

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 7/2024 OF 31<sup>ST</sup> JANUARY 2024**

**BETWEEN**

**EMCURE PHARMACEUTICAL LIMITED ..... APPLICANT**

**AND**

**CHIEF EXECUTIVE OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**HETERO LABS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Chief Executive Officer Kenya Medical Supplies Authority in relation to Tender No. GF ATM HIV NFM-2023/2024-OIT-010-SUPPLY OF ARVs MEDICINES I.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb - Chairperson
2. Mr. Daniel Langat - Member
3. CPA Alexander Musau - Member

**IN ATTENDANCE**

1. Ms. Sarah Ayoo - Holding Brief for the Board Secretary
2. Ms. Evelyn Weru - Secretariat



## **PRESENT BY INVITATION**

### **APPLICANT**

**EMCURE PHARMACEUTICALS LIMITED**

Mr. Gachuba

- Advocate, Mwaniki Gachuba Advocates

### **RESPONDENTS**

**CHIEF EXECUTIVE OFFICER, KENYA  
MEDICAL SUPPLIES AUTHORITY**

1. Mr. Ogamba

- Advocate, Migos-Ogamba & Waudo  
Advocates

2. Mr. Waudo

- Advocate, Migos-Ogamba & Waudo  
Advocates

### **INTERESTED PARTY**

**HETERO LABS LIMITED**

1. Mr. Wafula

- Advocate, SOW Advocates LLP

2. Mr. Owino

- Advocate, SOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Medical Supplies Authority, the Procuring Entity herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. GF ATM HIV NFM-2023/2024-OIT-010-SUPPLY OF ARVs MEDICINES I (hereinafter referred to as the "subject tender") which

was in two (2) lots and was conducted through Open International Tender (OIT) method. The invitation was by way of an advertisement in the Daily Nation Newspaper on 21<sup>st</sup> November 2023 , on the Procuring Entity's website [www.kemsa.go.ke](http://www.kemsa.go.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document') was available for download. The subject tender's submission deadline was scheduled on 6<sup>th</sup> December 2023.

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

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 6<sup>th</sup> December 2023 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 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 ten (10) tenders were submitted in response to the subject tender and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Macleods Pharmaceuticals Ltd
2.	Hetero Labs Limited
3.	APL Healthcare Limited
4.	Laurus Labs Limited

5.	Cipla Quality Chemical Industries Ltd
6.	Emcure Pharmaceuticals Ltd
7.	Universal Corporation Limited
8.	Cipla Ltd
9.	Mylan Laboratories Limited
10.	Lupin Limited

### **Evaluation of Tenders**

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the ten (10) tenders as captured in a Tender Evaluation Report for the subject tender signed by members of the Evaluation Committee on 15<sup>th</sup> December 2023 (hereinafter referred to as the "Evaluation Report") and in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation –
  - (a) Documentary Compliance of the Tenderer;
  - (b) Technical Evaluation of the Product (Sample); and
- iii Financial Evaluation.

### **Preliminary Evaluation**

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause A) Preliminary Examination of Section III- Evaluation and Qualification Criteria at page 38 of the Tender

Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

5. At the end of evaluation at this stage, three (3) tenders were determined non-responsive including the Applicant's tender, while seven (7) tenders, including the Interested Party's tender, were determined responsive and proceeded to Technical Evaluation.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B) Technical Evaluation and Clause C) Product Evaluation of Section III- Evaluation and Qualification Criteria at page 38 to 39 of the Tender Document. The Evaluation Committee was required to examine the documentary compliance of the tenderer and also examine the product (s)/sample(s) as submitted by the tenderer.
7. At the end of examination of the documentary compliance of the tenderers, all seven (7) bidders were found responsive and were recommended to proceed for examination of their submitted samples/products.
8. The Evaluation Committee made the following observations following examination of samples submitted by bidders:
  - ***Bidder No. 02 – Hetero Labs Limited; Product insert submitted is not legible contrary to the requirement that product insert shall be legible. In the event of award***

***bidder to provide legible insert at pre-delivery and at delivery of full consignment.***

- ***Bidder No. 03 – APL Healthcare Limited; In the event of award bidder to provide product insert at pre-delivery and at delivery of full consignment***
- ***Bidder No. 09 – Mylan Laboratories Limited: Submitted wrong product insert. In the event of award bidder to provide correct insert at delivery and at full consignment.***

9. In view of the above observations, the Evaluation Committee requested through the Ag. Director Procurement to seek clarification on product insert from the aforementioned bidders.

10. At the end of evaluation at this stage, the seven (7) tenders were determined responsive including the Interested Party's tender and proceeded to Financial Evaluation.

### **Financial Evaluation**

11. At this stage of evaluation, the Evaluation Committee was required to compare tenderers prices and delivery schedules and confirm procurement of *Lot 1: Quantity – 600,000 MUST be ex stock (MANDATORY)* and *Lot 2: Quantity – 2,216,705 MUST be delivered between 1-8 weeks from effective date of contract (MANDATORY)* as set out under Clause D) Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 39 of the Tender Document. Award of the subject tender would be recommended to the lowest responsive bid to price and delivery schedule.

12. At the end of evaluation at this stage, tenders were ranked as follows:

Lot 1 – Tenofovir 300mg/Lamivudine 300mg/Doultegravir 50mg, Pack of 90's

Bidder No.	Bidder Name	Unit of issue	Quantity	Unit Pack Price in USD	Total Price in USD	Delivery Schedule- Ex stock
2.	Hetero Labs Limited	Pack of 90's	600,000	8.19	4,914,000.00	Ex-Stock. Delivery within 30 days from PO
8.	Cipla Limited	Pack of 90's	600,000	9.05	5,430,000.00	Within 20 weeks from receipt of confirmed PO
3.	APL Healthcare Limited	Pack of 90's	600,000	9.09	5,454,000.00	Immediate
9.	Mylan Laboratories Limited	Pack of 90's	600,000	9.37	5,622,000.00	1-8 Weeks
7.	Universal Corporation Limited	Pack of 90's	600,000	10.20	6,120,000.00	First 200,000 packs to be delivered 90 days from receipt of po . thereafter 200,000 packs every month until full delivery.
4.	Laurus Labs Limited	Pack of 90's	600,000	-	-	8 weeks with anglo /French label or 10-12 weeks with KE special marking label stock. This contrary to price schedule and financial evaluation criteria.
10.	Lupin Limited	Pack of 90's	600,000		No offer	

The Evaluation Committee recommended the award of Lot 1 to Bidder No. 2 Hetero Labs Limited at a unit price of USD 8.19 and at a total cost of USD 4,914,000.00 being the lowest evaluated responsive bidder.

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Lot 2-Tenofovir 300mg/Lamivudine 300mg/Dolutegravir 50mg, Pack of 90's

Bidder No.	Bidder Name	Unit of issue	Quantity	Unit Pack Price in USD	Total Price in USD	Delivery Schedule- 1-8 weeks
2.	Hetero Labs Limited	Pack of 90's	2,216,705	8.40	18,620,322.00	6-8 Weeks
8.	Cipla Limited	Pack of 90's	2,216,705	9.05	20,061,180.25	Within 21-24 weeks from receipt of confirmed PO
9.	Mylan Laboratories Limited	Pack of 90's	2,216,705	9.37	20,770,525.85	1 to 8 Weeks
3.	APL Healthcare Limited	Pack of 90's	2,216,705	9.74	21,590,706.70	8 Weeks
7.	Universal Corporation Limited	Pack of 90's	2,216,705	10.20	22,610,391.00	First 200,000 packs to be delivered 90 days from receipt of po. thereafter 200,000 packs every month until completion
10.	Lupin Limited	Pack of 90's	2,216,705	10.59	23,474,905.95	18-20 weeks from receipt of order
4.	Laurus Labs Limited	Pack of 90's	2,216,705	-	-	8 weeks with anglo / French label or 10-12 weeks with KE special marking label stock. This contrary to price schedule and financial evaluation criteria.

The Evaluation Committee recommended the award of Lot 2 to Bidder No. 2 Hetero Labs Limited at a unit price of USD 8.40 and at a total cost of USD 18,620,322.00 being the lowest evaluated responsive bidder.

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### Evaluation Committee's Recommendation

13. The Evaluation Committee recommended the award of the subject tender to the Interested Party, Hetero Labs Limited, being the lowest evaluated and most responsive bidder as per the evaluation criteria as follows:

<i>Lot</i>	<i>Item Description</i>	<i>Unit of issue</i>	<i>Quantity</i>	<i>Unit Pack Price in USD</i>	<i>Total Price in USD</i>
<i>Lot 1.</i>	<i>Tenofovir 300mg/Lamivudine 300mg/Doultegravir 50mg,</i>	<i>Pack of 90's</i>	<i>600,000</i>	<i>8.19</i>	<i>4,914,000.00</i>
<i>Lot 2</i>	<i>Tenofovir 300mg/Lamivudine 300mg/Doultegravir 50mg,</i>	<i>Pack of 90's</i>	<i>2,216,705</i>	<i>8.40</i>	<i>18,620,322.00</i>
<i>Total Value for both Lots</i>					<i>23,534,322.00</i>

### Due Diligence

14. The Evaluation Committee was required to carry out due diligence as provided under Clause E) Post Qualification of Section III- Evaluation and Qualification Criteria at page 39 of the Tender Document. At the end of the due diligence exercise, the Evaluation Committee observed that the Interested Party had satisfied the Post Qualification Parameters and had the financial capability to perform the contract satisfactorily and therefore recommended it for award of the subject tender.

### Professional Opinion

15. In a Professional Opinion, as a memo dated 18<sup>th</sup> January 2024 (hereinafter referred to as "the Professional Opinion"), the Acting

Director Procurement, Mr. Gilbert Mamati reviewed the manner in which the subject procurement process in the subject tender was undertaken including evaluation of tenders and due diligence and confirmed that the Evaluation Committee evaluated the subject tender using the procedures and criteria as set out in the Tender Document pursuant to the provisions of the Act and that the amount quoted by the lowest responsive bidder was within the estimated budgetary estimate. He concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

16. Thereafter, the Professional Opinion was approved as recommended by the Respondent, Dr. Andrew Mulwa, on 19<sup>th</sup> January 2024.

