

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 17/2024 OF 4TH MARCH 2024

BETWEEN

EMCURE PHARMACEUTICAL LIMITED APPLICANT

AND

CHIEF EXECUTIVE OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY2ND RESPONDENT

MYLAN LABORATORIES LIMITED 1ST INTERESTED PARTY

HETERO LABS LIMITED 2ND INTERESTED PARTY

Review against the decision of the Chief Executive Officer Kenya Medical Supplies Authority in Tender No. GF ATM HIV NFM-2023/2024-OIT-011 for SUPPLY OF ARVs MEDICINES II.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Dr. Susan Mambo | - | Member |
| 3. CPA Alexander Musau | - | Member |
| 4. QS Hussein Were | - | Member |

IN ATTENDANCE

1. Mr. James Kilaka - Acting Board Secretary
2. Mr. Philemon Kiprop - Secretariat
3. Mr. Anthony Wanyonyi - Secretariat
4. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT **EMCURE PHARMACEUTICALS LIMITED**

Mr. Gachuba - Advocate, Mwaniki Gachuba Advocates

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

Mr. Alex Thangei - Advocate, Waruhiu K'Owade & Ng'ang'a
Advocates

1st INTERESTED PARTY **MYLAN LABORATORIES LIMITED**

1. Mr. Suresh In-house Counsel, Mylan Laboratories Limited
2. Mr. Satish Mettu Mylan Laboratories Limited

2nd 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 and Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. GF ATM HIV NFM-2023/2024-OIT-011 for SUPPLY OF ARVs MEDICINES II (hereinafter referred to as the "subject tender") which had ten (10) Lot items through Open International Tender (OIT) method. The invitation was by way of an advertisement on 21st November 2023 , on the Procuring Entity's website www.kemsa.go.ke and the Public Procurement Information Portal 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 6th December 2023.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee 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 eight (8) tenders were submitted in response to the subject tender and were recorded as follows:

Bidder No.	Name
1.	Phillips Therapeutics Limited
2.	Mylan Laboratories Limited
3.	Shanghai Desano Bio-Pharmaceuticals Co. Limited
4.	Emcure Pharmaceuticals Limited
5.	Laurus Labs Limited
6.	Aurobindo Pharma Limited
7.	Hetero Labs Limited
8.	Macleods Pharmaceuticals Limited

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the eight (8) tenders as captured in a Tender Evaluation Report for the subject tender signed by members of the Evaluation Committee on 10th January 2024 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 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 five (5) tenders 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 first and then examine the product/sample as submitted by the tenderer.
7. At the end of examination of the documentary compliance of the tenderers and the evaluation of the submitted samples/products the results were as in the table below.

Bid Item	Responsive Bids	
	Documentary	Samples/Products
1	3	3
2	1	1
3	2	1
4	1	1
5	1	1
6	1	1
7	3	2
8	2	2
9	1	1
10	1	1

8. At the end of the technical evaluation stage the bids that were determined responsive for the submitted samples/products as shown in the table above, and which included the Interested Partys' bids, proceeded to Financial Evaluation.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to compare tenderers prices 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 evaluated responsive bid.

10. Tenders were recommended for award as follows:

Bidder No 02:- Mylan Laboratories Limited

<u>Item No.</u>	<u>Item Description</u>	<u>Unit of issue</u>	<u>Quantity</u>	<u>Unit Pack Price in USD</u>	<u>Total Price in USD</u>
4.	Abacavir/Lamivudine 120/60mg dispersible	Pack of 30's	400,000	2.45	980,000.00
6.	Atazanavir/Ritonavir 300/100mg	Pack of 30's	568,000	7.80	4,430,400.00
9.	Lamivudine / Zidovudine 30mg/60mg dispersible	Pack of 60's	28,793	1.94	55,858.42
10.	Dolutegravir 10mg	Pack of 30's	65,000	4.00	260,000.00
Total					5,726,258.42

Bidder No 6:- Anurobindo Pharma Limited

<u>Item No.</u>	<u>Item Description</u>	<u>Unit of issue</u>	<u>Quantity</u>	<u>Unit Pack Price in USD</u>	<u>Total Price in USD</u>
5.	Nevirapine Oral Suspension, 100ml, 10mg/ml	100ml Bottle	280,000	1.97	551,600.00
Total					551,600.00

Bidder No 7:- Hetero Labs Limited

<u>Item No.</u>	<u>Item Description</u>	<u>Unit of issue</u>	<u>Quantity</u>	<u>Unit Pack Price in USD</u>	<u>Total Price in USD</u>
1.	Abacavir 600mg / Lamivudine 300mg Tablets	Pack of 30's	100,000	6.64	664,000.00
2.	Darunavir 600mg	Pack of 60's	3,304	40.08	132,424.32
3.	Ritonavir 100mg	Pack of 30's	7,436	6.24	46,400.64
7.	Dolutegravir 50mg	Pack of 30's	219,000	1.04	227,760.00
8.	Lamivudine/ Tenofovir 300/300mg	Pack of 30's	240,000	2.48	595,200.00
Total					1,665,784.96

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended the award of the subject tender to the lowest evaluated and most responsive bidders being Mylan Laboratories Limited, Aurobindo Pharma Limited and Hetero Labs Limited as enumerated above under Financial Evaluation.

Global Fund reviewed and concurred with the Evaluation Committee's recommendations for award of the tender.

Due Diligence

12. 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 to 40 of the Tender Document. At the end of the due diligence exercise, the Evaluation Committee observed that the recommended lowest evaluated bidders had satisfied the Post Qualification Parameters and had the financial capability to perform the contract satisfactorily and recommended them for award of the tender.

Professional Opinion

13. In a Professional Opinion, as a memo signed on 19th February 2024, the Acting Director Procurement, Mr. Edward Buluma reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and due diligence and confirmed that the Evaluation Committee evaluated the 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 bidders was within the budgetary estimate. He concurred with the recommendations of the Evaluation Committee with respect to award of the tender.

14. The Professional Opinion was approved as recommended by the Respondent, Dr. Andrew Mulwa, on 19th February 2024.

Notification to tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters dated 20th February 2024.

REQUEST FOR REVIEW NO. 17 OF 2024

16. On 4th March 2024, Emcure Pharmaceuticals Limited, the Applicant herein, filed a Request for Review together with Supporting Affidavit and Authority to Swear Affidavit, all dated 1st February 2024, through the firm of Mwaniki Gachuba Advocates seeking the following orders from the Board:

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

b) The Respondent's decision to award Item No. 6. namely Atazanavir / Ritonavir 300 / 100 mg of the Tender Document for Supply of ARVs Medicines II (TENDER NO. GF ATM HIV NFM – 2023/2024 – OIT 011) to the 1st Interested Party be annulled and set aside.

c) The Respondent's decision to award Item No. 7. namely Dolutegravir 50 mg of the Tender Document for Supply of ARVs Medicines II (TENDER NO. GF ATM HIV NFM – 2023/2024 – OIT 011) to the 2nd Interested Party be annulled and set aside.

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

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

17. In a Notification of Appeal and a letter dated 4th March 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4th March 2024.

18. On 7th March 2024, the Respondent filed, through Waruhiu K'Owade & Ng'ang'a Advocates, a Notice of Appointment of Advocates, a Respondent's Memorandum of Response and a Respondent's List & Bundle of Documents, all dated 6th March 2024 together with a physical file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

19. Vide letters dated 8th March 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

20. On 8th March 2024, the 2nd Interested Party, Hetero Labs Limited, filed through SOW Advocates LLP a Notice of Appointment of Advocates, an Interested Party's Memorandum of Response and an Interested Party's List and Bundle of Documents, all dated 7th March 2024.

21. On 12th March 2024, the Applicant filed a Rejoinder to the Respondent's Memorandum of Response and a rejoinder to the 2nd Interested Party's Memorandum of Response both dated 11th March 2024.

22. On 14th March 2024, the 1st Interested Party, Mylan Laboratories Limited, filed its response in the form of a letter to the Request for Review.

23. Vide a Hearing Notice dated 18th March 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 19th March 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

24. On 18th March 2024, the Respondents filed their Written Submissions together with a List and Bundle of Authorities dated 18th March 2024.

25. When the matter came up for hearing on 19th March 2024 at 11.00 a.m., Counsels for the Applicant, Respondent and the 2nd Interested Party notified the Board that they had not been served with the 1st Interested party's response to which the Board directed the 1st Interested Party to serve the parties. Thereafter Counsel for the Applicant, Mr. Gachuba sought leave to seek instructions from his client. Further, counsels for the Applicant, the Respondent and the 2nd Interested Party stated that they were agreeable to canvassing the Request for Review by way of written submissions. Mr. Thangei for the Respondent then requested the Board to allow the Respondent to issue contracts for items in the subject tender that were not in contest.

26. Having considered parties' submissions, the Board (a) declined the request by counsel for the Respondent's to issue contracts for uncontested items of the subject tender, (b) directed that the Request for Review would be canvassed by way of written submissions and (c) directed the Applicant to file its rejoinder to 1st Interested Party's response by close of business on 19th March 2024.

27. Parties were also informed that the Board would communicate its decision on 25th March 2024 via email.

28. On 19th March 2024, the Applicant filed a Rejoinder to the 1st Interested Party's Reply together with its Written Submissions both dated 19th March 2024.

29. On 19th March 2024, the 2nd Interested Party filed its Written Submissions dated 19th March 2024.

PARTIES' SUBMISSIONS

Applicant's Case

30. In its submissions, the Applicant reiterated the contents of the Request for Review dated 1st February 2024, together with a Supporting Affidavit sworn on 1st March 2024 U.D. Balaji, the Applicant's Executive Vice President – Global HIV/AIDS Initiatives, an Authority to Swear Affidavit dated 1st March 2024 and signed by Sanjay Mehta, a Rejoinder to the Respondent's Memorandum of Response dated 11th March 2024, a rejoinder to the 2nd Interested Party's Memorandum of Response dated 11th March 2024, a Rejoinder to the 1st Interested Party's Reply dated 19th March 2024 together with its Written Submissions dated 19th March 2024 as filed before the Board.

31. The Applicant submitted that the overarching duty of the Respondent was to evaluate and adjudicate the Applicant's tender in accordance with a fair administrative action that was expeditious and efficient as espoused in Article 47(1) of the Constitution of Kenya, 2010 and Section 4(1) of the Fair Administrative Action Act, 2015. In support, it referred the Board to the holding in the case of *COACA/E012/2024*

between Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others and Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) and pointed out that the Board's duty pursuant to Section 28(1)(a) of the Act is to review whether the Respondent evaluated and adjudicated the Applicant's bid in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair.

32. The Applicant further submitted that pursuant to Section 80(6) of the Act, the Respondent was under a duty to evaluate tenders within 30 days from the opening date and further, that pursuant to Regulation 78(2) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") the head of procurement was under duty to prepare and submit a professional opinion to the Respondent within a day upon receipt of the evaluation report hence the Respondent was under a duty to make a decision within a day of receipt of the professional opinion and evaluation report. The Applicant contended that the Respondent did not indicate in its Memorandum of Response whether tenders were evaluated by 5th January, 2024, having pointed out that the subject tender opened on 6th December 2023 and thirty days lapsed on 5th January 2024; when the head of procurement received the evaluation report, prepared and submitted a professional opinion within one day of receipt of the evaluation report and; whether the Respondent made his decision within one day thereof.

33. The Applicant submitted that the Respondent did not deny that it notified the Applicant of the outcome of the evaluation process on 20th February 2024 nor deny that it did not give reasons why it took him so long to finalize the evaluation process and award the subject tender. The Applicant pressed on that the Respondent failed to comply with the duty imposed on it by Article 47(2) of the Constitution and invited the Board to presume that the Respondent's failure to furnish the Applicant with reasons for failure to comply with Section 80(6) of the Act and Regulation 78(2) and 79(1) of Regulations 2020 was without good reason.

34. The Applicant contended that whereas Section 79(1) of the Act provided that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents, there was no provision in the Act or ITT in Tender Document that provided that a mandatory requirement in the Tender Document was not subject to correction, revision or amendment. In support of its argument, the Applicant referred to the holding in the case of *Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR* and submitted that the Respondent failed to give effect to TT 28.1 and ITT 29.2 of the Tender Document wherein he undertook to define each non-conformity with the requirements of the Tender Document and to determine how a non-conforming Tender would affect the scope, quality, or performance of the Goods or limit the rights and obligations of a parties to contract and how the

rectification of the non-conformity would unfairly affect the competitive position of other Tenderers.

35. The Applicant referred to the provisions of Section 82 of the Act and Regulation 74(2) of Regulations 2020 and submitted that as the law stands currently, it is only the tender price that is absolute and final and is not subject to any correction, revision, adjustment or amendment. Thus, any eligibility or mandatory requirement in the Tender Document is amenable to correction, revision, adjustment or amendment and errors thereof are not regarded as major deviation to the Tender Document. In support of this argument, the Applicant referred to the holding by the Board in *PPARB Application No. 28/2023 Trident Insurance Company Limited v Secretary To Independent Electoral and Boundaries Commission & another*.

36. The Applicant submitted that the principles enumerated under Article 227(1) of the Constitution are conjunctive and not disjunctive. The Applicant further submitted that the Respondent set out the evaluation and award procedures in the Tender Document but did not adduce any evidence to demonstrate that he complied with the said procedures. In support of its argument, the Applicant referred the Board to the provisions of ITT 16.3(b), 17.5, 27.1, 29.2 of the Tender Document and the holdings in the case 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)*; *Beach Clean Services South Africa CC*

v The City of Cape Town and 2 Others case no 24190/2012, delivered on 3 July 2013); Transcend Media Group Limited v Communications Authority of Kenya, Application No. 76 of 2018; and Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR.

37. As to 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 Request for Review.

38. The Applicant, in conclusion, stated that the Respondent applied the evaluation procedure in the case of the Interested Parties 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

39. In opposing the instant Request for Review, the Respondent relied on its Memorandum of Response dated 6th March 2024, Respondent's List & Bundle of Documents dated 6th March 2024, the physical file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act, Written Submissions dated 18th March 2024 together with a List and Bundle of Authorities dated 18th March 2024 as filed before the Board.

40. The Respondent submitted that in its letter of notification of intention to award the subject tender, it informed the Applicant that its bid was unsuccessful for being non-responsive since *'The document was not paginated in a continuous ascending order, page 89 not indicated. From page 88 the next page indicated is 90. After page 112 the next page is 123'* which reason was true and had been admitted to by the Applicant.
41. The Respondent referred the Board to the provisions under Clause 7 at page 3, Clause 6.4 at page 10, Clause (A) (1) Under the Preliminary Examination Criteria at page 38 of the Tender Document, Sections 58, 60, 74(1), 79(1) and 80 of the Act and Regulation 74(1) of Regulations 2020 and submitted that it was clear that the Applicant breached mandatory tendering requirements and that the Respondent was right in rejecting the Applicant's bid for being non-responsive and it could not progress to the next stage of evaluation.
42. The Respondent further submitted that failure to comply with a mandatory requirement cannot amount to a minor deviation contemplated under Section 79(2) of the Act and referred to the holding in *PPARB Application No. 7 of 2024 Encore Pharmaceutical Limited vs. Kenya Medical Supplies Authority & another* and *Republic vs. Public Administrative Review Board & Others Exparte Fourway Construction Company Limited* in support of its argument.

43. The Respondent contended that the Applicant failed to paginate a total of twelve (12) documents and that a Procuring Entity cannot seek clarification under Section 81 (1) of the Act in respect of a bid that fails the preliminary evaluation for failure to comply with the mandatory requirements.

44. The Respondent referred the Board to the decision by the High Court in *JR MISC Application No. 60 of 2020, Republic vs. PPRAB & Another, Exparte TUV Australia Turk* and *Republic vs. Public Procurement Administrative Review Board & Another Exparte Athi Water Services Board & Another 2017 e KLR* urged the Board to dismiss the Request for Review with costs.

1st Interested Party's Case

45. It was the 1st Interested Party's case that pagination of documents by bidders was a mandatory requirement and the review of bid documents required only strict examination to determine if the bid was in compliance with the requirements outlined in the Tender Document. The 1st Interested Party contended that there was no additional requirement to review the type and magnitude of the error and the ground of disqualification was available at the preliminary stage and did not require a detailed examination of substance of a bidder's tender including matters related to bid quoted by the said bidder.

46. The 1st Interested Party contended that the Procuring Entity and the Board were only required to consider bids that are in conformance with the tender requirements and anticipated that the spirit and procedure

detailed in the Tender Document would prevail in the instant Request for Review and that the Board would maintain the award in the subject tender as notified by the Procuring Entity.

2nd Interested Party's Case

47. In opposing the Request for Review, the Interested relied on its Memorandum of Response, List and Bundle of Documents, dated 7th March 2024 and Written Submissions dated 19th March 2024.
48. The 2nd Interested Party submitted that the Request for Review was not merited since it was full of unsubstantiated claims. It further submitted that the matter at hand was one of public importance touching on the right to health and life of so many Kenyans living with HIV and Aids who urgently needed the ARVs that were subject of the tender herein and that the Applicant ought to present very cogent evidence of violations of the Constitution, the Act, Regulations 2020 and the Instructions to tenderers that it alleges were violated and/or breached to its' detriment.
49. The 2nd Interested Party pressed on that a tenderer cannot be the one to decide which Regulations and Rules should be applied to it and in what manner it should be applied and submitted that Regulations 74 (1) (b) and 74 (1) (c) of Regulations, 2020, are to be considered in totality as one whole under Regulations 74 of Regulations 2020, and not in isolation from each other as suggested by the Applicant.

50. It further submitted that the Applicant had not demonstrated or given any evidence to show that the Respondent applied Regulation 74 (1) (b) to it alone and not the rest of the tenderers and that all tenderers were treated equally and fairly in total compliance with the law and Regulations.

51. It was the 2nd Interested Party's case that the Applicant had not denied that it missed certain pages and failed to comply with mandatory requirements for the specific preliminary examination provided for in the Tender Document and as such, its tender was non-responsive for failing to materially comply with the Instructions to Tenderers as provided for including failing to comply with the requirement for pagination and/or serialization; which requirement was mandatory.

52. The 2nd Interested Party submitted that the allegations that the Respondent breached Article 47 (1) and 227 (1) of the Constitution, Section 79 (2) and 80 (2) of the Act, and Regulations 74 (2) and 75 (2) of Regulations 2020 by allegedly failing to define the Applicant's non-compliance with the Tender Documents as either deviation, reservation or omission was unfounded and without any factual or legal basis and 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* and urged the Board to dismiss the instant Request for Review with costs.

BOARD'S DECISION

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

A. 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;

B. Whether the Respondent evaluated and awarded the subject tender expeditiously in line with Section 80(6) of the Act;

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

As to 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.

54. It is the Applicant's case on this issue that the Respondent breached Article 47(1) and 227(1) of the Constitution, Sections 79(2), 80(2) and 81 of the Act, Regulation 74(2) of Regulations 2020 and several provisions of the Tender Document for failing to waive the error or oversight in pagination of its bid which, according to the Applicant, was a minor deviation and for failing to seek clarification of the error or oversight in pagination of the Applicant's tender as the said error did not affect the substance of the tender.

55. On the Respondent's side, it was their case that the Applicant's tender failed to meet a mandatory requirement of pagination that was 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 and could not be treated as a minor deviation pursuant to Section 79(2) of the Act.

56. The 1st and 2nd Interested Parties aligned themselves with the Respondent's submissions and argued that the Applicant failed to meet the threshold on the requirements set out in the Act, Regulations 2020 and the provisions of the Tender Document to render its tender as responsive and hence warrant it being granted the orders sought in this Request for Review.

57. The Board notes that the Applicant was notified vide a letter of Notification of Intention to Award dated 20th February 2024 that its bid

was unsuccessful having been disqualified at the Preliminary Evaluation stage. The said letter reads in part:

"....."

3. Reason/s why your Bid was unsuccessful

Ite m No.	Item Description	Unit of Issu e	Quantit y	Reason(s) for Non Responsivenes s
6.	<i>Atazanavir/Ritonavi r 300/100mg</i>	<i>Pack of 30's</i>	<i>568,000</i>	➤ The document was not paginated in a continuous ascending order, Page 89 not indicated. From page 88 the next page indicated is 90. After page 112
7.	<i>Dolutegravir 50mg</i>	<i>Pack of 30's</i>	<i>219,000</i>	

				<i>the next page is 123.</i>
--	--	--	--	----------------------------------

.....”

58. The letter of Notification of Intention to Award the subject tender dated 20th February 2024 was the clear trigger that set off the instant Request for Review.

59. 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)"***

60. 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..."

61. Section 60(1) of the Act 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."

62. 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)"

63. 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.

64. 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."

65. 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."

66. Similarly, these eligibility and mandatory requirements in the tender document were considered by the High Court 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** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) where it held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often

overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

67. In essence, a responsive tender is one that meets all the mandatory requirements as set out in the Tender Document which are the first hurdle that tenderers must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, tenderers found to

be non-responsive are excluded from the tendering process regardless of the merits of their tenders.

68. 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."

69. 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.

70. In **Miscellaneous Civil Application No. 85 of 2018** 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."

71. 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.

72. 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....."

73. 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."

74. 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.

75. The Board notes that Section 74(1) of the Act provides:

" 74 Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following-

.....

(i) requirement of serialisation of pages by the bidder for each bid submitted; and

....."

76. Additionally, 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.*

77. The Board notes from page 10 of 48 of the Evaluation Report that the Applicant was rendered non-responsive at the Preliminary Evaluation stage for failure to paginate its bid in a continuous ascending order from the first page to the last page in the format (i.e. 1,2,3.....n where n is the last page) having failed to indicate page 89 and pages after 112 all through to 122 were missing.

78. The Board has further studied the Applicant's original tender and note that the Applicant's bid was not paginated in a continuous ascending order as page 89 was not indicated and after page 112, the next paginated page was 123. The Applicant has not contested the same only going on to contend that this ought to be considered as a minor deviation.

79. The Board takes 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 1st 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.

80. Justice Ogola in the case of **Republic v Public Procurement Administrative Review Board; Ex-parte Accounting Officer, Kenya Ports Authority & another; FCM Travel Solutions t/s Charleston Travel Limited & 3 others (Interested Parties) [2021] eKLR** held as follows:

46. Section 74 (1)(i) of the Public Procurement and Asset Disposal Act provides as follows: -

"(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following-

- a) the name and address of the procuring entity;**
- b) the tender number assigned to the procurement proceedings by the procuring entity;**
- c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;**
- d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;**
- e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;**
- f) a statement that those submitting tenders or their representatives may attend the opening of tender;**
- g) applicable preferences and reservations pursuant to this Act;**
- h) a declaration that the tender is only open to those who meet the requirements for eligibility;**

- i) requirement of serialization of pages by the bidder for each bid submitted; and*
 - j) any other requirement as may be prescribed.*
- (2) All tender documents shall be sent out to eligible bidders by recorded delivery."*

.....

49. In light of the foregoing, it becomes apparent to this court that the aspect of serialization of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

.....

52. That failure to serialize each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in contravention with

the provisions of section 74 and 79 of the PPAD Act of 2015 and thus ultra vires."

81. 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. The Board is 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.

82. The Board is 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.

83. 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"

84. It is the Board's 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. 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."

85. In view of the foregoing, the Board is 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.

86. 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. This ground of review therefore fails and is disallowed.

As to whether the Respondent evaluated and awarded the subject tender expeditiously in line with Section 80(6) of the Act.

87. The Board takes cognizance of Section 80(6) of the Act which reads as follows:

"80(6) The evaluation shall be carried out within a maximum period of thirty days"

88. In its submissions, the Applicant indicated that it is the duty of the Board to review whether the Respondent evaluated and adjudicated the subject tender in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair. The Applicant contended that the Respondent did not indicate in its Memorandum of Response whether tenders were evaluated by 5th January, 2024, since the subject tender opened on 6th December 2023 and thirty days lapsed on 5th January 2024. Further, that the Respondent did not indicate when the head of procurement received the evaluation report, whether he prepared and submitted a professional opinion within one day of receipt of the evaluation report and; whether the Respondent made his decision within one day thereof.

89. Having carefully studied the confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act, the Board notes that indeed the subject tender's submission deadline was on 6th December 2023 and that the public opening of bids was carried out on 6th December 2023 at the Tender Opening Hall by the Tender Opening Committee.

90. It is also clear from the confidential documents that the Respondent appointed an Evaluation Committee to evaluate bids in the subject tender on 6th December 2023 and that the members of the Evaluation Committee met and conducted the evaluation process from 18th December 2023 to 22nd December 2023 which was a span of 5 days and within the stipulated statutory timelines of 30 days pursuant to Section 80(6) of the Act. An Evaluation Report was then prepared and signed by members of the Evaluation Committee on 10th January 2024. A Professional Opinion prepared by the Acting Director Procurement Mr. Edward Buluma and signed on 19th February 2024 was approved as recommended by the Respondent on the same day of 19th February 2024 and tenderers subsequently notified of the outcome of evaluation on 20th February 2024 in line with Section 87 of the Act which states that:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person

submitting the successful tender that his tender has been accepted.

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

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

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

91. Section 87 of the Act dictates that a notification of award is made in writing by the accounting officer of the procuring entity to the successful tenderer before expiry of the tender validity period. However, this notification of award does not form a contract.

92. In the circumstances, the Board finds that the Evaluation Committee concluded the evaluation of bids of the subject tender within the maximum period of 30 days in line with Section 80(6) of the Act and a recommendation of award was made by the Evaluation Committee and

letters of notification of intention to award the successful tenderers issued within the tender validity period and the Respondent evaluated and awarded the tender expeditiously in line with Section 80(6) of the Act and Regulations 2020. This ground of review accordingly fails and is disallowed.

As to what orders the Board should grant in the circumstances.

93. The Board has found 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.

94. The Board has also found that the Respondent evaluated and awarded the subject tender expeditiously in line with Section 80(6) of the Act and Regulations 2020.

95. The upshot of these findings therefore is that the instant Request for Review fails.

FINAL ORDERS

96. 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 this Request for Review:

A. The Request for Review dated 1st February 2024 and filed on 4th March 2024 in respect of Tender No. GF ATM HIV NFM-2023/2024-OIT-011 for SUPPLY OF ARVs MEDICINES II be and is hereby dismissed.

B. In view of the findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 25th Day of March 2024.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB