

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 45/2024 OF 30TH MAY 2024

BETWEEN

KENYAN ALLIANCE INSURANCE CO. LIMITED _____ APPLICANT

AND

ACCOUNTING OFFICER,

JARAMOGI OGINGA ODINGA

UNIVERSITY OF SCIENCE & TECHNOLOGY _____ 1ST RESPONDENT

JARAMOGI OGINGA ODINGA

UNIVERSITY OF SCIENCE & TECHNOLOGY _____ 2ND RESPONDENT

ZAMARA RISK INSURANCE BROKERS LTD _____ 3RD RESPONDENT

Review against the decision of the Accounting Officer, Jaramogi Oginga Odinga University of Science & Technology in relation to Tender No. JOOUST/PQ/ONT/043/2024-2025 for Provision of Insurance for Group Life, WIBA and Personal Accident Cover.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. Mr. Jackson Awele | - | Panel Chairperson |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. Mr. Stanslaus Kimani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

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Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 19th April 2024, submitted under the Confidential File submitted by the Procuring Entity, the following nine (9) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Johncele Insurance Brokers Ltd
2.	Pelican Insurance Brokers Ltd
3.	The Kenyan Alliance Insurance Brokers Ltd
4.	APA Insurance Ltd
5.	Madison General Insurance
6.	Jubilee General Insurance
7.	GA Insurance
8.	Acentria Insurance Brokers Ltd
9.	Zamara Risk and Brokers Insurance Ltd

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
- Preliminary Evaluation
 - Technical Evaluation
 - Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 25 to 27 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 3 tenders were established as non-responsive with only 6 tenders including that of the Applicant and the 3rd Respondent being found responsive and thus qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as B- Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA at page 27 of the Tender Document.
8. Tenders were to be evaluated against the requirements at this stage, which requirements contained a weighted score. In order to qualify for further evaluation, a tenderer had to garner a minimum score of 70 marks.

9. At the end of the evaluation at this stage, 1 tender was found unresponsive with only 5 tenders, including that of the Applicant and 3rd Respondent, qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 3: Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA at page 27 of the Tender Document.
11. The tender prices indicated in tenderer's tenders were then to be compared and the successful tender would be that established as having quoted the lowest tender price.
12. From Pages 8 to 10 of the Evaluation Report dated 30th April 2024, it would appear that the Evaluation Committee conducted due diligence on all the tenderers evaluated at this stage and established the Applicant as the only firm authorized to offer all the classes of business in the subject tender.

Evaluation Committee's Recommendation

13. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Applicant at its tender price of **Kenya Shillings Seventeen Million, Six Hundred and Ninety-Eight Thousand, Nine Hundred and Eighty-Seven (Kshs. 17,698,987.00).**

Professional Opinion

14. In a Professional Opinion dated 30th April 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Procurement Manager, Mr. Gad Rogo, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Applicant.
15. On the same day, 30th April 2024, the 1st Respondent concurred with the Professional Opinion .

Notification to Tenderers

16. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 2nd May 2024 indicating the Applicant as the successful tenderer at its tender price of **Kenya Shillings Seventeen Million, Six Hundred and Ninety-Eight Thousand, Nine Hundred and Eighty-Seven (Kshs. 17,698,987.00).**
17. From the documents submitted as part of the Confidential File it would appear that subsequent letters dated 14th May 2024 were prepared by the 1st and 2nd Respondents revoking the earlier letters of 2nd May 2024.
18. Equally, it would appear that other letters dated 16th May 2024 were sent to the tenderers now identifying the 3rd Respondent as the successful tender in place of the Applicant. These letters indicated that the 3rd Respondent was the successful tender at its tender price of **Kenya Shillings Eleven Million, Nine Hundred and Eighty-Eight, Eight Hundred and Fifty-Four (Kshs. 11,988,854).**

REQUEST FOR REVIEW

19. On 30th May 2024, the Applicant through the firm of Masaki & Gathu Advocates LLP, filed a Request for Review dated 28th May 2024 supported by an Affidavit sworn on 29th May 2024 by John Kimani, a Principal Officer at the Applicant, seeking the following orders from the Board in verbatim:

- a) The Decision of the Procuring Entity vide its letter dated 14th May 2024 and referenced JOOUST/OT/043/2024/2025/12 issued on 16th May 2024 purporting to revoke the Notification of Intention to Award dated 2nd May of the Tender Ref- JOOUST/OT/043/2024/2025/03 for Provision of Insurance Services for Group Life, WIBA, and Personal Accidents Cover services for Jaramogi Oginga Odinga University of Science Technology and the subsequent Notification of Intention to Award dated 16th May 2024 be and are hereby declared null and void and the same be and are set aside;***
- b) An order reinstating the Notification of Intention to Award dated 2nd May 2024 and referenced JOOUST/OT/043/2024/2025/03 in favour of the Applicant's successful bid and a consequent direction to the Procurement Entity to admit the Applicant's bid in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case;***
- c) An order directing the Procuring Entity and its Chief Accounting Officer to pay costs of the Review; and***

d) Any other necessary orders as are necessary for the ends of justice and under the circumstances of the case herein as provided by Section 173 of the Public Procurement and Asset Disposal Act.

