 27<sup>th</sup> October 2023 which was outside the tendering period of between 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023
- iii. Failure to submit a Valid Life Insurance Membership from AKI (on Group Life Insurance)
- iv. Failure to submit a duly filled and signed and stamped Tender Eligibility i.e. Number 6 of the confidential business questionnaire filled with No. (the tenderer would be providing goods, works, non-consulting services or consulting services during implementation of the contract specified in this Tender Document and the confidential ownership disclosure form not dully filled.
- v. Failure to submit a commitment of not having any pending claims with any of its current clients outstanding for more than 6 months i.e. the submitted commitment is dated 5<sup>th</sup> October 2023 and outside the tendering period of 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023.

41. The Respondents contended that the Applicant's allegation that they were discriminated against is without basis. Further that the Procuring Entity could not seek any clarification from the Applicant at the Preliminary Evaluation Stage as this would be extending to it an unfair advantage over the rest of the tenderers.



42. The Respondent affirmed that the Procuring Entity provided the Applicant with reasons as to why its tender was unsuccessful and thus there was no breach of Article 47 of the Constitution as alleged by the Applicant.
43. It was also argued that Applicant had not demonstrated loss and or damage suffered as a result of the Respondent's actions in the notification of intention to award the subject tender.
44. It was urged that the Applicant's tender was found unresponsive in line with Section 79(1) and 80(1) of the Act as the Applicant failed to meet the mandatory requirements at the Preliminary Evaluation Stage of the Tender Document.
45. Reliance was placed on the case of ***Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 Ors (Interested Parties) Ex parte Roben Aberdare (K) Limited [2019]eKLR*** for the proposition that failure to comply with mandatory requirements leads to automatic disqualification of a tenderer from a tender process.

### **Interested Party's Case**

46. The Interested Party argued that the instant Request for Review was fatally defective and incompetent for failing to meet the criteria set out under Regulation 203 of the Regulations 2020 read with the Fourteenth Schedule as well as Section 37(1) if the Companies having been made in



the name of the Applicant but signed by Mwaniki Gachuba Advocate without the express authority and declaration of the Applicant.

47. According to the Interested Party, the Request for Review ought to have been signed by the Applicant or alternatively the Request be brought by an Advocate and signed by the Advocate on behalf of the Applicant. For this reliance was placed on the Board's Decision in ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Company Ltd v Lake Victoria North Water Works Development Agency and Ors*** and ***Court of Appeal Civil Appeal No. 295 of 2023; Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Ltd.***

48. It was the Interested Party's contention that the Applicant's attached Authority to Swear Affidavit dated 6<sup>th</sup> December 2023 granting the firm of Mwaniki Gachuba Advocates authority to act as their Counsel does not meet the threshold provided for under Section 37(2) of the Companies Act. According to the Interested Party the authority ought to have been signed by two authorized signatories or by a director in the presence of another witness, but the present one was only signed by Nixon Shigholi, the Applicant's CEO and Principal Officer. The Interested Party took the view that the CEO was an employee and not a director. Further that under Section 34 of the Companies Act, only a director can bind a company.

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49. The Interested Party relied on ***Assia Pharmaceuticals v Nairobi Veterinary Centre Limited*** for the proposition that suits instituted by a company should be backed by company resolutions for their institution.
50. The Interested Party equally assailed the affidavits sworn in the matter by Michael Gichiri Wanyoike, whose designation at the Applicant was not a director but Head of Business Development and Marketing. Further that the said Michael Gichiri Wanyoike had not attached a Power of Attorney of resolution authorizing him to bring the instant Request for Review.
51. It was also contended that the Interested Party emerged the successful tenderer in the subject tender after meeting all the requirements in the Tender Document.
52. The Interested Party disputed the Applicant's allegation that the IFMIS system could not allow tenderers to submit other documents before they submitted their Form of Tender. According to the Interested Party, the Applicant was unable to upload certain documents owing to its lack of knowledge on how to effect the uploads in the IFMIS portal.
53. The Interested Party further disputed that it was a duty on the Procuring Entity to disclose the number of pages recorded during tender opening and tender evaluation. The Interested Party maintained that this was confidential information.

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54. The Interested Party indicated that the Applicant's tender was not the lowest evaluated tender after it was found unresponsive.
55. Relying on Section 79(1) and 80(1) of the Act together with the decisions in **PPARB Application No. 120 of 2019; Madison General Insurance Kenya Limited and Kenya Bureau of Standards and Lt Col (Rtd) B.N. Njiraini, the Accounting Officer and Jubilee Insurance Company of Kenya Limited; Republic v Public Procurement Administrative Review Board & anor; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020]eKLR; Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019]eKLR** for the proposition that only responsive tenders should be compared.

### **BOARD'S DECISION**

56. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
57. Whether the instant Request for Review conforms to Regulation 203(1) of the Regulations 2020 and the Fourteenth Schedule?

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I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

***In determining this issue, the Board will determine:***

Whether the instant Request for Review conforms to Regulation 203(1) of the Regulations 2020 and the Fourteenth Schedule?

Depending on the finding on the above issue

II. ***Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?***

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

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

58. Subsequent to the institution of the instant Request for Review, on 20<sup>th</sup> December 2023, the Interested Party filed a Notice of Preliminary Objection dated 20<sup>th</sup> December 2023 challenging the competency of the Request for Review. According to the Interested Party, the Request for Review was incompetent and defective having been executed by Counsel for the Applicant without the lawful authority of the Applicant and that no such authority had been stated to have been issued to the firm of Mwaniki Gachuba Advocates to execute the Request for Review contrary to the provisions of Regulation 203(1) of the Regulations 2020. Accordingly, the Interested Party sought the Request for Review to be struck out with costs.



59. In response to the Notice of Preliminary Objection, on 22<sup>nd</sup> December 2023, the Applicant filed Grounds of Opposition dated 22<sup>nd</sup> December 2023. It was argued in the Ground of Opposition that under Section 170(c) the Board lacked jurisdiction to entertain the Interested Party's Notice of Preliminary Objection; the Objection was frivolous under Regulation 208 of the Regulations 2020; Order 9 Rule 1 of the Civil Procedure Rules as read with Section 40 of the Companies Act 2012 and Section 72 of the Interpretation and General Provisions Act; the Request for Review complies with Regulation 203 of the Regulations 2020 and that the Objection is not based on pure points of law.
60. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over 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.
61. 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."***

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62. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction 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."***

63. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

***"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."***

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

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***"...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...."***

65. 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."***

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

***The functions of the Review Board shall be—  
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

67. Before delving into the merits of the Interested Party's Notice of Preliminary Objection, the Board shall address the competency of the

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Preliminary Objection. Subsequent to the Interested Party's filing of its Notice of Preliminary Objection, on 22<sup>nd</sup> December 2023, the Applicant filed its Grounds of Opposition in response. Ground No. 1 of the Grounds of Opposition attacked the competency of the Interested Party's Preliminary Objection urging that under Section 170(c) of the Act, the Board lacked jurisdiction to entertain the Interested Party's Notice of Preliminary Objection. Ground No. 4 of the Grounds of Opposition equally attacked the Preliminary Objection citing that it was not based on a pure point of law.

68. On Ground No. 1 of the Grounds of Opposition, Section 170(c) of the Act reads:

***170. Parties to review***

***The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity;***  
***and***

***(d) such other persons as the Review Board may determine.***

69. From the foregoing, Section 170 above lists the parties to a Request for Review to include an Applicant, the Accounting Officer of a Procuring Entity, the successful tenderer and any other party as the Board may determine. Section 170(c) simply enlists the successful tenderer as a necessary party to a Request for Review but does not address itself to a Preliminary Objection or the competency of a Preliminary Objection.

Therefore, this attack on the competency of the Interested Party's Notice of Preliminary Objection is unmerited.

70. On Ground No. 4 of the Grounds of Opposition, a Preliminary Objection should constitute a pure ground of law which does not require an inquiry into facts.
71. The Interested Party's Notice of Preliminary Objection primarily rests on one ground i.e. the instant Request for Review was made in the name of the Applicant but executed by the Applicant's lawyers in breach of Regulation 203(1) of the Regulations 2020. The Board finds that this ground of the Preliminary Objection constitutes a pure point of law as it simply calls on the Board to examine the drafting of the Request for Reviewing alongside Regulation 203(1). Accordingly, this attack on the competency of the Interested Party's Notice of Preliminary is equally unmerited.
72. Turning to the merits of the Notice of Preliminary Objection, the Interested Party assailed the Request for Review as incompetent and defective having been executed by Counsel for the Applicant without the lawful authority of the Applicant and that no such authority had been stated to have been issued to the firm of Mwaniki Gachuba Advocates to execute the Request for Review contrary to the provisions of Regulation 203(1) of the Regulations 2020.
73. The Applicant on its part through Grounds 2 and 3 of the Grounds of Opposition took the position that the Applicant was in fact compliant



with Regulation 203 and that the Preliminary Objection was frivolous under Regulation 208 of the Regulations 2020; Order 9 Rule 1 of the Civil Procedure Rules 2010 as read with Section 40 of the Companies Act 2015 and Section 72 of the Interpretation and General Provisions Act

74. Regulation 203(1) of the Regulations 2020 prescribes the form of a Request for Review in the following terms:

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

75. The Form adverted to under Regulation 203(1) appears as follows:

***"Fourteenth Schedule (r 203(1))***

***Form for Review***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

***Application No.....OF.....***

***BETWEEN***

***.....Applicant***

***AND***

***.....Respondent***

***REQUEST FOR REVIEW***

76. ***I/WE..... the above named Applicant(s) of address.....physical address.....P.O. Box No.....Tel No.....Email.....hereby Request the Public***

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*[Signature]*

***Procurement Administrative Review Board to review the whole or part of the above mentioned decision on the following grounds namely***

***1...***

***2...***

***SIGNED.....(APPLICANT)***

***DATED.....ON .....DAY***

***OF...../20***

***FOR OFFICIAL USE ONLY***

***Lodged with the Secretary,***

***Public Procurement Administrative Review Board on the .....Day of .....20....***

***SIGNED***

***Board Secretary***

77. The above form has also been provided at page 45 of 68 of the Tender Document and it requires a Request for Review before this Board to be by the Applicant and equally signed by the Applicant.
78. From the above form, an Applicant before the Board is required to (i) indicate its name, physical address, telephone number and email address; (ii) set out the decision under challenge while outlining the grounds and orders sought for in the Request for Review; (iii) sign off the Request for Review; (iv) date the Request for Review; and upon

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lodging of the Request for Review with the Board Secretary, the Board Secretary appends his signature on it and indicates the date it was presented.

79. However, Regulation 208 of the Regulations 2020 permits a party to a Request for Review before the Board to be represented by an Advocate or a representative of his choice during the hearing:

***"208. Representation by person of own choice***

***Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."***

80. Order 9 Rule 1 of the Civil Procedure Rules 2010 equally provides for representation of parties before courts by Advocates and agents in the following terms:

***"Applications, appearances or acts in person, by recognized agent or by advocate [Order 9, rule 1.]***

***Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:***

***Provided that—***

***(a) any such appearance shall, if the court so directs, be made by the party in person; and***

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***(b)where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.”***

81. It would therefore follow that both the Regulations 2020 and the Civil Procedure Rules 2020 make allowance for parties to be represented before the Board by either Advocates or other representatives.
82. Turning to the instant Request for Review, the same is hereinafter reproduced in part for ease of reference:

***OCCIDENTAL INSURANCE COMPANY LIMITED ..... APPLICANT  
VERSUS  
CHIEF OFFICER, THE OFFICE OF THE GOVERNOR,  
COUNTY GOVERNMENT OF MAKUENI ..... RESPONDENT  
JUBILEE ALLIANZ GENERAL  
ASSURANCE KENYA LIMITED ..... INTERESTED PARTY***

***REQUEST FOR REVIEW of the Decision of the Chief Officer in  
the Office of the Governor of the County Government of  
Makueni, P.O. Box 78-90300, Makueni. Email co.***

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*governor@makueni.go.ke* in the matter of the Tender for Provision of General Insurance Cover (GPA, WIBA, GLA, Fire and Burglary Insurance) (Tender No. 13666581-2023/2024) through the letter of notification of intention to award dated 27<sup>th</sup> November, 2023.