#### **Notification to tenderers**

17. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 18<sup>th</sup> January 2024.

#### **REQUEST FOR REVIEW NO. 7 OF 2024**

18. On 31<sup>st</sup> January 2024, Emcure Pharmaceuticals Limited, the Applicant herein, filed a Request for Review dated 30<sup>th</sup> January 2024 together with a Supporting Affidavit sworn on 30<sup>th</sup> January 2024 U.D. Balaji, the Applicant's Executive Vice President – Global HIV/AIDS Initiatives and an Authority to Swear Affidavit dated 30<sup>th</sup> January 2024 and signed by Tajuddin Shaikh, Chief Financial Officer on behalf of the Applicant

(hereinafter referred to as the 'instant Request for Review') through Mwaniki Gachuba Advocates seeking the following orders from the Board in verbatim:

***a) The Respondent's decision to disqualify the Applicant's tender at the preliminary examination stage be annulled and set aside.***

***b) The Respondent's decision to award the Tender Document for Supply of ARVs Medicines I (Tender No. GF ATM HIV NFM – 2023/2024 – OIT - 010) to the Interested Party at the tender price of USD 23,534,322.00 be annulled and set aside.***

***c) The Respondent be directed to re-admit the Applicant's tender and subject it to technical evaluation.***

***d) Costs of the application be awarded to the Applicant.***

19. In a Notification of Appeal and a letter dated 31<sup>st</sup> January 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> 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 24<sup>th</sup> 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 31<sup>st</sup> January 2024.

20. Vide letters dated 5<sup>th</sup> February 2024, 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 three (3) days.

21. On 5<sup>th</sup> February 2024, the Interested Party, Hetero Labs Limited, filed through SOW Advocates LLP a Notice of Appointment dated 5<sup>th</sup> February 2024, an Interested Party's Memorandum of Response dated 5<sup>th</sup> February 2024, and an Interested Party's List and Bundle of Documents dated 5<sup>th</sup> February 2024.

22. On 5<sup>th</sup> February 2024, the Respondent filed through Migos-Ogamba & Waudu Advocates a Notice of Appointment of Advocates dated 5<sup>th</sup> February 2024, a Notice of Preliminary Objection dated 5<sup>th</sup> February 2024, a Respondent's Memorandum of Response dated 5<sup>th</sup> February 2024, and the Respondent's Replying Affidavit sworn on 5<sup>th</sup> February 2024 by Dr. Andrew Mulwa, the Procuring Entity's Ag. Chief Executive Officer and the Respondent herein together with a physical file

containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

23. Vide a Hearing Notice dated 9<sup>th</sup> February 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 14<sup>th</sup> February 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

24. On 9<sup>th</sup> February 2024, the Applicant filed through Mwaniki Gachuba Advocates a Further Affidavit sworn on 9<sup>th</sup> February 2024 by U.D. Balaji, Applicant's, Notice of Preliminary Objection dated 9<sup>th</sup> February 2024, Reply to Preliminary Objection dated 9<sup>th</sup> February 2024, and Applicant's Rejoinder to Interested Party's Memorandum of Response dated 9<sup>th</sup> February 2024.

25. On 13<sup>th</sup> February 2024, the Respondent filed through Migos-Ogamba & Waudu Advocates the Respondent's List of Documents dated 13<sup>th</sup> February 2024.

26. On the morning of 14<sup>th</sup> February 2024, the Respondent filed through Migos-Ogamba & Waudu Advocates Respondent's Written Submissions dated 13<sup>th</sup> February 2024.

27. When the matter first came up for hearing on 14<sup>th</sup> January 2024 at 11.00 a.m., the Board read out pleadings filed in the matter. Counsel for the Applicant, Mr. Gachuba sought for an adjournment to enable

him seek instructions pertaining to documents which had been served upon him by the Respondent on the evening of 13<sup>th</sup> February 2024 and to file a response. On his part, Mr. Waudo, counsel for the Respondent, submitted that he was ready to proceed with the hearing and argued that they had equally been pressed for time to respond to pleadings filed by the Applicant and urged the Board to note that the tender in question was a matter of public interest. Counsel for the Interested Party, Mr. Wafula, submitted that he had equally woken up to the documents filed by the Respondents on the evening of 13<sup>th</sup> February 2024 and was of the view that the same did not raise substantive issues that would limit parties from proceeding with the hearing given that the matter was of public interest and the Board had limited time to render its decision. He urged the Board to grant the Interested Party corresponding leave to file further documents should it be inclined to allow the Application by the Applicant. In a rejoinder, Mr. Gachuba indicated that he had not been served with the Interested Party's List of Documents and pointed out that the prayer for an adjournment had been occasioned by the Respondent's late service of its documents and it would be unfair for the Applicant to go into the hearing the without all relevant facts pertaining to the matter.

28. Having considered parties' submissions on the application for adjournment, the Board directed Mr. Wafula to serve Mr. Gachuba with the Interested Party's List and Bundle of Documents and then sought to know whether parties were agreeable to canvassing the instant Request for Review by way of filing exhaustive written submissions in

the interest of time. There being no objection by parties, the Board directed that the instant Request for Review would be canvassed by way of written submissions and directed (a) the Applicant to file and serve any further affidavit, all encompassing written submissions and authorities by 12.00 noon on 15<sup>th</sup> February 2024, (b) the Respondent to file and serve a further affidavit limited to issues arising from the Applicant's further affidavit and all encompassing supplementary written submissions in the matter by 11.00 a.m. on 16<sup>th</sup> February 2024 and (c) the Interested Party to file and serve a further affidavit, if necessary, limited to issues arising from the Applicant's further affidavit and all encompassing written submissions by 6.00 p.m. on 16<sup>th</sup> February 2024. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation properly filed before it in rendering its decision.

29. Parties were also informed that the instant Request for Review having been filed on 31<sup>st</sup> January 2024 was due to expire on 21<sup>st</sup> February 2024 and that the Board would communicate its decision on 21<sup>st</sup> February 2024 to all parties to the Request for Review via email.

30. On 15<sup>th</sup> February 2024, the Applicant filed a Supplementary Affidavit sworn on 15<sup>th</sup> January 2024 by U.D. Balaji together with Written Submissions dated 15<sup>th</sup> February 2024.

31. On 16<sup>th</sup> February 2024, the Respondent filed Respondent's Supplementary Written Submissions dated 16<sup>th</sup> February 2024 together with the Respondent's List and Bundle of Authorities dated 16<sup>th</sup> February 2024.

32. On 16<sup>th</sup> February 2024, the Interested Party filed Written Submissions dated 16<sup>th</sup> February 2024 together with an Interested Party's Further List and Bundle of Documents dated 16<sup>th</sup> February 2024.

## **PARTIES' SUBMISSIONS**

### **Applicant's Case**

33. In its submissions, the Applicant reiterated the contents of the Request for Review dated 30<sup>th</sup> January 2024, the Further Affidavit sworn on 9<sup>th</sup> January 2024 by U.D. Balaji, the Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024, Reply to Preliminary Objection dated 9<sup>th</sup> February 2024, Applicant's Rejoinder to Interested Party's Memorandum of Response dated 9<sup>th</sup> February 2024, Supplementary Affidavit sworn on 15<sup>th</sup> January 2024 and Written Submissions dated 15<sup>th</sup> February 2024.

34. On whether the Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2023 (*perhaps meant to read 2024*) has merit, the Applicant submitted that Ground 1 of the Respondent's Preliminary Objection is frivolous and lacks merit as it is clearly based on Section 96 of the Public Procurement and Disposal Act, 2005 (repealed) and not Section 170 of

the Public Procurement and Asset Disposal Act, 2015. In support of its argument, the Applicant referred the Board to the holding in the case of *El Roba Enterprises Limited & 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR*.

35. The Applicant further submitted that Ground 2 of the Respondent's Preliminary Objection is frivolous and lacks merit by virtue of Regulation 208 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020"), Section 2 of the Advocates Act, and Order 9 Rule 1, Order 2, Rule 16 of the Civil Procedure Rules, 2010. The Applicant indicated that from its annexure "UDB 1" it appointed its advocate through U.D. Balaji who has the power of attorney to submit its tender and the authority to appoint an Advocate and as such, his appointment binds the Applicant. In support of its argument, the Applicant referred to the holding at paragraph 101 in the case of *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce, 1996 CanLII 149 (SCC), [1996] 3 S.C.R. 727*

36. The Applicant also referred the Board to the provisions of Section 2 of the Advocates Act and submitted that Mr. Mwaniki Gachuba Advocate, having been duly appointed by the Applicant for purposes of Regulation 208 of Regulations 2020 had lawful authority under Order 2, Rule 16 and Order 9 Rule 1 of the Civil Procedure Rules, 2010 to sign the Request for Review on behalf of the Applicant and relied on the holding in the case of *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others [2013] Eklr* and *Occidental Insurance Company Limited v Chief*

*Officer, the Office of Governor, County Government of Makueni & Jubilee Allianz General Assurance Kenya Limited; Application No. 106 of 2023.*

37. The Applicant referred the Board to ITT 4.4 of the Tender Document and submitted that ground 3 of the Respondents Preliminary Objection was frivolous and lacks merit since the Applicant is a foreign company incorporated in India hence it is not formed or registered under the Companies Act, 2015 either as a company or as a branch of a foreign company and its internal management are not subject to the provisions of the Kenyan Companies Act,2015.
38. The Applicant further submitted that ground 4 of the Respondent's Preliminary Objection is frivolous and lacks merit as the Respondent did not plead any Indian provisions to demonstrate that the Applicant's board of directors was barred from delegating its authority to an employee to sign an authority to swear affidavit.
39. The Applicant submitted that ground 5 of the Respondent's Preliminary Objection is frivolous and lacks merit as no law was cited to demonstrate that the term statements in Regulation 203(2)(b) of Regulations 2020 excludes affidavits of support of request for review since the said regulation provides that a request for review ought to be accompanied by such statements as the applicant considers necessary in support of its request and the Applicant considered the Supporting Affidavit as its necessary statement.