20. In a Notification of Appeal and a letter dated 30th May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 said 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 30th May 2024.
21. On 5th June 2024, the 1st and 2nd Respondents filed an undated response executed by one Katwa Jeptanui. The 1st and 2nd Respondents also forwarded to the Board the Confidential Documents pursuant to Section 67(4) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").
22. Vide letters dated 5th June 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 24th March 2020. All tenderers in the subject tender were invited

to submit to the Board any information and arguments concerning the subject tender within 3 days from 5th June 2024.

23. On 6th June 2024, the 3rd Respondent, through the firm of Teddy & Company Advocates filed a Notice of Appointment of Advocates. Subsequently on 7th June 2024, the 3rd Respondent filed its response in the form of an affidavit sworn 6th June 2024 by Francis Omanyala, the 3rd Respondent's Management Consultant.
24. On 7th June 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 12th June 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
25. On the morning of 12th June 2024, the 3rd Respondent filed their Bundle of Authorities of even date.
26. On 12th June 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their various Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.
27. However, before the Board could give hearing directions Counsel for the Applicant, Mr. Omayio, requested the Board to adjourn the matter to 12:30 p.m. as he was equally appearing before the High Court in a separate matter..

28. Counsel for the 1st and 2nd Respondents, Ms. Jeptanui, equally sought an adjournment to 12:00 noon to allow her conclude a separate matter she was handling at the Siaya Law Courts.
29. Counsel for the 3rd Respondent, Mr. Ochieng' indicated his willingness to indulge his colleagues request for an adjournment.
30. Accordingly, the Board retreated and returned a Ruling adjourning the hearing to 12:30 p.m. on the same day, 12th June 2024. The Board equally directed that each party would be assigned 10 minutes to argue their case with the Applicant getting an extra 5 minutes to offer a rejoinder.
31. When the Board reconvened at 12:30 p.m. all Counsel were present and ready to proceed save for Counsel for the 1st and 2nd Respondents, Ms. Jeptanui, who had not joined the online session. The Board adjourned the session for 10 minutes while directing the Secretariat to get in touch with Ms. Jeptanui.
32. When the Board reconvened one Mr. Julius Rogo, a representative from the Procuring Entity asked the Board to adjourn the matter further as their Counsel, Ms. Jeptanui, was still held up in a court case, presumably the court case in Siaya that Ms. Jeptanui had earlier alluded to.
33. The Board adjourned the session to 1.00 p.m. to allow Counsel for the 1st and 2nd Respondents, Ms. Jeptanui to join the session and for further directions.

34. When the Board reconvened at 1:00 p.m. all Counsel including Ms. Jeptanui, were now present and ready to proceed with the hearing as earlier directed.

PARTIES SUBMISSIONS

Applicant's Case

35. Counsel for the Applicant, Mr. Omayio, argued that following the evaluation of the tenders received in the subject tender, the 1st and 2nd Respondents issued a Notification dated 2nd May 2024 indicating the Applicant as the successful tenderer only for them to issue a subsequent Notification on 16th May 2024 indicating the 3rd Respondent as the successful tenderer. He contended that about 8 minutes after receiving the Notification the Applicant were issued with a cancellation of the previous Notification indicating that they were the successful tenderer.
36. According to the Applicant the 1st and 2nd Respondents acted ultra vires and in breach of Articles 10(2), 47 and 227 of the Constitution of Kenya, 2010 by purporting to cancel the previous notification without involving the Applicant.
37. Counsel for the Applicant, Mr. Omayio, argued that on 2nd May 2024 the 1st and 2nd Respondents were compliant with Section 87 of the Act in issuing the 1st Notification. He pointed that the said Notification indicated on its face that dissatisfied tenderers were at liberty to seek a debrief or lodge a Request for Review.
38. According to Counsel, the Procuring Entity usurped powers of the Board by sitting on a complaint that would have otherwise been made to the Board. He contended that the Procuring Entity unilaterally re-opened the

evaluation without involving the Applicant and the other tenderers and considered parameters brought to its attention by the 3rd Respondent in breach of the Applicant's legitimate expectation.

39. Mr. Omayio argued that the Procuring Entity quoted Section 63(1) of the Act in its purported revocation when the said provision was on termination and not revocation and re-evaluation. Further, that Section 83 of the Act requires that any post-qualification process should be done prior to the award of the tender. It was Counsel's submission that the 1st Notification is what was contemplated under Section 87 of the Act and he urged the Board to allow the Request for Review.

1st and 2nd Respondents' Case

40. Counsel for the 1st and 2nd Respondents, Ms. Jeptanui, submitted that upon issuance of the 1st Notification and during the standstill period, the Insurance Regulatory Authority responded to the Procuring Entity's letter seeking a clarification on the tenderers. The said response confirmed the status of the licenses offered to the various tenderers and it emerged that some of the tenderers that the Procuring Entity had already eliminated on account of lack of licenses to offer to offer the covers under the subject tender actually had such licenses.
41. Ms. Jeptanui indicated that at this point, the Procuring Entity recalled the 1st Notification arguing that the said Notification did not constitute an award but an intention to award.
42. Counsel equally informed the Board that the Procuring Entity gathered information that the Applicant breached the Code of Ethics by providing

inaccurate information on their litigation history. She argued that whereas the Applicant indicated in their affidavit that they had no litigation history, they in fact had pending litigation matters.

43. She argued that the Procuring Entity withdrew the initial Notification because there were some material governance issues that were detected and that Section 63 of the Act allowed for revocation of Notifications.
44. Ms. Jeptanui maintained that the Applicant was not the lowest evaluated tenderer and therefore sought for the Request for Review to be dismissed.

3rd Respondent's Case

45. Counsel for the 3rd Respondent, Mr. Ochieng', indicated that the 3rd Respondent placed reliance on their filed documents in the Request for Review.
46. Mr. Ochieng' submitted that under Clause 45 of the Tender Document the letter of award could only be issued after the lapse of the standstill period; all concerns on the tender addressed and that the letter must require the successful tenderer to issue a performance bond within 21 days. He argued that the 1st Notification did not contain the above and thus did not constitute a letter of award.
47. Counsel equally submitted that Section 86 of the Act defined a successful tenderer as one that offered the lowest tender price and that under the subject tender the 3rd Respondent's tender price of Kshs 11,988,854 was in fact lower than the Applicant's Kshs.17,6998,987.

48. Mr. Ochieng further submitted that from the look of the Request for Review no loss would accrue to the Applicant. While relying on ***James Oyondi t/a Betoyo Contractors & Ors v Elroba Enterprises Ltd*** he argued that where a tenderer is unsuccessful at the Technical and Preliminary Stage they cannot invoke the jurisdiction of the Board under Section 167(1) of the Act.
49. Counsel also pointed out that the revocation of the 1st Notification was not a cancellation of the subject tender under Section 63 of the Act but in fact a post qualification process.

Applicant's Rejoinder

50. In a brief rejoinder, Counsel for the Applicant, Mr. Omayio, emphasized that the 1st and 2nd Notifications of Intention to Award were effective at the same time before the subsequent cancellation of the 1st Notification.
51. He maintained that during the standstill period it was not the Procuring Entity that sought the clarification from the Insurance Regulatory Authority but a complaint by an unsuccessful tenderer.
52. Counsel argued that the 1st Notification was clear in its text that it constituted the letter of award.
53. He emphasized that though debriefing is not provided for in the Act, its definition entailed a meeting between government personnel and a

tenderer after a contract had been awarded. He maintained that subsequent to an award, the Procuring Entity's hands were tied.

CLARIFICATIONS

54. The Board sought for the Procuring Entity to confirm the response that the Insurance Regulatory Authority gave in respect of Absa Life Assurance to offer short term products such as WIBA and Personal Accident covers. Counsel for the 1st and 2nd Respondents, Ms. Jeptanui, indicated that the Insurance Regulatory Authority confirmed that Absa Life Assurance was licensed to equally cover WIBA and Personal Accidents. Counsel for the 3rd Respondent, Mr. Ochieng, equally confirmed the response made on behalf of the Procuring Entity.
55. The Board asked the Procuring Entity to confirm whether the 1st Notification was the notification contemplated under Section 87 of the Act. Further, the Procuring Entity was to confirm if it was not under the said provision to clarify the provision of the Act under which the 1st Notification was issued. Counsel for the 1st and 2nd Respondents, Ms. Jeptanui, indicated that the 1st Notification did not contain a timeframe for acceptance. Counsel for the 3rd Respondent, Mr. Ochieng, chimed in arguing that the 1st Notification did not constitute an award but an intention of award while drawing parallels between Clauses 41 and 45 of the Tender Document.
56. The Board sought clarity on what the Procuring Entity was undertaking during the standstill period and whether the same constituted post qualification processes under Section 83 of the Act. No specific response was made to this question by the 1st and 2nd Respondents. However,

Counsel for the 3rd Respondent, Mr. Ochieng indicated that the Act permitted due diligence to be undertaken at any time before award of the tender.

57. The Board sought clarity on whether the Procuring Entity invoked Section 63(1)(e) of the Act at the point of revoking the 1st Notification too which Counsel for the 1st and 2nd Respondents, Ms. Jeptanui indicated that the Procuring Entity detected material governance issues. Counsel for the 3rd Respondent, Mr. Ochieng' argued that the revocation was not undertaken pursuant to Section 63 of the Act as the letter communicating the revocation indicated that the subject tender was still underway.

58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 30th May 2024 had to be determined by 20th June 2024. Therefore, the Board would communicate its decision on or before 20th June 2024 to all parties via email.

BOARD'S DECISION

59. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the 1st and 2nd Respondents' revocation of the Notification dated 2nd May 2024 was in line with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document?***

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

60. Before delving in to an analysis of the issues framed above, the Board wishes to acknowledge that subsequent to the conclusion of the hearing of the instant Request for Review, on 13th June 2024, Acentria Insurance Brokers Limited, a tenderer in the subject tender, filed a letter dated 10th June 2024. This letter was a response to the Board's letter dated 5th June 2024 to all the tenderers that participated in the subject tender to offer a response to the filed Request for Review within 3 days from 5th June 2024. The timelines for filing of any such response by tenderers lapsed on 8th June 2024. Therefore, Acentria Insurance Brokers Limited's letter having been filed outside time without leave and equally subsequent to the conclusion of the hearing, shall not be considered for purposes of this Request for Review as the parties to the Request for Review did not have an opportunity to make comments on the contents of the letter.

61. The Board shall now consider the issues it has framed for determination in the instant Request for Review:

Whether the 1st and 2nd Respondents' revocation of the Notification dated 2nd May 2024 was in line with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document

62. The Applicant instituted the present proceedings taking issue with the 1st and 2nd Respondents' revocation of the Notification letter dated 2nd May 2024 without involving the Applicant. The Applicant having been identified as the successful tenderer in the said Notification argued that it ought to have been informed and given room to participate in the proceedings leading up to the revocation of the said Notification.

63. Counsel for the Applicant, Mr. Omayio, argued that the Applicant received a subsequent Notification letter dated 15th May 2024 on 16th June 2024 and 8 minutes later received a letter cancelling the initial Notification letter of 2nd May 2024.
64. The 1st and 2nd Respondents maintained that the revocation of the Notification Letter of 2nd May 2024 was in order following the said Respondents receipt of a Letter from the Insurance Regulatory Authority confirming the eligibility of the other tenderers that had been previously disqualified on the assumption that the said tenderers did not have the necessary licenses to offer some of the covers under the subject tender. Counsel for the 1st and 2nd Respondents, Jeptanui, argued that the revocation was done under Section 63(1)(e) of the Act. She equally highlighted that the Applicant breached the Code of Ethics by making false declarations on its litigation history.
65. The 3rd Respondent supported the revocation of the Notification Letter dated 2nd May 2024 citing that revocation could happen at any time before the award of the subject tender. Counsel for the 3rd Respondent, Mr. Ochieng, argued that the 3rd Respondent offered a lower a tender price than the Applicant and thus under Section 86 of the Act, the 3rd Respondent was correctly found as the successful tenderer in place of the Applicant. He maintained that the revocation was not a termination of the subject tender but was done as part of the post-qualification process under Section 83 of the Act.
66. The Board is therefore called upon to interrogate the circumstances surrounding the revocation of the Notification Letter dated 2nd May 2024.