**REQUEST FOR REVIEW**

**OCCIDENTAL INSURANCE COMPANY LIMITED** of Crescent Business Centre, 7<sup>th</sup> Floor, Parklands Road, Parklands, P.O. Box 39459-00623 Nairobi, Tel (Details withheld) the above-named Applicant whose address for service of this application is Mwaniki Gachuba Advocates, Josem Trust House, 3<sup>rd</sup> Floor, Masaba Road, Upper Hill, P.O. Box (details withheld), Nairobi, Tel (Details withheld), Email (details withheld) hereby requests the Public Procurement Administrative Review Board to review the whole of the above mentioned decision on the **FOUNDATIONS** THAT:

1...

2...

3...

4...

**BY THIS MEMORANDUM, THE APPLICANT REQUESTS THE BOARD FOR ORDERS THAT:**

a).



*b)...*

*...*

*e)...*

***Dated at Nairobi this 8<sup>th</sup> day of December 2023***

***Signed***

***MWANIKI GACHUBA***

***ADVOCATES FOR THE APPLICANT***

83. The instant Request for Review was dated 8<sup>th</sup> December 2023 and filed on 11<sup>th</sup> December 2023. Paragraph 1 of the Request for Review indicates the name of the Applicant, its postal address, telephone number, and email address. Thereafter, the Request indicates that its address for service in the matter shall be Mwaniki Gachuba Advocates, whose address is equally disclosed before proceedings to set out the various grounds under which the Request is anchored. The Request is also signed by Mwaniki Gachuba Advocates, the Applicant's lawyers.
84. Essentially, the instant Request has been brought in the Applicant's name through their appointed lawyers, whose identity and address are disclosed at paragraph 1 of the Request and thereafter the said lawyers signed off the Request. This is not a contravention of the Form under the Fourteenth Schedule which requires that a Request for Review brought by an Applicant to be equally signed off by the Applicant since Regulation 208 of the Regulations 2020 permits parties appearing

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before the Board to be represented by Advocates or other representatives of their choice.

85. The facts of the present Request for Review are distinguishable from those in ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Co. Limited v the Chief Executive Officer, Lake Victoria North Water Works Development Agency & another.*** In the latter case, the Request for Review did not identify the relationship of the Advocates and the Applicant unlike in the former. Accordingly, this Ground of the Interested Party's Notice of Preliminary Objection dated 20<sup>th</sup> December 2023 fails.

86. In view of the foregoing the Board finds that it has jurisdiction over the instant Request for Review.

**Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?**

87. The Applicant assailed the Procuring Entity's decision to disqualify its submitted tender at the Preliminary Evaluation Stage for the reason that:

- i. The Applicant failed to submit a duly filled, signed and stamped the Schedule of prices form i.e. the submitted form is dated 27<sup>th</sup> October 2023 which was outside the tendering period of between 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023
- ii. The Applicant failed to submit a Valid Life Insurance Membership from AKI (on Group Life Insurance)



- iii. The Applicant failed to submit a duly filled and signed and stamped Tender Eligibility i.e. Number 6 of the confidential business questionnaire filled with No. (the tenderer would be providing goods, works, non-consulting services or consulting services during implementation of the contract specified in this Tender Document and the confidential ownership disclosure form not dully filled.
- iv. The Applicant failed to submit a commitment of not having any pending claims with any of its current clients outstanding for more than 6 months i.e. the submitted commitment is dated 5<sup>th</sup> October 2023 and outside the tendering period of 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023.

88. According to the Applicant it submitted a responsive tender and that it was improperly disqualified from the subject tender without being afforded an opportunity to clarify on the documents it is alleged to have failed to submit as part of its tender. It therefore took the view that the subject tender ought not to have been awarded to the Interested Party whose tender price was much higher than it.

89. On the other end, the Respondent maintained that the Procuring Entity's Evaluation Committee properly evaluated the tenders received in response to the invitation to tender in the subject tender. According to the Respondent, the Applicant was disqualified at the Preliminary Stage of Evaluation after it failed to meet the Mandatory requirements in the

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Tender Document. Specifically, the Respondent pointed out that the Applicant:

- i. Failed to submit a duly filled, signed and stamped the Schedule of prices form i.e. the submitted form is dated 27<sup>th</sup> October 2023 which was outside the tendering period of between 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023
- ii. Failed to submit a Valid Life Insurance Membership from AKI (on group Life Insurance)
- iii. Failed to submit a duly filled and signed and stamped Tender Eligibility i.e. Number 6 of the confidential business questionnaire filled with No. (the tenderer would be providing goods, works, non-consulting services or consulting services during implementation of the contract specified in this Tender Document and the confidential ownership disclosure form not dully filled.
- iv. Failed to submit a commitment of not having any pending claims with any of its current clients outstanding for more than 6 months i.e. the submitted commitment is dated 5<sup>th</sup> October 2023 and outside the tendering period of 31<sup>st</sup> October 2023 and 14<sup>th</sup> November 2023.

90. The Interested Party maintained that it submitted the lowest evaluated tender and which was was responsive to the requirements in the Tender Document.

91. The Board is therefore invited to interrogate the Evaluation Committee's evaluation process that culminated in the disqualification of the



Applicant's disqualification from the subject tender at the Preliminary Evaluation Stage.

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

***"80. Evaluation of tender***

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

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."***

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

***"79. Responsiveness of tenders***

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

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

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

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

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

***a) be quantified to the extent possible; and***

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

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

**“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or**

functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the

**underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."**

See also ***Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019]eKLR***

95. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
96. The Board has keenly studied the Tender Document in the subject tender and it bears reproducing the requirements the Applicant is alleged to have been unresponsive towards:

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**PRELIMINARY MANDATORY REQUIREMENTS**

<b>NO.</b>	<b>DESCRIPTION</b>
<b>1</b>	<b><i>Submit a duly, filled, signed and stamped Form of Tender in the prescribed manner in the tender document by the person with the Power of Attorney</i></b>
<b>...</b>	<b><i>...</i></b>
<b>6</b>	<b><i>Must duly fill, sign and stamp the Schedule of Prices Form</i></b>
<b>..</b>	<b><i>...</i></b>
<b>8</b>	<b><i>Attach a valid membership from Association of Kenya Insurers Association (AKI) or Association of Insurance Brokers of Kenya (AIBK) certified by Commissioner for Oaths or an Advocate.</i></b>
<b>...</b>	<b><i>...</i></b>
<b>16</b>	<b><i>Submit a duly filled and signed and stamped Tender Eligibility- Confidential Business Questionnaire in the prescribed manner in the tender document and confidential ownership disclosure form.</i></b>
<b>...</b>	<b><i>...</i></b>
<b>27</b>	<b><i>The tenderer must not have any pending claims with any of its current clients outstanding for more than 6 months</i></b>

***The bidder must meet all the mandatory requirements to proceed to technical evaluation stage.***

97. From the above, all the 27 requirements at the Preliminary Evaluation Stage were mandatory requirements that tenderers participating the subject tender had to meet in order to qualify for further evaluation at

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*[Signature]*

the Technical Evaluation Stage. Failure to meet any of the said requirements on the part of a tenderer would attract its disqualification from further evaluation. The Board shall now review each of the above mandatory requirements against the Applicant's submitted tender.

98. Mandatory Requirement No. 1 above required tenderers in the subject tender to submit a duly filled, signed and stamped Form of Tender by the person with the Power of Attorney. Accordingly, any tenderer who failed to submit a duly filled, signed and signed Form of Tender by the person with the Power of Attorney would be unresponsive to this requirement and therefore liable to disqualification from further evaluation.
99. An excerpt of the Form of Tender provided for in the Tender Documents is herein reproduced:

***Form of Tender***

...

***a)...***

...

***d) Conformity: We offer to provide Insurance Services in conformity with the tendering document of the following:  
[insert the list of items tendered for and a brief description of the Insurance Services]***

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**SCHEDULE OF TENDERED ITEMS AND PRICES**

<b>1</b>	<b>2</b>	<b>3</b>		<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>
<b>No. item to be insured</b>	<b>Description of item to be insured</b>	<b>Value of item to be insured</b>	<b>Major contingencies requiring insurance</b>	<b>Insurance period (YEAR)</b>	<b>Insurance Premium for Specified period (Tender price)</b>	<b>Price discount if any</b>	<b>Total Tender Price for Insurance Service (Col. 5-6)</b>
<b>No. 1</b>							
<b>No. 2</b>							
<b>No. 3</b>							

***e) Discounts: The discounts offered and the methodology for their application are***

***i) The discounts offered are: [Specify in detail each discount offered]***

***ii) The exact method of calculation to determine the net price after application of discounts is shown below: [Specify in detail the method that shall be used to apply the discounts]***

***..***

***j) State-owned enterprise or institution: [select the appropriate option and delete the other.] [We are not a state-owned enterprise or institution]/ [We are a state-***

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*[Signature]*

***owned enterprise or institution but meet the requirements of ITT 4.6];***

...

***q) Code of Ethical Conduct: We undertake to adhere to the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from (specify website) during the procurement process and execution of any resultant contract.***

100. The Board has studied the Applicant's Form of Tender at pages 4 to 8 the Applicant's tender and excerpts of the same are herein reproduced for ease of reference

***Form of Tender***

...

***a)...***

...

***d) Conformity: We offer to provide Insurance Services in conformity with the tendering document of the following: [insert the list of items tendered for and a brief description of the Insurance Services];***

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*[Signature]*

**SCHEDULE OF TENDERED ITEMS AND PRICES**

<b>1</b>	<b>2</b>	<b>3</b>		<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>
<b>No. item to be insured</b>	<b>Description of item to be insured</b>	<b>Value of item to be insured</b>	<b>Major contingencies requiring insurance</b>	<b>Insurance period (YEAR)</b>	<b>Insurance Premium for Specified period (Tender price)</b>	<b>Price discount if any</b>	<b>Total Tender Price for Insurance Service (Col. 5-6)</b>
<b>No. 1</b>	...	...	...	...	...	...	...
<b>No. 2</b>	...	...	...			...	...
...	...	...		...		...	...
<b>No. 8</b>	<b>Money</b>	...	...	...	...	...	
<b>No. 9</b>	<b>Fidelity Guarantee</b>	...	...	...	...	...	...
<b>No. 10</b>	<b>Public Liability</b>	...	...	...	...	...	...

***e) Discounts: The discounts offered and the methodology for their application are***

***i) The discounts offered are: [Specify in detail each discount offered]***

***ii) The exact method of calculation to determine the net price after application of discounts is shown below: [Specify in detail the method that shall be used to apply the discounts]***

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***j) State-owned enterprise or institution: [select the appropriate option and delete the other.] [We are not a state-owned enterprise or institution]/ [We are a state-owned enterprise or institution but meet the requirements of ITT 4.6];***

...

***p) Code of Ethical Conduct: We undertake to adhere to the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal, copy available from (specify website) during the procurement process and execution of any resultant contract.***

101. From a comparison of the Form of Tender provided for in the Tender Document and the Form of Tender forming part of the Applicant's tender, the following becomes apparent:
- i. The Applicant duly filled Clause (d) of the Form of Tender as it supplied a List of 10 items tendered for as well as a brief description of services. The Evaluation Committee therefore fell in err when it indicated that Clause (d) was not duly filled.
  - ii. The Applicant failed to duly fill Clause (e) of the Form of Tender as it did not supply any details on any applicable discounts as required under the Clause. The Evaluation Committee was therefore correct in its indication that Clause (e) was not duly filled.
  - iii. The Applicant did not duly fill Clause (j) of the Form of Tender as it did not disclose as required under the clause whether it was

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state-owned enterprise or institution. The Evaluation Committee was therefore correct in its indication that Clause (e) was not duly filled.

- iv. The Applicant did not duly fill Clause (q) of the Form of Tender. Other than a renaming of this Clause as Clause (p) the Applicant did not indicate the website from where the code of conduct could be obtained.

102. Mandatory Requirement No. 6 required tenderers participating in the subject tender to submit duly filled, signed and stamped Schedule of Prices Form. Any tenderer who failed to submit a Schedule of Prices Form that was duly filled, signed and stamped would be unresponsive to this mandatory requirement and would be liable to disqualification from further evaluation.

103. The Applicant's tender contained a filled Schedule of Prices Form at pages 31 to 34 an excerpt of page 31 would be apt:

1	2	3		4	5	6	7
<i>No. item to be insured</i>	<i>Description of item to be insured</i>	<i>Value of item to be insured</i>	<i>Major contingencies requiring insurance</i>	<i>Insurance period (YEAR)</i>	<i>Insurance Premium for Specified period (Tender price)</i>	<i>Price discount if any</i>	<i>Total Tender Price for Insurance Service (Col. 5-6)</i>
<i>No. 1</i>	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...
<i>No. 10</i>		...	..	...	...	...	...
	<i>TOTAL One Year</i>				...	...	...

*Name of Tenderer Occidental Insurance Company Limited [insert complete name of Tenderer]*

*Signature of Tender [signature of the person signing the Tender]*

*Signed*

*Date 27<sup>th</sup> October 2023 [insert date]*

104. From the above, the Applicant's signed and stamped its Schedule of Prices Form. However, the date indicated on the Schedule of Prices form is 27<sup>th</sup> October 2023, which date predates the tender invitation notice in the subject tender which was sent on 31<sup>st</sup> October 2023.
105. Mandatory Requirement No.6 required the Schedule of Prices to be duly filled, signed and stamped. However, the Applicant in indicating that the Schedule of Prices was prepared on a date outside the tendering period signals that the Schedule was filled with incorrect details. For this reason, the Board finds that the Applicant was not responsive to Mandatory Requirement No. 6 under the Tender Document.
106. Mandatory Requirement No. 8 on its part required participating tenderers to attach a valid membership from the Association of Kenya Insurers (AKI) or Association Insurance Brokers of Kenya (AIBK) certified by an Advocate or a Commissioner for Oaths. Accordingly, failing to submit a valid membership from either the Association of Kenya Insurers or Association Insurance Brokers of Kenya certified by an Advocate or a Commissioner for Oaths on the part of a tender would attract disqualification from further evaluation.

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*[Signature]*

*[Signature]*

107. Page 38 of the Applicant's tender contained a Certificate of Membership of the Association of Kenya Insurers bearing the Applicant's stamp and certified by Erick O. Orende, an Advocate and Commissioner for Oaths. The said Certificate of Membership is herein reproduced for ease of reference:

***Certificate of Membership***

***No. AKI M10162***

***The Association of Kenya Insurers***

***Expires on 31<sup>st</sup> December 2023***

***P.O. Box 24339,00100 GPO, Nairobi Kenya***

***This is to certify that***

***Occidental Insurance Company Limited***

***is a member of the Association***

***Issued this 1<sup>st</sup> day of January 2023***

***Signed***

***Chairman***

***Signed***

***Secretary***

108. From the above, it is clear that the (i) Applicant supplied a Certificate of membership to the Association of Kenya Insurers (ii) the Applicant's membership was valid from 1<sup>st</sup> January 2023 to 31<sup>st</sup> December 2023 (iii) the Certificate was certified by Erick O. Orange, who was both an

Advocate and a Commissioner for Oaths. Accordingly, the Applicant was responsive to mandatory requirement no. 8 of the Tender Document.

109. The Board finds great difficulty to follow the Respondent's argument that the tenderer failed to provide a Valid Life Insurance membership from Association of Kenya Insurers (on Group Life Insurance) when the tender document did not provide for such requirement. Mandatory Requirement No. 8 only required tenderers to submit a valid membership of the Association of Kenya Insurers (AKI) or Association of Insurance Brokers of Kenya certified by a Commissioner for Oaths or an Advocate. Accordingly, the Board faults the Procuring Entity's Evaluation Committee for disqualifying the Applicant's tender on account of failure to provide a valid life insurance membership.
110. Mandatory Requirement No. 16 required tenderers to submit a duly filled, signed and stamped Tender Eligibility- Confidential Business Questionnaire and the confidential ownership disclosure form. Failing to submit these documents as part of a tenderer's tender would render the tender unresponsive and would attract disqualification of that tender from further evaluation.
111. The Applicant submitted as part of its tender a duly filled, signed and stamped Tender Eligibility- Confidential Business Questionnaire at pages 9 to 13. The Applicant was therefore responsive to the requirement. However, the Respondent appeared to take issue with fact the Applicant indicated as part of its conflict-of-interest disclosure that it would not be



providing goods, works, non-consulting services during the implementation of the contract specified in the Tender Document. The relevant response is reproduced herein below:

***Conflict of interest disclosure***

<b>No.</b>	<b>Type of Conflict</b>	<b>Disclosure YES/NO</b>	<b>If yes provide details of the relationship with the tenderer</b>
<b>1</b>	...	...	...
...	...	...	...
<b>6.</b>	<b><i>Tenderer would be providing goods, works, non-consulting services during the implementation of the contract specified in this Tender Document</i></b>	<b>No</b>	

112. We find great difficulty in following the Respondent's line of argument as the disclosure above attracted a Yes/No response, none of which response on its own called for disqualification of a tenderer.

113. Mandatory Requirement No. 27 required tenderers not to have any pending claims with any of its current clients outstanding for more than 6 months. This requirement did not however make it mandatory for tenderers to furnish any document to demonstrate the absence of

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pending claims for the stated period. Accordingly, any tenderer without an outstanding claim with any of its clients for more than 6 months would be responsive to this requirement.

114. The Board has perused the Confidential File submitted to it pursuant to section 67(3) to ascertain whether there was any correspondence or document implicating the Applicant as having a pending claim with any of its clients for more than 6 months and has not seen any. The Board therefore faults the Respondent for purporting to disqualify the Applicant from the subject tender on the basis of Mandatory Requirement No. 27.
115. Overall, the Applicant was properly found non-responsive to Mandatory Requirements No. 1,2 and 6 and improperly found non-responsive to Mandatory Requirements No. 8, 16 and 27. However, under the Tender Document, failing to meet any Mandatory Requirements at the Preliminary Evaluation Stage would lead to automatic disqualification from further evaluation with the result that the Applicant's tender was on account of non-compliance with Mandatory requirements No. 1,2 and 6 properly disqualified from the subject tender.
116. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document to the extent of its compliance with Mandatory Requirements No. 1,2 and 6. However the Procuring Entity's Evaluation Committee improperly evaluated the Applicant's tender in accordance



with Sections 79 and 80 of the Act as well as the provisions of the Tender Document to the extent of its compliance with to Mandatory Requirements No. 8, 16 and 27.

**What orders the Board should grant in the circumstances?**

117. The Board has found that it has jurisdiction over the instant Request for Review.
118. The Board has equally found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document to the extent of its compliance with Mandatory Requirements No. 1,2 and 6. However the Procuring Entity's Evaluation Committee improperly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document to the extent of its compliance with to Mandatory Requirements No. 8, 16 and 27.
119. The upshot of our finding is that the Request for Review dated 8<sup>th</sup> December 2023 in respect of Tender No. 13666581-2023/2024 for Provision of General Insurance Cover (GPA, WIBA, GLA, Fire and Burglary Insurance) fails in the following specific terms:



**FINAL ORDERS**

120. 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 8<sup>th</sup> December 2023:

- 1. The Interested Party's Notice of Preliminary Objection dated 20<sup>th</sup> December 2023 be and is hereby dismissed.**
  
- 2. The Request for Review dated 8<sup>th</sup> December 2023 be and is hereby dismissed.**
  
- 3. The Respondent is hereby directed to proceed with the procurement process of Tender No. 13666581-2023/2024 for Provision of General Insurance Cover (GPA, WIBA, GLA, Fire and Burglary Insurance) to its lawful and logical conclusion .**
  
- 4. Given Board's finding above, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 2<sup>nd</sup> Day of January 2024.**

  
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**CHAIRPERSON**  
**PPARB**

  
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**SECRETARY**  
**PPARB**