40. The Applicant submitted that ground 6 of the Respondent's Preliminary Objection is frivolous and lacks merit as Section 74 of the Act relates exclusively to tender notices which are not included under Sections 79(1) and 80(2) of the Act as a basis of tender examination and evaluation hence Regulation 74(1)(b) of Regulations 2020 is *in vacuo* and inconsistent with Section 79(1) and 80(2) of the Act.

41. The Applicant submitted that ground 7 of the Respondent's Preliminary Objection is frivolous and lacks merit by virtue of Article 2(6) of the Constitution of Kenya, 2010 and by virtue of the fact that the Respondent did not annex any treaty, agreement or other convention that has been ratified by Kenya and to which Kenya is party that rendered the Act inoperable in respect of the subject procurement proceeding. In support of its argument, the Applicant referred the Board to the holding in *Wanjiku & another v Attorney General & another; Muna & another (Interested Parties) (Petition 190 of 2011) [2012] KEHC 5410 (KLR) (Constitutional and Human Rights) (23 July 2012) (Judgment)*.

42. The Applicant contends that the Respondent's Preliminary Objection is incompetent and not based on pure points of law but on issues that require the Board to engage in a fishing expedition for facts and evidence.

43. On whether the Applicant's Preliminary Objection has merit, the Applicant submitted that no evidence was filed to demonstrate that

Migos Ogamba & Waudu Advocates were appointed by the Company Secretary in the name of the Procuring Entity pursuant to an express authority to do so by a resolution of the Board of Directors of the said Procuring Entity. The Applicant contends that the appointment of the Respondent's advocates on record by the Procuring Entity's Company Secretary in the name of the Procuring Entity was ultra vires Section 9A (2) of the Kenya Medical Supplies Authority Act, 2013.

44. The Applicant further contends that the Interested Party did not file any evidence to demonstrate that SOW Advocates LLP were appointed with the Interested Party's express authority to do so by a resolution of the Board of Directors of the said Interested Party. In support of its argument, the Applicant referred the Board to the holding by the Court of Appeal in the case of *Spire Bank Limited v Land Registrar & 2 others [2019] eKLR* and the case of *Affordable Homes Africa Limited v Ian Henderson & 2 Others HCCC No. 524 of 2004*.

45. On whether the Request for Review has merit, the Applicant submitted that the tendering process in the subject tender was governed by the Act and that this was also acknowledged by Global Fund as evidenced at page 5 of its letter dated 22<sup>nd</sup> December 2023.

46. The Applicant pointed out that the Respondent disqualified its tender because page 89 of its tender document was missing/not indicated and further indicated that even if its tender had passed the preliminary

examination, it would have failed at technical examination stage on account of the failure to submit a Product Retention Certificate.

47. The Applicant made reference to the provisions of Article 227(1) of the Constitution, Section 79(1) and 80 of the Act and the holdings in the South African cases of *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA)*, *Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 (1) SA 16 (SCA) ([2004] 1 All SA 504)*, and *Beach Clean Services South Africa CC v The City of Cape Town and 2 Others case no 24190/2012, delivered on 3 July 2013*) and submitted that the Respondent was under a duty to (a) examine and evaluate the Applicant's tender and regard it as responsive if it conformed to all requirements set out in the Tender document, (b) to regard the Applicant's tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the Tender Document or if it contains errors or oversights that can be corrected without touching on the substance of the tender, and (c) to quantify the deviations and appropriately take them into account in the evaluation of tenders. The Applicant pressed on that this duty was underpinned under ITT 16.3(b), 17.5, 27.1 and 29.2 of the Tender Document.

48. The Applicant also referred the Board to the holding in PPARB Application No. 76 of 2018 *Transcend Media Group Limited v Communications Authority of Kenya* and the Court of Appeal decision

*in Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR.*

49. On whether it is entitled to costs, the Applicant submitted that Section 173(d) of the Act empowers the Board to order the payment of costs as between parties to the review in accordance with the scale as prescribed and costs would compensate the Applicant for the trouble it has taken in prosecuting the instant Request for Review.

50. In conclusion, the Applicant submitted that the Respondent applied the evaluation procedure in the case of the Interested Party but denied it the same treatment hence failed to uphold the conjunctive principles under Article 47(1), 201 and 227(1) of the Constitution and urged the Board to allow the Request for Review as prayed.

### **Respondents' Case**

51. In opposing the instant Request for Review, the Respondent relied on its Replying Affidavit sworn by Dr. Andrew Mulwa on 5<sup>th</sup> February 2024, its Notice of Preliminary Objections dated 5<sup>th</sup> February 2024, its Memorandum in Response dated 5<sup>th</sup> February 2024, its List of Documents dated 13<sup>th</sup> February 2024 Written Submissions dated 13<sup>th</sup> February 2024, Supplementary Written Submissions dated 16<sup>th</sup> February 2024 together its List and Bundle of Authorities dated 16<sup>th</sup> February 2024.

52. In response to paragraph 1 of the Applicant's Reply to Preliminary Objection that Ground 1 of the Preliminary Objection is frivolous and lacks merit, the Respondent submitted that Section 170 of the Act does not contradict Section 167(1) of the Act since the breach of a legal duty contemplated therein is expressly stated to be the breach of a legal duty imposed on a procuring entity by the law hence the parties to the Request for Review must include the Procuring Entity. The Respondent further submitted that with regard to the case of *El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betovo Contractors 5 others (2018) eKLR* relied upon by the Applicant, the Court did not state that the accounting officer of a procuring entity is the only necessary party to a request for review and that Section 170 of the Act cannot be read in isolation and that failure to enjoin the procuring entity as a respondent is not a technicality that can be cured by Article 169 of the Constitution and that it is a fundamental defect as the procuring entity is a necessary party.

53. The Respondent pointed out that Regulation 203(1) of Regulations 2020 provides that a request for review under Section 167(1) of the Act shall be made in the form set out in the Fourteenth Schedule of Regulations 2020 and the form for review set out in the Fourteenth Schedule provides categorically that the request for review is against the decision of the procuring entity and not of the Accounting Officer. It is the Respondent's case that the procuring entity as well as the accounting officer must be a party to the review in accordance with

Section 170 and 167(1) of the Act and Regulation 203(1) of Regulations 2020 as read with the Fourteenth Schedule of Regulations 2020.

54. The Respondent indicated that in any event, litigation is normally instituted against both the procuring entity as well as the accounting officer because the procuring entity is a body corporate capable of suing and being sued in its own name and a claim against the procuring entity cannot be prosecuted against the accounting officer since the accounting officer and the procuring entity are not one and the same.

55. The Respondent referred the Board to the provisions of Regulation 203(2)(b) & (3) of Regulations 2020 that require a request for review to be accompanied by such statements as the applicant considers necessary in support of its request and submitted that the Supporting Affidavit filed by the Applicant in support of its request for review is sworn by one U. D. Balaji who claims to have authority to do so on behalf of the Applicant Company yet it is clear from the contents of the said Supporting Affidavit that U.D. Balaji is not a Director of the said company having described himself therein as the Applicant's Executive Vice President-Global HIV/AIDS Initiatives and he therefore could not have signed the said document in the presence of a witness to attest his signature as envisioned in Section 37 (2) (b) of the Companies Act.

56. The Respondent pointed out that it was aware that Section 40 (1) and (2) of the Companies Act empowers the directors and or shareholders of a company to appoint another person through a Power of Attorney

to carry out certain responsibilities on their behalf but the said U.D Balaji did not produce (a) any evidence to prove that the Applicant had passed a Resolution to institute the instant Request for Review, (b) any evidence to prove that a Power of Attorney was granted to him by the Applicant pursuant to a Resolution of the Board of Directors of the said Applicant that authorized him to institute and prosecute administrative review proceedings on behalf of the Applicant in respect of the subject tender, (c) the Minutes of the Meeting of the Board of Directors of the Applicant where the said Applicant discussed and resolved to institute the instant Request for Review, to appoint and give him power of attorney to prosecute the said Request for Review in respect of the subject tender for and on behalf of the Applicant , and (d) any evidence to prove that the Board of Directors of the Applicant had passed a Resolution to instruct the firm of Mwaniki Gachuba Advocates to act for the said Applicant in the instant Request for Review.

57. The Respondent pressed on that there is no evidence that Mr. U. D. Balaji was authorized by the Applicant to appoint Mwaniki Gachuba Advocates to act on the Applicant's behalf contrary to the provisions of Section 167(1) of the Act and the Fourteenth Schedule of Regulations 2020. In support of its argument, the Respondent referred the Board to the holding by Justice Odunga in *George Miyare t/a Miyare & Company Advocates v Nyando Power Techniques Limited (2017) eKLR*.

58. The Respondent contends that the Resolution of the Operations Committee of the Board of Directors of the Applicant purportedly made

on 20<sup>th</sup> March 2023 have not been produced for the Board to confirm that Resolutions were made on the said date by the Board of the Applicant to (a) institute the instant Request for Review, (b) authorize the aforesaid U.D.BALAJI vide a Power of Attorney to institute the instant Request for Review and to act on behalf of the Applicant during the proceedings before the Board in the instant Request for Review, and (c) appoint the law firm of Mwaniki Gachuba Advocates to act for the Applicant in the instant Request for Review.

59. The Respondent took issue with the averment made in the Applicant's Supporting Affidavit dated 30<sup>th</sup> January 2024 where an Authority to Swear Affidavits had been annexed and U.D. Balaji claimed to derive his authority, from an Authority to Swear Affidavits granted to him by one TAJUDDIN SHAIKH who is described therein as the chief finance officer of the Applicant.

60. The Respondent contends that as at the date of the purported resolution of the Applicant's Board of Directors, to wit, 20<sup>th</sup> March 2023, the subject tender had not even been floated by the Respondent having been advertised on 20<sup>th</sup> November 2023 and that the Authority to Swear Affidavit authorizes U.D.Balaji to plead and swear on behalf of the Applicant the Supporting Affidavit and all other necessary documents but does not authorize U.D. Balaji to commence and prosecute administrative review proceedings on behalf of the Applicant in relation to the subject tender. In support of this argument, the Respondent referred the Board to the holding by the Delhi High Court

in *Nibro Ltd vs. National Insurance Co. Ltd.* on 6 March 1990, Equivalent citations: AIR 1991 DELHI25, (1991) 70COMPCAS388 (DELHI), 41 (1990) DLT 633.

61. The Respondent also referred the Board to the holding in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer Lake Victoria North Water Works Development Agency and Lake Victoria North Water Works Development Agency* and submitted that in the absence of a competent statement in support of the instant Request for Review, the same was fatally defective for contravening the provisions of Regulation 203(2) (b) of Regulations 2020 having failed to be sworn by a properly authorized representative of the Applicant Company.

62. The Respondent took issue with the fact that the Applicant's Further Affidavit sworn on 9<sup>th</sup> January 2024 was sworn before a Notary Public in Johannesburg, South Africa yet it is not explained how or why U. D. Balaji, a resident of Pune, Maharashtra, India ended up swearing an Affidavit in in Johannesburg, South Africa.

63. The Respondent submitted that the instant Request for Review is fatally defective having been signed by Mwaniki Gachuba Advocates with no authorization from the Applicant contrary to Section 167(1) of the Act read with the Fourteenth Schedule of Regulations 2020. The Respondent further submitted that the candidate in this tender was Emcure Pharmaceuticals Ltd and not Mwaniki Gachuba Advocates and

if Mwaniki Gachuba Advocate was filing the request for review on behalf of Emcure Pharmaceuticals Ltd then Mwaniki Gachuba Advocates ought to have been formally appointed by Emcure Pharmaceuticals Ltd.

64. It is the Respondent's case that failure to serialize and/or paginate a tender document is not a minor deviation, omission or error since serialization of a bid document is a mandatory requirement under the subject tender's Tender Document and under Section 74(1)(i) of the Act and Regulation 74(1)(b) of Regulations 2020. In support of its argument, the Respondent referred the Board to the holding in *Republic v Public Procurement Administrative Review Board; Ex-Parte Accounting Officer, Kenya Ports Authority & Another; FCM Travel Solutions t/a Charleston Travel Limited & 3 Others (Interested Parties) (2021) eKLR*.

65. The Respondent pressed on that pagination and serialization of bid documents is a mandatory requirement under the Global Fund Procurement Guidelines which are in consonance with provisions of the Tender Document, Section 74(1) (I) of the Act and Regulation 74(1) (b) of Regulations 2020 and that it is not a matter of the Board to determine if Regulation 74(1)(b) of Regulations 2020 is in vacuo as alleged by the Applicant. The Respondent further pressed on that the Applicant had an opportunity to seek for clarification about the requirement on serialization of his bid document before bids were opened.

66. With regard to the Applicant's preliminary objection that the firm of Migos Ogamba & Waudu Advocates was improperly appointed to act for the Respondent supposedly due to a want of a Board Resolution by the Kenya Medical Supplies Authority, the Procuring Entity, the Respondent asked the Board to take judicial notice of the fact that the process and procedure followed by the Procuring Entity and any other parastatal in pre-qualifying and registering suppliers, and in procuring goods and services, of any kind, is spelt out under the Act and Regulations 2020 which do not provide a role for the Boards of the said parastatals in public procurement which is an operational issue under Section 8(3)(c)(i) of the Kenya Medical Supplies Authority Act 2013 and the Chief Executive Officer is responsible for the day to day running and operation of the said Authority. Further, the Respondent submitted that the responsibilities of an accounting officer are set out under Section 44 of the Act which does not place any legal duties and/or responsibilities on the Board of Directors of public bodies.

67. In response to the Applicant's preliminary objection challenging the authority of the Ag. Chief Executive Officer of the Procuring Entity to swear the replying affidavit, it is the Respondent's case that Dr. Andrew Mulwa is competent to swear the said Replying Affidavit pursuant to his legal duties and responsibilities under Section 8 (3) (c) (i) of the Kenya Medical Supplies Authority Act 2013 and Section 44 of the Public Procurement and Asset Disposal Act 2015. The Respondent invited the Board to take judicial notice of the fact that the Management of the Procuring Entity can be easily identified from its official website and

that the said allegations are scandalous being unsupported by evidence and being of no foreseeable benefit in advancing the Applicant's cause in the instant Request for Review.

68. The Respondent urged the Board to dismiss the instant Request for Review with costs.

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

69. In opposing the instant Request for Review, the Interested relied on its Memorandum of Response dated 5<sup>th</sup> February 2024, List and Bundle of Documents dated 5<sup>th</sup> February 2024, Further List and Bundle of Documents dated 16<sup>th</sup> February 2024 and Written Submissions dated 16<sup>th</sup> February 2024.

70. In its submissions, the Interested Party indicated that it supports the Notice of Preliminary objection by the Respondent together with its' Replying Affidavit and Memorandum of Response as well as the submissions thereto.

71. On whether the Applicant's Preliminary Objection is merited with regard to the Interested Party's Advocate filing a Memorandum of Response on behalf of the Interested Party, the Interested Party submitted that the preliminary objection was frivolous, incompetent and lacked any substantive backing in law and ought to be dismissed since when the Interested Party was served with the instant Request for Review, it instructed the firm of SOW Advocates LLP to enter

appearance and file requisite documents and/ or pleadings on its behalf and subsequently, the said law firm filed a Notice of Appointment and Memorandum of Response in accordance with Regulations 2020.

72. The Interested Party contends that the firm of SOW Advocates LLP received general instructions from the Interested Party as a client and that there is no legal requirement that when a company is giving instructions to an advocate, it should as well give the appointed firm of advocates express authority to do so through the Company's Board Resolution. The Interested Party further contends that the Board Resolution is only needed when the company is appointing an officer who will be acting on its' behalf in terms of appearing in court, signing relevant documents, swearing Affidavits, etc and that the same does not extend to the Advocates representing it.

73. The Interested Party submitted that the onus is on the Applicant to show that the Interested Party did not instruct and authorize the firm of SOW Advocates LLP to enter appearance and file Memorandum of Response on its' behalf and there is no such evidence before the Board.

74. The Interested Party further submitted that in any event, either a board resolution or authority to act and plead can be filed at any time in the course of the proceedings and even lack of it is not a ground for dismissal of matter and as such, there is no legal requirement that it should be filed contemporaneously with the suit or defense at the time of filing them. In support of this argument, the Interested Party relied

on the holding in *Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling)(2013) eKLR*, where the High Court followed a long list of court decisions that state that lack of authority to plead or board resolution is not ground for dismissal of a suit.

75. The Interested Party submitted that pursuant to directions of the Board on 14<sup>th</sup> February, 2024, parties were granted leave to file supplementary and further affidavits including documents limited to the issues raised in the previous documents and pleadings in court and in compliance with the Board's directions, the Interested Party has filed an Authority to Plead, Act and Swear Affidavit dated 3<sup>rd</sup> February 2024.

76. On whether the instant Request for Review is merited, the Interested Party submitted that the Applicant has alleged and submitted that the Respondent breached Articles 47 (1) and 227 (1) of the Constitution of Kenya, Section 79(1) of the Act, and Regulation 74 (1) ( c) of Regulations 2020 by examining the Applicant's tender security under Regulation 74 (1) (b) of Regulations 2020 as opposed to Regulation 74 (1) (C ) of Regulations 2020 yet Regulations 74(1)(b) and (c) ought to be considered in totality as one and not in isolation.

77. The Interested Party contends that the Applicant has not demonstrated or given any evidence to show that the Respondent applied Regulation 74 (1) (b) of Regulations 2020 to it alone and not to the rest of the tenderers in the subject tender yet all tenderers were

treated equally and fairly in total compliance with the Act and Regulations 2020.

78. The Interested Party pointed out that the Applicant has not denied that it missed certain pages and failed to comply with the mandatory requirement for the specific preliminary examination which was provided in mandatory terms and having failed to comply with a mandatory requirement and provisions of the Act, the Applicant's tender was non-responsive and the Respondent was correct in disqualifying its tender at the preliminary evaluation stage.

79. The Interested Party submitted that the Respondent through the tender instructions gave sufficient definitions of what amounted to deviation, reservation or omission and that defining non-compliance of the Applicant's tender as either deviation, reservation or omission is unfounded and without any factual or legal basis.

80. The Interested Party referred the Board to the holding by the High Court in the case *Republic v Public Procurement Administrative Review Board; Ex-parte Accounting Officer, Kenya Ports Authority & another; FCM Travel Solutions t/a Charleston Travel Limited & 3 others (Interested Parties) [2021] eKLR* and urged the Board to find that failed to comply with the provisions of the Act ,Regulations 2020, and the Tender Document and was rightly disqualified at the preliminary stage and does not deserve the prayers being sought in the instant Request for Review.

81. The Interested Party submitted that the matter before the Board is of great public importance that affects the lives of so many Kenyans who urgently need ARVS Medicine and the Applicant has neither provided any evidence to show how it was discriminated against nor given any evidence to show that the Interested Party was favoured in being awarded the subject tender.

82. The Interested Party submitted that the procurement process in the subject tender was competitive and the most suitable tenderer was rightfully awarded the subject tender and urged the Board to dismiss the instant Request for Review with costs.

### **BOARD'S DECISION**

83. The Board has considered each of the parties' cases, documents, pleadings, oral and 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 this issue, the Board will make a determination on the following sub-issues:

- i Whether the Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024 is merited?*
- ii Whether the Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2023 (perhaps meant 2024) is merited?*

Depending on the determination of the first issue;

**B. Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of 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;**

84. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

85. 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."***

86. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

***"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 evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

87. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

*"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 Respondent 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."*

88. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

*"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common*

*place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."*

89. 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 overarching 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...."*

90. 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."***

91. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

92. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

***"(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."***

93. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

***"(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."***

94. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main

function being reviewing, hearing and determining tendering and asset disposal disputes.

95. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board 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. [Emphasis by the Board]***

***(2) .....***

***(3) .....***

.....

***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.***

96. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and

Regulations 2020 at any stage of the procurement process in a manner prescribed.

97. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

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

***203. Request for a review***

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

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

***(a) .....***

***(b) .....***

***(c) be made within fourteen days of —***

***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***

***(ii) the notification under section 87 of the Act; or***

***(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***

***(d) .....***

***(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***

***(4) .....***

98. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

***i Whether the Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024 is merited?***

99. The Applicant objected to the Respondent's Memorandum of Response dated 5<sup>th</sup> February 2024, Replying Affidavit sworn on 5<sup>th</sup> February 2024 and the Interested Party's Memorandum of Response dated 5<sup>th</sup> February 2024 on the grounds that (a) there was no express authority

by a resolution of the Board of Directors of Kenya Medical Supplies Authority, the Procuring Entity herein, for Migos Ogamba & Wauda Advocates appointed by the Company Secretary in the name of Kenya Medical Supplies Authority to draw and file the Respondent's Memorandum of Response dated 5<sup>th</sup> February 2024 and Replying Affidavit sworn on 5<sup>th</sup> February 2024, (b) the appointment of Migos Ogamba & Wauda Advocates by the Company Secretary on the name of Kenya Medical Supplies Authority was ultra vires Section 9A(2) of the Kenya Medical Supplies Authority Act, 2013, (c) Migos Ogamba & Wauda Advocates were not contracted in a system that was fair, equitable, transparent, competitive and cost-effective as required under Article 227 (1) of the Constitution and (d) the Interested Party's Memorandum of Response was drawn and filed by SOW Advocates LLP in the name of the Interested Party without an express authority to do so by a resolution of the Board of Directors of the said Interested Party.

100. In response to the Applicant's Preliminary Objection, the Respondent submitted that the process followed by the Procuring Entity in pre-qualifying and registering suppliers and in procuring goods and services is spelt out under the Act and Regulations 2020 and no law has been cited that gives the Board of Directors a role in public procurement which is an operational issue under Section 8(3)(c)(i) of the Kenya Medical Supplies Authority Act 2013 and a responsibility of the Procuring Entity's Accounting Officer, the Respondent herein.

101. On its part, the Interested Party submitted that the firm of SOW Advocates LLP received general instructions from it as a client to represent it in the instant Request for Review and filed a Notice of Appointment dated 5<sup>th</sup> February 2024 to this effect and further filed an Authority to Plead, Act and Swear Affidavit dated 3<sup>rd</sup> February 2024 and as such the onus is on the Applicant to show that the Interested Party did not instruct and authorize the firm of SOW Advocates LLP to enter appearance and file Memorandum of Response on its' behalf.

102. Having considered parties' pleadings and submissions on the Applicant's Preliminary Objection, we understand the issues in contention touch on the Respondent's and Interested Party's representation in the instant Request for Review.

103. Regulation 208 of Regulations 2020 provides that:

***"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."***

104. Further, Order 9 of the Civil Procedure Rules, 2010 provides for recognized agents and advocates who are duly appointed to act on behalf of others in court proceedings. Order 9 rule 7 provides for a Notice of appointment of advocate as follows:

***"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his***

***behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."***

105. We note that the Respondent, having been notified by the Board Secretary of filing of the instant Request for Review proceeded to file on 5<sup>th</sup> February 2024 a Notice of Appointment of Advocates dated 5<sup>th</sup> February 2024 through the firm of Migos-Ogamba & Wauda Advocates which reads in part:

***"TAKE NOTICE that the Respondent herein CHIEF EXECUTIVE OFFICER, KENYA MEDICAL SUPPLIES AUTHORITY, has appointed the firm of Migos-Ogamba & Wauda Advocates to act for him in this matter.***

***TAKE FURTHER NOTICE that the Respondent's address for service for the purposes hereof only shall henceforth be care of Migos-Ogamba & Wauda Advvocates Crawford Business Park, 4<sup>th</sup> Floor, Suite 25, State House Road, P.O. Box 89447-80100, NAIROBI.***

....."

106. We further note that the Respondent, being the accounting officer of the Procuring Entity, deponed at Paragraph 40 the Replying Affidavit sworn on 5<sup>th</sup> February 2024 by Dr. Andrew Mulwa, Ag. Chief Executive



Officer of the Procuring Entity Exhibit that he had instructed the firm of Migos Ogambo & Waudu Advocates to act for it in the instant Request for Review and annexed exhibit marked "KEMSA 10" being a letter of instructions which reads in part:

".....

*Dear Sir,*

**RE: IN THE MATTER OF PUBLIC PROCUREMENT  
ADMINISTRATIVE REVIEW BOARD EMCURE  
PHARMACEUTICALS LIMITED VS KENYA MEDICAL  
SUPPLIES AUTHORITY APPEAL NO. 7 OF 2014**

*Reference is made to the above.*

*The Authority is in receipt of the notification of appeal at the Public Procurement Administrative Review Board and the appeal herewith attached for your perusal and reference.*

*Please consider this correspondence as instructions to your firm to proceed to enter appearance on behalf of Kenya Medical Supplies Authority. Kindly promptly liaise with our procurement and legal department to compile the relevant documents, prepare and file a response.*

*Your fees shall be assessed and paid in accordance with the Advocates Remuneration Order (2014).*

*Yours faithfully,*

*(signed)*

***Fredrick Wanyonyi***

***CORPORATION SECRETARY***

107. The Applicant at ground 2 of its Preliminary Objection contends that the appointment of Migos Ogamba & Waudu Advocates by the Company Secretary in the name of Kenya Medical Supplies Authority was ultra vires Section 9A(2) of the Kenya Medical Supplies Authority Act, 2013 which sets out the responsibilities of the Corporation Secretary. We have not found any violation of the said provision with regard to the issuance of the letter of instruction appointing the Respondent's advocates by the Corporation Secretary and this ground of objection lacks merit.

108. In the same vein, the Interested Party having been notified by the Board Secretary of filing of the instant Request for Review proceeded to file on 5<sup>th</sup> February 2024 through the firm of SOW Advocates LLP a Notice of Appointment dated 5<sup>th</sup> February 2024 which reads in part:

***"TAKE NOTICE that HETERO LABS LIMITED, the Interested Party herein, has appointed the firm of SOW Advocates LLP, The Westery Building, 3<sup>d</sup> Floor, Suite 3C, Mpesi Lane Off Mutithi Road, Westlands, P.O. Box 25676-00603 Nairobi, Email: [info@sowadvocates.co.ke](mailto:info@sowadvocates.co.ke) to act for them in this matter.***

***Henceforth, all future correspondence and court process should be addressed and served via the said advocates.***

.....”

109. The Interested Party also filed a Further List and Bundle of Documents dated 16<sup>th</sup> February 2024 comprising of an Authority to Plead, Act and Swear Affidavit dated 3<sup>rd</sup> February 2024 and a Power of Attorney duly signed on 27<sup>th</sup> November 2023. We note from the Interested Party’s Power of Attorney that it nominated and authorized Mr. S. Bhavesh Shah, its Director Marketing to ***‘make relevant applications and execute necessary documents in respect of tender bids for and on behalf and in a manner favorable to the Company’***. Additionally, in the Authority to Plead, Act and Swear Affidavit dated 3<sup>rd</sup> February 2024, the Interested Party authorized Mr. S. Bhavesh Shah, being its nominee to ***‘appear, plead, represent, act and swear on its behalf in preparation of the Memorandum of Responses, swear all Affidavits, execute all court documents, and attest to all other documents, pleadings in this suit and any other subsequent pleadings that are necessary in this matter and any other matter that may arise later on.’***

110. In the circumstance, we find that the above Notice of Appointment of Migos-Ogamba & Wauda Advocates to act on behalf of the Respondent and the Notice of Appointment of SOW Advocates LLP to act on behalf of the Interested Party suffices and the said advocates



are properly on record to represent the Respondent and Interested Party's in the instant Request for Review. This is further buttressed by evidence supplied to the Board as seen from various paragraphs such as paragraph 2 and 15 of the Respondent's Replying Affidavit sworn on 5<sup>th</sup> February 2024 by Dr. Andrew Mulwa, the Ag. Chief Executive Officer of the Procuring Entity and the Respondent herein, which reads:

***" 2. THAT I have read and understood the Request for Review and where necessary have had the same explained to me by the Respondents' Advocates on record and wish to respond thereto as follows.***

.....  
***15. I have been advised by the Respondents' Advocate on record EDWIN WANGWE ADVOCATE which advice I verily believe to be true that pagination and serialization of bid documents is a mandatory requirement under the Global Fund Procurement Guidelines. Annexed hereto and marked KEMSA 7 is a copy of the said guideline.***

....."

111. Further, paragraph 2 of the Interested Party's Memorandum of Response dated 5<sup>th</sup> February 2024 reads:

***" 2. The Interested Party's address for service for purposes of this Review shall be c/o SOW Advocates LLP, The Westery, 3<sup>rd</sup> Floor, Mpesi Lane, Off Muthithi Road, Westlands, P.O. Box 25676-00603, Nairobi, email: info@sowadvocates.co.ke."***

112. Accordingly, the Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024 fails.

***ii Whether the Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2023 (perhaps meant 2024) is merited?***

113. The Respondent objected to the Applicant's Request for Review on grounds *inter alia*, that (a) the Applicant failed to meet the threshold requirement for filing a competent request for review under Section 167(1) of the Act by failing to include the Procuring Entity as a respondent in the instant Request for Review, (b) the instant Request for Review is fatally defective for having been signed by Mwaniki Gachuba Advocates who was neither authorized to do so nor properly appointed to act on behalf of the Applicant, (c) the Supporting Affidavit filed in support of the Request for Review is fatally defective and bad in law having been signed by U. D. Balaji who claims to have been authorized by the Applicant through a resolution made on 20<sup>th</sup> March 2023 to plead and swear on behalf of the Applicant the said affidavit and all other necessary affidavits, (d) in the absence of a competent statement in support of the request for review, the instant Request for Review is fatally defective for contravening provisions under Regulation 203(2)(b) of Regulations 2020, and (e) the no objection letter issued by Global Fund is not open to challenge pursuant to Section 6 of the Act and that the Global Fund issued the no objection letter after reviewing the entire procurement process and satisfying

itself that the procurement process was conducted in accordance with the Global Fund Procurement Guidelines which pursuant to Section 6 of the Act, overrides the Act and Regulations 2020 where any provisions of the Act conflicts with the said guidelines.

114. In response to the Respondent's Preliminary Objection, the Applicant submitted that (a) by virtue of Section 170 of the Act, ground 1 of the Respondent's Preliminary Objection was frivolous and lacks merit, (b) it appointed its Advocates on record through U.D. Balaji who has the Power of Attorney to submit its tender, and the authority to appoint an advocate on its behalf who had lawful authority to sign the instant Request for Review on its behalf, (c) the Applicant being a Company formed in India is not subject to the provisions of the Kenyan Companies Act, 2015, (d) the Respondents failed to plead or demonstrate that the Applicant's Board of Directors are barred from delegating its authority to an employee to sign an authority to swear affidavit, (e) the term statements in Regulation 203(2)(b) of Regulations 2020 does not exclude affidavits sworn in support of the request for review, Regulation 74(1)(b) of Regulations 2020 is in vacuo and inconsistent with Section 79(1) and 80(2) of the Act, (f) no treaty, agreement or other convention that has been ratified by Kenya and to which Kenya is a party was annexed that rendered the Act inoperable in respect of the subject procurement proceedings, and (g) that the Preliminary Objection is incompetent and not based on pure points of law but on issues that require the Board to go on a fishing expedition of facts and evidence.

115. On its part, the Interested Party submitted that it was in support of the Respondent's Preliminary Objection and submissions thereto.

116. The Board having considered parties' submissions on the Respondent's Preliminary Objection notes that the issues in contention relate to (a) applicability of the Act in the subject tender, and (b) whether the instant Request for Review as filed is competent.

***On the issue of applicability of the Act in the subject tender;***

117. As regards the issue of conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya, and to which Kenya is a party, Section 6 of the Act provides that:

***"(1) Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.***

***(2) Where the Republic of Kenya is required under the terms of any treaty or convention to which she is party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part or***

*wholly, jointly or separately, procurement through such contributions shall be –*

*(a) in discreet activities where possible; and*

*(b) subject to the applicable provisions of the Act.*

*(3) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) apply shall be subject to the provisions of the Act. ”*

118. We note that Section 6(1) of the Act takes cognizance of the application of treaties, agreements and conventions ratified by Kenya by dint of Article 2(5) and (6) of the Constitution. This is why the introductory sentence under Section 6 of the Act states that the provisions of section 6(1) of the Act is subject to the Constitution. Further, this provision supports the view that Kenya cannot rely on its procurement law where there is a conflict with any obligations of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. Such procurement in case of a conflict, should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, which form part of the law of Kenya by virtue of Article 2 (6) of the Constitution.

119. In **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR**

(hereinafter referred to as "the KPLC Case") Justice Nyamweya held as follows:

**"[55] *In addition, section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution.***

**[56] *This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and are more likely to result in difficulties of interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies***

**[57] *It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of***

***Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.”[Emphasis by the Board]***

120. The Respondent in the instant Request for Review deponed at paragraph 13 and 14 of its Replying Affidavit sworn on 5<sup>th</sup> February 2024 by Dr. Andrew Mulwa as follows:

***"13. THAT on 27<sup>th</sup> December 2023, the Respondent received the Global Fund feedback report dated 22<sup>nd</sup> December 2023. Annexed hereto and marked KEMSA 5 is a copy of the email from the treasury forwarding the said feedback report and marked KEMSA 6 is a copy of the said report.***

***14. THAT the Global Fund being the funders anticipated under Section 6 of the Act gave a qualified no objection.”***

121. We note that the Respondents contention is that a no objection letter was issued by Global Fund having reviewed the entire procurement process in the subject tender and as such the procurement proceedings in the subject tender were not open to be challenged pursuant to Section 6 of the Act. This then begs the question whether procurement proceedings in the subject tender were subject to the provisions of the Act in light of the letter of no objection issued by Global Fund and the objection raised by the Respondent.

122. It is not in contest that the subject tender was advertised by the Procuring Entity on behalf of the Government of Kenya and the Ministry of Health in partnership with Global Fund. **Clause 1 of the Invitation to Tender at page 3 of the Tender Document** provided that the tender invitation in the Tender Document stated that the Government of Kenya received a grant from Global Fund to fight AIDS, TUBERCLOSIS and malaria under New Funding model (NFM) for the year 2023/2024 which it intends to use part of the funds to supply ARVs MEDICINES I.

123. **Clause 3 of the Invitation to Tender at page 3 of the Tender Document** further provided that that bidding would be conducted through the procedures specified in the Act and Global Fund's Policies on Procurement and Supply Management, June, 2021 and open to all.

124. Clause 2.1 of the Guide to Global Fund Policies on Procurement and Supply Management of Health Products, June 2021 provides for applicable laws as follows:

**" 2.1 When procuring and managing the supply of health products, recipients undertake to comply at all times with applicable laws, including with any required authorizations relating to those health products in a timely manner pursuant to the requirements established by the relevant regulatory authority in the country in which those products will be utilized."**

125. ITT 16.3(b) of Section II- Tender Data Sheet (TDS) at page 29 of the Tender Document provides as follows with regard to other procurement specific documentation requirements:

***"Other procurement specific documentation requirements are:***

***Applicable Guidelines: Government of Kenya (GOK), The Public Procurement and Asset Disposal Act 2015. The Global Fund's Policies on Procurement and Supply Management, June 2021 The Global Fund Quality Assurance Policy as amended and restated on 14 December, 2010.***

***Note: In the event of a conflict between the Public Procurement and Asset Disposal Act and the Global Fund's PSM Policies, the Global Fund's PSM Policies shall prevail".***

....."

126. In essence, if a conflict arose in the procurement proceedings of the subject tender with regard to the provisions of the Act, the Global Funds Policies on Procurement and Supply Management of Health Products would prevail. This Board has not been pointed to any event of any conflict that may have arisen in the procurement proceedings of the subject tender touching on the Act and the Global Funds Policies on Procurement and Supply Management of Health Products.

127. We have carefully studied the Global Fund Feedback Report dated 22<sup>nd</sup> December 2023 annexed as Respondent's exhibit marked "KEMSA 6" which has been relied upon by the Respondent in advancing its argument on the issue of applicability of the Act and note that the Global Fund Report indicated that the objective of the review was to check (i) adherence to the Government of Kenya Public Procurement and Asset Disposal (PPAD) Act 2015 (revised edition 2022) and PPAD Regulations 2020, as well as (ii) compliance with Global Fund (GF) requirements and guidance for competitiveness, transparency/fairness, cost-effectiveness, and quality assurance – as laid out in the grant agreements, the GF Procurement and Supply Management (PSM) Guidelines and on the GF website.

128. We also take note of the Global Fund Conclusion and Final Recommendation at page 5 of the Global Fund Feedback Report which acknowledged compliance with the provisions of the Act in the procurement proceedings in the subject tender as follows:

***"The Global Fund review documented overall compliance with the PPAD Act and GF procurement guidance....."***

129. In view of the above, it is our considered view and finding that Global Fund acknowledged that the procurement proceedings in the subject tender were subject to the provisions of the Act in addition to its policies and requirements and as such, the Act is applicable to all procurement proceedings of the subject tender having established that there was no

conflict with regard to the provisions of the Act and the Global Fund policies as far as resolution of disputes arising from the procurement proceedings in the subject tender was concerned.

130. We have also perused the Global Fund Grant Regulations published in 2023 which are applicable to all grants governed by Framework Agreements amended or executed after 14<sup>th</sup> June 2023 and note that the Global Fund Grant Regulations provide for arbitration as a dispute resolution mechanism under Regulation 12.7 at page 34 of 35 in the following terms:

**" 12.7 Arbitration**

***Any dispute, controversy or claim arising out of or relating to a Grant Agreement, or the breach, termination or invalidity thereof, which cannot be resolved through amicable negotiations, shall be finally settled by arbitration in accordance with the United Nations Commission on International Trade Law Arbitration Rules in force at the time of the commencement of the arbitration. The Global Fund and the Grantee agree to be bound by the arbitration award rendered in accordance with such arbitration as the final adjudication of any such dispute, controversy, or claim.....***

131. It is our considered view that the above arbitration clause is limited to disputes between Global Fund and a Grantee of the fund and not

between Global Fund and tenderers or a Grantee of the fund and tenderers and it is therefore is inapplicable for purposes of managing and resolving disputes in the present procurement proceedings.

132. As such, the Board finds and holds that it has jurisdiction to entertain the instant Request for Review. Accordingly, this ground of the Respondent's Preliminary Objection fails.

***On the issue of whether the instant Request for Review as filed is competent;***

133. We have hereinbefore established that pursuant to Section 167 (1) of the Act, an aggrieved candidate or tenderer who claims to have suffered or risk suffering loss or damage due to a breach of duty imposed on a procuring entity by the Act or Regulations 2020 may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process or disposal process in such a manner as may be prescribed.

134. Section 170 of the Act sets out in mandatory terms parties to an administrative review as follows:

***"170. 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."***

135. In essence, an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

136. Regulation 203(1) of Regulations 2020 provides that:

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

137. Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

***FOURTEENTH SCHEDULE***

***(r 203(1))***

***FORM FOR REVIEW***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD***

***Application No.....OF ..... 20.....***

**BETWEEN**

.....**APPLICANT (Review Board)**

**AND**

.....**RESPONDENT (Procuring Entity)**

**Request for Review of the decision of the .....(Name of the Procuring Entity of .....dated the .....day of .....20 ..... in the matter of Tender No .....of .....20 .....for .....(Tender description)**

**REQUEST FOR REVIEW**

**I/We.....the above named Applicant (s) of address.....physical address.....P.O Box No.....Tel No..... Email hereby Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely**

- 1.**
- 2.**

**By this memorandum, the Applicant requests the Board for an order/orders that:**

- 1.**
- 2.**



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

**DATED on .....day of...../20**

**FOR OFFICIAL USE ONLY**

**Lodged with the Secretary,**

**Public Procurement Administrative Review Board on....**

**Day of .....20...**

**SIGNED**

**Board Secretary**

138. From the format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

139. It is also evident from the format provided above under the Fourteenth Schedule of the Act that the Respondent has been indicated to be the Procuring Entity in blankets with no further indication that the accounting officer of the Procuring Entity ought to be a respondent in the Request for Review thus depicting a clear departure by the



Fourteenth Schedule of the Act (being a subsidiary legislation) from the provisions of Section 170 of the Act (being the enabling Act).

140. There being an inconsistency between the Fourteenth Schedule and the provisions of Section 170 of the Act, the Board in making a determination of whether it is mandatory for a procuring entity to be joined as a respondent in a request for review is guided by the provisions of Section 31(b) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya which provides:

***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation –***

***(a) .....***

***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act."***

141. Further, we note that Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 provides that:

***"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."***

142. The High Court in **Petition No. 20 of 2019 Victor Juma v Kenya School of Law & Council of Legal Education [2020]** eKLR addressed the relationship between a primary legislation and a subsidiary legislation and compared the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 and held as follows:

***"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case and the relevant legislative instrument to be applied is the KSL Act."***

143. In view of the foregoing provisions and case law, this Board is of the considered view that the form provided in the Fourteenth Schedule of the Act is a subsidiary legislation to the Act and any provision in the said form that is inconsistent with the provisions of the Act ought not to override the provisions of the Act and is not applicable to the extent of such inconsistency. As such, the indication that a respondent in a request for review is a procuring entity is void for being inconsistent with the provisions of Section 170 of the Act which require an accounting officer to be included as a party in a request for review application.

144. As such, the Applicant was not mandated to include the Procuring Entity as a respondent in the instant Request for Review and did not fail to meet the threshold requirement for filing a competent Request for Review under Section 167(1) of the Act by dint of failure to include the Procuring Entity as a respondent in its Request for Review application. Accordingly, this ground of objection by the Respondent fails.

145. At this juncture, the Board must now address its mind on whether (a) the Applicant's Advocates, Mwaniki Gachuba Advocates are properly on record on behalf of the Applicant, and (b) the instant Request for Review is fatally defective having been signed by Mwaniki Gachuba Advocates on behalf of the Applicant.

146. Having carefully studied the instant Request for Review, we note that the same is accompanied by a Supporting Affidavit sworn by U. D. Balaji which reads in part as follows:

***"I, U.D. Balaji of care of Emcure Pharmaceuticals Limited, Plot No. P-1 & P-2, IT-BT Park, Phase II M.I.D.C., Hinjawadi, Pune – 411057, Maharashtra, India make oath and state:***

***1. THAT I am the Applicant's Executive Vice President – Global HIV/AIDS Initiatives, duly authorised and conversant with the facts herein hence competent to swear this affidavit. Annexed hereto and marked "UDB 1" is a copy of the authority.***

.....”

147. We note that the Authority to Swear Affidavit referred to by the said U. D. Balaji reads in part as follows:

***"Pursuant to a resolution of the Operations Committee of the Board of Directors of EMCURE PHARMACEUTICALS LIMITED (the "Company") made on 20<sup>th</sup> March 2023, the Company authorized MR.U.D.BALAJI to plead and swear on its behalf the Supporting Affidavit and all other necessary affidavits herein.***

***The Company through MR. U.D.BALAJI also appointed Mwaniki Gachuba Advocates to act on its behalf and represent it in the matter and in any subsequent matters related thereto.***

***DATED at MAHARASHTRA this 30<sup>th</sup> day of January 2024***

***SIGNED by TAJUDDIN SHAIKH, Chief Financial Officer on behalf of EMCURE PHARMACEUTICALS LIMITED***

.....”

148. We note that it is the Respondent's case that the relevant affidavits in the instant Request for Review were not sworn by a properly authorized representative of the Applicant. The Respondent claims that:

- a) *U.D.Balaji is not a director of the Applicant having described himself as the Applicant's Executive Vice President – Global HIV/AIDS Initiatives;*
- b) *U.D.Balaji has not produced any evidence to prove that the Applicant had passed a Resolution to institute the instant Request for Review;*
- c) *U.D.Balaji has not produced any evidence to prove that a Power of Attorney was granted to him by the Applicant Company pursuant to a Resolution of the Board of Directors of the said Company that authorized him to institute and prosecute administrative review proceedings on behalf of the Applicant in respect to the subject tender;*
- d) *U.D Balaji has not produced the Minutes of the meeting of the Board of Directors of the Applicant where the Applicant resolved to institute the instant Request for Review, appoint and issue him with the Power of Attorney to prosecute the instant Request for Review on its behalf;*
- e) *U.D.Balaji in his Supporting Affidavit sworn on 30<sup>th</sup> January 2024 annexed an Authority to Swear Affidavit dated 30<sup>th</sup> January 2024 and signed by Tajuddin Shaikh described as the Chief Financial Officer on behalf of Emcure Pharmaceuticals Limited;*

- f) *Resolutions of the Operations Committee of the Board of Directors of the Applicant made on 20<sup>th</sup> March 2023 have not been produced before the Board;*
- g) *The Applicant has not placed before the Board any Power of Attorney that authorized U.D. Balaji to institute a request for review with respect to the subject tender.*

149. This Board having carefully studied the Applicant's original tender submitted as part of the confidential documents by the Respondent pursuant to Section 67(3)(e) of the Act notes that the Applicant submitted at pages 96 to 99 of its tender a Specific Power of Attorney appointing Mr. Utharadhi Devbalaji as its Attorney with regard to the subject tender. The Specific Power of Attorney reads in part as follows:

**"EMCURE PHARMACEUTICALS LIMITED**

**.....do hereby authorize Mr. Utharadhi Devbalaji, Sr. Director – Global HIV/AIDS Initiatives is appointed by the Company, hereinafter referred to as the "Attorney", to do the following acts, individually, for and in the name and on behalf of the Company:**

**1. to apply for procurement of domestic and international tender documents, bid bonds, sign/alter and submit the quotation/documents of the Company, if required;**

**2. to represent the Company, negotiate the matters and complete legal formalities with all domestic and international tendering authorities;**

**3. ....**

**4.....**

**5.....**

**6.....**

**The Company do hereby agree to ratify and confirm all and whatsoever the Attorney(s) shall lawfully do or cause to be done by virtue of these presents....."**

150. In view of the contents of the above Specific Power of Attorney, we are of the considered view that the Applicant has provided enough evidence before the Board that Mr. U.D. Balaji was duly authorized to represent the Applicant in the procurement proceedings in the subject tender and being the authorized signatory of the Applicant, he had authority to institute and prosecute administrative review proceedings on behalf of the Applicant with respect to the subject tender including appointing the firm of Mwaniki Gachuba Advocates to act on behalf of the Applicant in these proceedings.

151. With regard to the issue of the Applicant's Advocates signing the Request for Review, we note that Section 26(2) of the Statutory Instruments Act provides that:



***"Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead."***

152. In the same breadth, Section 72 of the Interpretation and General Provisions Act provides that:

***"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."***

153. In essence, where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently does not affect the substance of that document or statutory instrument.

154. The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in

declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as "the Alfred Mutua case") where it held:

***"In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."***

155. Turning to the circumstances of the instant Request for Review, we note that the Applicant's Request for Review reads in part as follows:

".....

**REQUEST FOR REVIEW**

**EMCURE PHARMACCEUTICALS LIMITED of Plot No. P-1 & P-2, IT-BT Park, Phase II M.I.D.C., Hinjawadi, Pune – 411057, Maharashtra, India. Tel +91 20 35070000/40240000 Email : [corporate@emcure.com](mailto:corporate@emcure.com)**



***the above-named Applicant whose address for service of this application is Mwaniki Gachuba Advocates, Josem Trust House, 3<sup>d</sup> Floor, Masaba Road, Upper Hill, P.O. Box 3082-00506, Nairobi. Tel. 0725103901, Email: [info@mwanikigachuba.com](mailto:info@mwanikigachuba.com) hereby requests the Public Procurement Administrative Review Board to review the whole of the above-mentioned decision on the GROUNDS THAT:***

.....

***DATED at NAIROBI this 30<sup>th</sup> day of January 2024***

***(signed)***

***MWANIKI GACHUBA***

***ADVOCATES FOR THE***

***APPLICANT"***

156. From the above Request for Review filed by the Applicant, we note that it (a) is made in the name of the Applicant and not its Advocate, (b) indicates that the Applicant's address of service for purposes of the Request for Review shall be its advocates, Mwaniki Gachuba Advocates, (c) sets out the request to review the subject tender while laying out grounds for review and orders sought from the Board; (d) has been signed off by the Applicant's advocates on record Mwaniki Gachuba Advocates; (e) was lodged and received by the Board's Secretary on 31<sup>st</sup> January 2024 as evidenced by the signature endorsed Board's Secretary.



157. The above scenario is contemplated under Regulation 208 of Regulations 2020 aforementioned which allows a party to a request for review to be represented by an advocate in procurement proceedings before the Board.

158. This Board in **PPARB Application No. 34 of 2023 Wodex Technologies Limited v The Accounting Officer, National Health Insurance Fund (NHIF) & Another**, considered similar circumstances as those raised in the instant Request for Review and held as follows at pages 79 to 80 of its decision:

*"From the above Request for Review filed by the Applicant, we note that it (a) is made in the name of the Applicant and not its Advocate, (b) indicates that the Applicant's address of service for purposes of the Request for Review shall be its advocates, Caroline Oduor & Associates Advocates, (c) sets out the request to review the subject tender while laying out eleven grounds for review and six orders sought from the Board; (d) has been signed off by the Applicant's advocates on record Caroline Oduor & Associates Advocates; (e) was lodged and received by the Board's Secretary on 31<sup>st</sup> May 2023 as evidenced by the signature endorsed Board's Secretary.*

**In our considered view, the import of the words "whose address of service for purpose of this Request for Review shall be care of Caroline Oduor & Associates Advocates" in the Applicant's Request for Review dated 30<sup>th</sup> May 2023 and filed on 31<sup>st</sup> May 2023 connote that any document or information delivered to the Applicant's Advocate's address indicated in the Request for Review is considered to have been delivered to the Applicant itself and is binding on the Applicant."**

159. The Board has further considered its holding at page 70 in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") where it held as follows:

**"It would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed by the Applicant's Advocates. However, the instant request for review was by the Applicant but signed by the Applicant's Advocates."**

[Emphasis]

***From the foregoing, we find that the instant Request for Review was signed off by the Applicant's Advocates despite the Request for Review being made in the name of the Applicant thus fatally defective and bad in law for not being in the prescribed form and having been signed by the Applicant's Advocates instead of the Applicant in accordance with the mandatory requirements of Regulation 203(1) read with the Fourteenth Schedule of the Regulations 2020."***

160. In essence, the Board was alive to the fact that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. Notably, the Toddy case is distinguishable from the instant Request for Review since the Request for Review therein was made by the Applicant but signed by the Applicant's Advocates whereas, in the instant Request for Review, we have established from the Request for Review application that the Applicant's address of service for purposes of the Request for Review has been indicated to be its advocates, Mwaniki Gachuba Advocates, on behalf of the Applicant, Emcure Pharmaceuticals Limited. As such, the deviation by the Applicant in the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review compared to the circumstances in the Toddy case, where the Applicant did not provide its Advocates address of service for purposes of its Request for Review

and instead availed its own address yet its Advocates signed off the Request for Review which cannot be said to be inconsequential but was in fact misleading.

161. In the circumstances, we find that failure by the Applicant to sign the instant Request for Review and the same being signed by its advocates, does not render it fatally defective and bad in law thus the Request for Review is not incompetent.

162. From the foregoing, the Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2023 fails. In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

**Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution;**

163. The Applicant was notified vide a letter of Notification of Intention to Award the subject tender dated 18<sup>th</sup> January 2024 that its bid was unsuccessful in the subject tender having been disqualified at the Preliminary Evaluation stage. The said letter reads in part:

"....."

**3. Reason/s why your Bid was unsuccessful**

- ***Pagination – Pg 89 missing/not indicated. (Page with a bid security).Therefore disqualified from further evaluation.***

.....”

164. There is no doubt that the letter of Notification of Intention to Award the subject tender dated 18<sup>th</sup> January 2024 is the trigger that set off the instant Request for Review.

165. The Applicant contends that the Respondent breached Article 47(1) and 227(1) of the Constitution, Section 80(2) and 81 of the Act and ITT 27 of the Tender Document by failing to request the Applicant to clarify the pagination of its tender document and failing to define its alleged non-compliance as either a deviation, reservation or omission.

166. We understand the Respondents’ response on this issue to be that the Applicant’s tender failed to meet a mandatory requirement as serialization was a mandatory requirement provided in the Tender Document, under Section 74(1)(i) of the Act and Regulation 74(1)(b) of Regulations 2020 hence the Applicant’s tender was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act and that the defect in the Applicant’s tender

document was not a minor deviation that ought to have been given an opportunity to provide clarifications and correct the mistake.

167. On its part, the Interested Party associated itself with the Respondent's submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

168. The Board is cognizant of Article 227 of the Constitution which provides as follows:

***"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) ....."***

169. 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. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."***

170. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

***"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."***

171. Further Section 60() provides as follows:

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."***

172. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information

to allow for fair competition among tenderers. Section 70(3) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."***

173. Section 80 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.***
  
- (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.***

**(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

**(a) the criteria shall, to the extent possible, be objective and quantifiable;**

**(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**

**(4) .....**

174. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

175. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

176. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

***"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."***

177. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

***"74. Preliminary evaluation of open tender***

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

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***

- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***

178. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was under an obligation to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

179. Notably, Section 79 (2) and (3) of the Act provides as follows with regard to minor deviations:

- "(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 document; or***
  - (b) errors or oversights that can be corrected without affecting the substance of the tender.***
- (3) A deviation described in subsection (2)(a) shall-***
- (a) be quantified to the extent possible; and***

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

180. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

181. In **Miscellaneous Civil Application 85 of 2018 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** the High Court considered what amounts to a minor deviation and determined as follows:

***"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any***

***such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....***

***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."***

182. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory

requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

183. Turning to the circumstances of the instant Request for Review, the Tender Document provided at Clause 7 of the Invitation to Tender at page 3 of the Tender Document as follows:

***" 7. Completed serialized/paginated Bidding documents shall be submitted accompanied with a signed declaration of the number pf pages....."***

184. Mandatory Requirement No. 1 of Clause A) Preliminary Examination of Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document provided as follows:

***"1. Tender documents must be paginated/serialized. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format; (i.e. 1,2,3.....n where n is the last page). (MANDATORY)."***

.....  
***NOTE: Failure to comply with Mandatory requirements will lead to disqualification. Only bidders who are successful at this stage will proceed to the next stage of evaluation."***

185. In essence, tenderers were required to comply with all the mandatory requirements at the Preliminary Examination stage for their respective tenders to proceed to the Technical Evaluation stage. If a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Examination stage, its tender would be found non-responsive and would be disqualified from proceeding to the Technical Evaluation stage.

186. We have studied the Applicant's original tender submitted to the Board by the Respondent as part of the confidential documents in respect to the subject tender and note that with regard to Mandatory Requirement No. 1 of Clause A) Preliminary Examination of Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document, page 89 of the Applicant's bid document was not paginated.

187. On this issue of serialization, we take cognizance of the holding by the High Court in **Republic v Public Administrative Review Board & Ors Ex-parte Fourway Construction Company Limited [2019] eKLR** which held as follows;

***"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1<sup>st</sup> Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing.***

188. From the above case law, a tenderer's failure to serialize its tender cannot be interpreted as a minor deviation and it cannot fall under the exceptions of Section 79(2) of the Act. We are therefore not persuaded by the Applicant's argument to consider the non-conformity in paginating its tender document as a minor deviation and immaterial as doing so would affect the competitive position of other tenders

considering the fact that public procurement espouses the principle of competition which requires that participating tenderers should compete on equal footing and as such, any non-compliance on any mandatory requirement calls for the automatic disqualification of the non-compliant tender.

189. We are also not persuaded by the Applicant's argument that it ought to have been given an opportunity to provide clarifications and explain the pagination defect pursuant to Section 81 of the Act.

190. We note that Section 81 of the Act provides that:

***"81 (1) A Procuring Entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.***

***(2) A clarification shall not change the terms of the tender"***

191. It is our considered opinion that the clarification referred under Section 81 of the Act is not mandatory but is only sought if the Procuring Entity deems it necessary. A perusal of the confidential file reveals that the Respondent only sought clarifications at the Technical Evaluation stage and not the Preliminary Evaluation stage from the Interested Party, Healthcare Limited and Mylan Laboratories with regard to the said tenderers' product insert details in their bid documents and this was not with regard to a mandatory requirement provided in the Tender Document.

192. We note that the High Court in **Republic vs. Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another [2017] eKLR** held as follows with regard to clarifications by a procuring entity:

***"Such clarification is however not a passport for the tenderer to change the terms of the tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However, the mere fact that the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change the terms of the tender."***

193. In view of the foregoing, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirement No. 1 of Clause A) Preliminary Examination of Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document.

194. In the circumstances, the Board finds that the Applicant's tender was properly evaluated in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

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

195. We have established that the Board has jurisdiction to hear and determine the instant Request for Review having found that both the Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024 and the Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2024 fails.

196. We have also established that the Procuring Entity's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

197. The upshot of our findings therefore is that the instant Request for Review fails.

### **FINAL ORDERS**

198. 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 30<sup>th</sup> January 2024 and filed on 31<sup>st</sup> January 2024:

**A. The Applicant's Notice of Preliminary Objection dated 9<sup>th</sup> February 2024 be and is hereby dismissed.**

**B. The Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> February 2024 be and is hereby dismissed.**

**C. The Request for Review dated 30<sup>th</sup> January 2024 and filed on 31<sup>st</sup> January 2024 be and is hereby dismissed.**

**D. The Respondent is hereby directed to proceed with the procurement process in Tender No. GF ATM HIV NFM-2023/2024-OIT-010-SUPPLY OF ARVs MEDICINES I. to its lawful and logical conclusion in accordance with provisions of the Tender Document, the Act, and the Constitution.**

**E. Each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 21<sup>st</sup> Day of February 2024.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**