67. For starters, the Notification Letter dated 2nd May 2024 and addressed to the Applicant is herein after reproduced for ease of reference:

NOTIFICATION OF INTENTION TO AWARD

Ref: JOOUST/OT/043/2024/2025/03 Date: 2/5/2024

ATT: MR. JOHN KIMANI

THE KENYAN ALLIANCE INSURANCE CO. LTD

P.O. BOX (Details Withheld)

TEL: (Details Withheld)

E-MAIL: (Details Withheld)

DATE OF TRANSMISSION: This Notification is sent by email on 2/5/24 at 1020 hours

Procuring Entity: J.O.O.U.S.T

Contact Title: Provision of Group Life, WIBA and Personal Accident Cover

ITT No: JOOUST/OT/043/2024/2025

This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period you may:

a) Request a debriefing in relation to the evaluation of your Tender, and/or

b) Submit a Procurement-related Complaint in relation to the decision to award the contract.

The successful Tenderer is here below:-

1	2	3	4
No	Description of Item	Name of	Tender Price

		Tenderer	
No.1	Group Life, Wiba and Personal Accident Insurance Cover	The Kenyan Alliance Insurance Co Ltd	17,698,987

2) Other Tenderers

1	2	3	4
	Description of Item	Name of Tenderer	Tender Price
No 1		Johncele Insurance Brokers Ltd	19,660,701
No 2		Pelican Insurance Brokers Ltd	15,023,601
No 3		The Kenyan Alliance Insurance Co. Ltd	17,698,987
No 4		APA Insurance Ltd	28,352,093
No 5		Madison General Insurance	21,053,287
No 6		Jubilee General Insurance	19,660,701
No 7		GA Insurance	19,648,441

No 8		Acentria Insurance Brokers Ltd	13,651,731
No 9		Zamara Risk and Brokers Insurance Ltd	11,988,854

3) How to request a debriefing

...

4) How to make a complaint

...

5) Standstill Period

DEADLINE: The Standstill Period is due to end at midnight on _____. The Standstill Period lasts ten (10) Business Days after the date of transmission of Notification of Intention to Award

The Standstill Period may be extended as stated in Section 4 above. If you have any questions regarding this Notification please do not hesitate to contact us.

On behalf of the Procuring Entity:

Signature: Signed

Name: EMILY ACHIENG AKUNO, PhD

Title/Position Vice Chancellor

Tel: (Details withheld)

Email (Details withheld)

68. From the above it is apparent that the Notification Letter dated 2nd May 2024: (i) communicated the 1st and 2nd Respondents' decision to award the subject tender (ii) the Applicant was established as the successful tenderer in the subject tender at a tender price of. Kshs. 17,698,987 (iii) the transmission of the Notification activated a Standstill Period of 10 business days; (iv) During the Standstill period tenderers were at liberty to seek debriefing and/or submit a procurement-related complaint.
69. The subsequent Notification Letter of 16th May 2024 is equally reproduced hereinbelow for ease of reference:

NOTIFICATION OF INTENTION TO AWARD

Ref: JOOUST/OT/043/2024/2025/03 Date: 16/5/2024

ATT: Mr. John Kimani

The Kenyan Alliance Insurance Co. Ltd

P.O. Box (Details withheld)

TEL: (Details withheld)

E-MAIL: (Details withheld)

DATE OF TRANSMISSION: This Notification is sent by email on 16/5/24 at 1645 hours

Procuring Entity: J.O.O.U.S.T

Contact Title: Provision of Group Life, WIBA and Personal Accident Cover

ITT No: JOOUST/OT/043/2024/2025

This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period you may:

c) Request a debriefing in relation to the evaluation of your Tender, and/or

d) Submit a Procurement-related Complaint in relation to the decision to award the contract.

The successful Tenderer is here below:-

1	2	3	4
No	Description of Item	Name of Tenderer	Tender Price
No.1	Group Life, Wiba and Personal Accident Insurance Cover	Zamara Risk Insurance Brokers Ltd	11,988,854

2) Other Tenderers

1	2	3	4
	Description of Item	Name of Tenderer	Tender Price
No 1		Johncele Insurance Brokers Ltd	19,660,701
No 2		Pelican Insurance Brokers Ltd	15,023,601
No 3		The Kenyan Alliance Insurance Co. Ltd	17,698,987
No 4		APA Insurance	28,352,093

		Ltd	
No 5		Madison General Insurance	21,053,287
No 6		Jubilee General Insurance	19,660,701
No 7		GA Insurance	19,648,441
No 8		Acentria Insurance Brokers Ltd	13,651,731
No 9		Zamara Risk Insurance Brokers Ltd	11,988,854

3) How to request a debriefing

DEADLINE: The deadline to request a debriefing expires at midnight on 21/05/24 at 2359 hours.

...

4) How to make a complaint

...

5) Standstill Period

DEADLINE: The Standstill Period is due to end at midnight on ____
The Standstill Period lasts ten (10) Business Days after the date of transmission of Notification of Intention to Award

The Standstill Period may be extended as stated in Section 4 above. If you have any questions regarding this Notification please do not hesitate to contact us.

On behalf of the Procuring Entity:

Signature: Sign

Name: EMILY ACHIENG AKUNO, PhD

Title/Position Vice Chancellor

Tel: Details withheld

Email (Details withheld)

70. From the above, the Notification Letter dated 16th May 2024 disclosed:
- (i) the 1st and 2nd Respondents' decision to award the subject tender (ii) the 3rd Respondent was established as the successful tenderer in the subject tender at a tender price of Kshs. 11,988,854 (iii) the transmission of the Notification activated a Standstill Period of 10 business days; (iv) During the Standstill period tenderers were at liberty to seek debriefing and/or submit a procurement-related complaint.
71. The difference between the above Notifications is that whereas the Notification Letter dated 2nd May 2024 disclosed the Applicant as the successful tenderer in the subject tender, the subsequent Notification Letter of 16th May 2024 indicated that the 3rd Respondent was successful tender in the same tender.
72. In order to offer clarity on who was the successful tenderer in the subject tender, the Procuring Entity referred the Board to the Revocation of Notification Letter dated 14th May 2024 which is herein reproduced for completeness of the record:

REVOCATION OF NOTIFICATION OF INTENTION TO AWARD

Bondo-Kenya

P.O. Box 210-40601

Date: 14/05/24

Bondo

Tel: +254-2501804

Email: vc@jooust.ac.ke

Web: www.joust.ac.ke

Ref: JOOUST/OT/043/2024/2025/03

Date: 2/5/2024

ATT: Mr. John Kimani

The Kenyan Alliance Insurance Co. Ltd

P.O. Box (Details Withheld)

Tel: (Details Withheld)

E-Mail: (Details Withheld)

**Subject: REVOCATION OF INTENTION TO AWARD-TENDER
PROCESSING STATUS UPDATE**

I trust this message finds you well.

I write to inform you of a recent development regarding the tender for Provision of Insurance Services for Group Life, Wiba, and Personal Accident Cover- JOOUST/PQ/ONT/043/2024-2025. Following meticulous review and post-qualification due diligence carried out with the Insurance Regulatory Authority (IR), it has come to our attention that specific material governance issues have been detected, necessitating a reassessment of the tender process.

In light of these findings, the earlier notification of intention to award, dated 2nd May 2024, is at this moment revoked. Please be advised that the tender remains under processing and evaluation. Communications regarding the status of the tender

and any subsequent actions will be conveyed at an appropriate time.

We appreciate your understanding and patience in this matter.

Yours sincerely.

Signature

Signed

Name

EMILY ACHIENG AKUNO, PhD

Title/Position

Vice Chancellor

Tel

(Details withheld)

Email

(Details withheld)

73. From the Revocation of Notification Letter above, the 1st Respondent observes that (i) during due diligence with the Insurance Regulatory Authority, the Procuring Entity detected some material governance issues that called for re-assessment of the tender process; (ii) the Notification Letter of 2nd May 2024 stood revoked; (iii) the tender was still and processing and (iv) the Procuring Entity would provide an update on the status of the tender process.

74. Absent any contest on the sequence of conveying of the Revocation Notification Letter and the Notification Letter dated 16th May 2024 to the tenderers, it would stand to logic that the Notification Letter dated 16th May 2024 naming the 3rd Respondent as the successful tender was the operative Notification Letter with the one of 2nd May 2024 having been revoked. However, in the instant Request for Review the Applicant argued that the Revocation of Notification Letter dated 14th May 2024 was preceded by the Notification Letter dated 16th May 2024. Counsel for the Applicant, Mr. Omayio, maintained that the Notification Letter dated

16th May 2024 was sent on 16th May 2024 and about 8 minutes later, the Revocation Notification Letter was sent to them.

75. Counsel for the 1st and 2nd Respondents maintained that the Revocation Notification Letter dated 15th May 2024 was sent to the Applicant on 15th May 2024 and thereafter the Notification Letter dated 16th May 2024 was sent to the Applicant on 16th May 2024.

76. The Board should at this stage established which account of events is accurate in the circumstance.

77. Paragraph 10 of the affidavit of John Kimani in support of the Request for Review contains an averment that the Revocation Notification Letter was sent on 16th May 2024:

10.THAT later and to be specific on 16th May at 4:52 PM; the procuring entity sent a Letter dated 14th May 2024 and referenced JOOUST/OT/043/2024/2025/12 through its email proc@jooust.ke to the Applicant's email being kai@kenyanalliance.com and kaikkenyanalliance.co.ke in an email titled "Revocation of Intention to Award"

78. The Board has equally spotted an email print-out annexed to the affidavit of John Kimani as "**Annexure 4(a)**" and the same bears reproducing:

From: JOOUST Procurement proc@jooust.ke

Sent: Thursday, May 16, 2024 4:52 PM

To:kai<kai@kenyanalliance.com>;kai<kai@kenyanalliance.co.ke

>

Subject: Revocation of Intention to award

Good day,

Please find the attached revocation of intention to award letter for your information.

BR

Gad Rogo

Ag. PM

PDF Attachment

79. The 1st and 2nd Respondents as the originators of the Revocation Letter did not adduce any evidence to rebut the averments and email print-out by the Applicant. The 1st and 2nd Respondents' Memorandum of Response is silent on the date when the revocation letter was sent to the Applicant. The 1st and 2nd Respondents' only address of when the Revocation Letter dated 14th May 2024 was sent was during their Counsel's address on this issue from the bar.
80. Absent any evidence contradicting the Applicant's version of the sequence of the 1st and 2nd Respondents' conveying of the Revocation Letter, the Board is inclined to agree with the Applicant's version that the Revocation Letter was preceded by the Notification Letter dated 16th May 2024. Effectively, the 1st and 2nd Respondents upset the previous communication of the Applicant as the successful tenderer in the subject tender without involving the Applicant.
81. The 1st and 2nd Respondents' conduct above brings to the fore the Applicant's right to a fair administrative action having been previously

informed of its emerging as the successful tenderer in the subject tender.

82. Article 47 of the Constitution of Kenya, 2010 spells out the right to fair administrative action in the following terms:

Fair administrative action.

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) promote efficient administration.

83. On its part, Section 4 of the Fair Administrative Action Act outline the details of enforcing the right to fair administration in the following words:

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

84. The High Court in ***Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board [2016] eKLR***, while adjudicating on the legality of the commencement of the deregistration of a Non-Governmental Organisation by the Non-Governmental Organisations Coordination Board offered guidance on the application of Article 47 of the Constitution of Kenya, 2010 in the following terms:

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.

****See also James Willy Kingori v Chairman Extra Ordinary Meeting of Michimikuru Factory Ltd & 2 others; Maurice Kobia Dickson (Interested party) [2022] eKLR***

85. The decision of an Accounting Officer to upset its previous communication to a tenderer as being successful in a tender qualifies as an administrative action within the meaning under Section 2 of the Fair Administrative Action Act. Accordingly, it would follow that the Procuring Entity should have as a bare minimum: (i) granted the Applicant notice of its intention to re-assess the tenders on the basis of the new information from the Insurance Regulatory Authority from the Insurance Regulatory Authority (ii) afforded the Applicant an opportunity to equally review the said information from the Insurance Regulatory Authority; (iii) allowed the Applicant make representations on the said information from the Insurance Regulatory Authority; (iv) given the Applicant written reasons for the decision to upset its position as the successful tender and (v) informed the Applicant of its right to challenge the decision upsetting its position as the successful tenderer.
86. In the circumstances obtaining, the 1st and 2nd Respondents (i) did not give the Applicant notice of its intention to re-assess the tenders on the basis of the new information from the Insurance Regulatory Authority from the Insurance Regulatory Authority (ii) did not afford the Applicant an opportunity to equally review the said information from the Insurance Regulatory Authority; (iii) did not allow the Applicant make representations on the said information from the Insurance Regulatory Authority. It would therefore follow that the 1st and 2nd Respondents'

actions were in contravention of the Applicant's right to a fair administrative action.

87. The 1st and 2nd Respondents' conduct of excluding the Applicant from the process that led to the upsetting of its position as the successful tenderer, is equally an antithesis to the principles of openness and accountability as contemplated at Articles 227(1) of the Act.

88. During the hearing of the instant Request for Review, it also became apparent to the Board that the Procuring Entity was mistaken as to the conduct of due diligence under Section 83 of the Act and Regulation 80 of the Act.

89. Section 83 of the Act provides for due diligence in the following terms:

83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall —

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

90. Regulation 80 of the Regulations 2020 provides as follows:

80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

91. Section 83 and Regulation 80 above contemplate that a Procuring Entity can undertake due diligence on tenderers any time before an award has been made. In the present case, the Procuring Entity conducted due diligence by writing a letter to the Insurance Regulatory Authority but before the Authority could offer its response, the Procuring Entity decided to finalize its evaluation and made an award of the subject

tender to the Applicant, only for it to revive the due diligence exercise upon receipt of the response from the Insurance Regulatory Authority.

92. Due diligence occupies a central place in the verification of a tenderer's qualification to deliver on a tender and that an adverse finding on a tenderer can potentially lead to its disqualification and the selection of another tenderer as the successful tenderer. Accordingly, it was erroneous on the part of the Procuring Entity to proceed to make an award as it did in the instant case prior to concluding the due diligence exercise and on the basis of incomplete information on the qualifications of the tenderers. The Procuring Entity was under an obligation to make a follow up on its letter to the Insurance Regulatory Authority and not to make a decision on unclear information as it did in the present case.

93. Additionally, the Board has observed that the 1st and 2nd Respondents are mixed up on the applicability of Section 63(1) of the Act on termination of tenders. The said Respondents pegged the revocation of the Notification Letter dated 2nd May 2024 on Section 63 of the Act, when the said section contemplates the cancellation of a tender process in totality:

63. Termination or cancellation of procurement and asset disposal proceedings

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

- (ii) substantial technological change;***
- (b) inadequate budgetary provision;***
- (c) no tender was received;***
- (d) there is evidence that prices of the bids are above market prices;***
- (e) material governance issues have been detected;***
- (f) all evaluated tenders are non-responsive;***
- (g) force majeure;***
- (h) civil commotion, hostilities or an act of war; or***
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) A report under subsection (2) shall include the reasons for the termination.***
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.***

94. Section 63 of the Act above spells out the processing of a termination of a tender which culminates in a tender process being cancelled in totality without any further consideration, unlike in the present case, where the Procuring Entity left the tender process open.

95. The Board has also observed that the Procuring Entity issued Notification Letters that flout Section 87 of the Act as read with

Regulation 82 of the Regulations 2020. Section 87 of the Act reads as follows:

87. Notification of intention to enter into a contract

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

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

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

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

96. Regulation 82 of the Regulations 2020 provides as follows:

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price.

97. From Section 87 and Regulation 82 above, the Notification Letters to be sent to unsuccessful tenderers should disclose the reasons why a tenderer was unsuccessful. In subject tender, the Procuring Entity sent a standard Notification Letter that did not disclose to each unsuccessful tenderer the specific reasons why its individual tender was not the successful tender.
98. In view of the foregoing, the Board finds that the 1st and 2nd Respondents' revocation of the Notification dated 2nd May 2024 was not in line with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.

What orders the Board should grant in the circumstances?

99. The Board has found that the 1st and 2nd Respondents' revocation of the Notification dated 2nd May 2024 was not in line with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.
100. The upshot of our finding is that the Request for Review dated 28th May 2024 but filed on 30th May 2024 in respect of Tender No. JOOUST/PQ/ONT/043/2024-2025 for Provision of Insurance for Group Life, WIBA and Personal Accident Cover succeeds in the following specific terms:

FINAL ORDERS

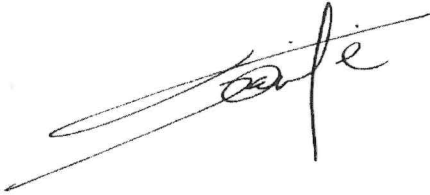
101. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 28th May 2024 but filed on 30th May 2024:

- 1. The Letters of Notification of Intention of Award dated 2nd May 2024 issued to the Applicant and all the other tenderers be and are hereby cancelled and set aside.**
- 2. The Letters of Notification of Intention of Award dated 16th May 2024 issued to the Applicant and all the other tenderers be and are hereby cancelled and set aside.**
- 3. The Letters of Notification dated 14th May 2024 revoking the Notification of Intention to award dated 2nd May 2024 be and are hereby cancelled and set aside.**
- 4. All tenders that were previously established as successful at the Technical Stage in respect of Tender No. JOOUST/PQ/ONT/043/2024-2025 for Provision of Insurance for Group Life, WIBA and Personal Accident Cover be and are hereby re-admitted for re-evaluation at the Financial Evaluation Stage.**
- 5. The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating the tenders previously established as successful at the Technical Stage in Tender No.**

JOOUST/PQ/ONT/043/2024-2025 for Provision of Insurance for Group Life, WIBA and Personal Accident Cover, while taking into account the findings of the Board in this Decision.

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


Dated at NAIROBI, this 19th Day of June 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB

