

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 52/2024 OF 11th JUNE 2024

BETWEEN

SAPON INSURANCE BROKERS LIMITED APPLICANT

AND

THE MANAGING DIRECTOR,

KENYA ELECTRICITY GENERATING COMPANY PLC RESPONDENT

Review against the decision of the Managing Director, Kenya Electricity Generating Company PLC in relation to Tender No. KGN-LEG-004-2024 for Provision of Insurance Services – Underwriters Only for the Year 2024-2026 and Tender No. KGN-LEG-005-2024 for Provision of Insurance Brokerage Services for the Year 2024-2026

BOARD MEMBERS PRESENT

- | | |
|----------------------|---------------------|
| 1. Ms. Alice Oeri | - Panel Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Mr. Joshua Kiptoo | - Member |

IN ATTENDANCE

- | | |
|------------------------|--|
| 1. Mr. Philemon Kiprop | - Holding Brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

SAPON INSURANCE BROKERS LIMITED

Mr. Ayisi Austin h/b for

Chaka Sichangi Advocate

- Advocate, AL & C LLP Partners Advocates

RESPONDENTS

THE MANAGING DIRECTOR, KENYA ELECTRICITY GENERATING COMPANY PLC

Mrs. Oduor Marysheila

-Advocate, TripleOKLaw LLP Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Electricity Generating Company Plc (hereinafter referred to as "the Procuring Entity") invited on 13th May 2024 sealed tenders from prequalified tenderers in response to Tender No. KGN-LEG-004-2024 for Provision of Insurance Services – Underwriters Only for the Year 2024-2026 (hereinafter referred to as the "Tender No. 1") and Tender No. KGN-LEG-005-2024 for Provision of Insurance Brokerage Services for the Year 2024-2026 (hereinafter referred to as the "Tender No. 2"). Tendering was conducted under Restricted Tendering method and the blank tender document for the two tenders issued to tenderers (hereinafter referred to as the 'Tender Document') were available for download on the Procuring Entity's website www.kengen.co.ke and on

the Public Procurement Information Portal (PPIP) website www.tenders.go.ke . The two tender's submission deadline was scheduled on 23rd May 2024 at 02.00 p.m.

Addenda & Clarifications

2. The Procuring Entity responded to several clarifications sought by bidder and indicated a change of the tender submission method vide Addendum No. 1 dated 21st May 2024, Addendum No. 2 dated 22nd May 2024, Clarification No. 1 dated 16th May 2024 and Clarification No. 2 dated 20th May 2024 in both Tender No. 1 and Tender No. 2.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes for Tender No. 1 and Tender No. 2 held on 23rd May 2024 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the following tenders were submitted and opened in the presence of tenderers' representatives present at the tender opening session:

Tender No. 1

Bidder No.	Name
1.	Old Mutual General Insurance Kenya
2.	APA Insurance Ltd
3.	Geminia Insurance Co. Ltd
4.	Fidelity Shield Insurance Company Ltd
5.	Britam General Insurance Co. Ltd
6.	CIC General Insurance Ltd
7.	Madison General Insurance Kenya Ltd
8.	GA Insurance Ltd
9.	Kenindia Assurance Co. Ltd
10.	MUA Insurance (Kenya) Ltd

Tender No. 2

National/Citizen

Bidder No.	Name
1.	Package Insurance Brokers
2.	Kenbright Insurance Brokers
3.	Macly Insurance Brokers
4.	Waumini Insurance Brokers

5.	Plan & Place Insurance Brokers
6.	Amro Insurance Brokers
7.	Peace of Mind Insurance Brokers
8.	Minet Kenya Insurance Brokers
9.	A Plan Insurance Brokers
10.	Disney Insurance Brokers
11.	Pelican Insurance Brokers
12.	Unipolar Insurance Brokers
13.	Canopy Insurance Brokers
14.	Acentria Insurance Brokers
15.	Four M Insurance Brokers

AGPO

Bidder No.	Name
1.	Sapon Insurance Brokers
2.	Utmost Insurance Brokers
3.	Amana Insurance Brokers
4.	Stansfield Insurance Brokers
5.	Surepoint Insurance Brokers

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of Tender No. 1 and Tender No. 2 as captured in the Evaluation Reports dated 30th May 2024 submitted as part of the confidential documents to the Board by the Respondent pursuant to Section 67(3)(e) of the Act in the following stages:
 - i Preliminary/Mandatory Evaluation; and
 - ii Financial Evaluation

Tender No. 1

Preliminary/Mandatory Evaluation

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary examination for Determination of Responsiveness Underwriters Mandatory Requirements – Both Lead and Co-Insurance of Section III-Evaluation and Qualification Criteria at page 23 to 24 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to be considered for the next stage of Financial Evaluation.
6. At the end of evaluation at this stage all the ten (10) tenders were determined responsive and proceeded for Financial Evaluation.

Financial Evaluation

7. The criteria for evaluation at this stage was set out under Financial Evaluation Criteria Under ITT 35.1 of Section III- Evaluation and Qualification Criteria at page 25 of the Tender Document. Evaluation would encompass, *inter alia*, an evaluation of the financial comparisons of costs/prices of (i) premiums quoted and (ii) premium rates indicated.
8. The bidders with the lowest evaluated costs would be considered for award(s) based on the Awards & Cover Placement Matrix provided at Section V, sub-part 3 of the Tender Document. In the event of a tie in the premiums quoted, the Evaluation Committee would consider (i) Technical Scores from the Prequalification phase and (ii) Applicable Excesses, Deductibles and Restrictive Policy Conditions and/or Warranties.
9. At the conclusion of evaluation at this stage, Geminia Insurance Company Ltd & Britam General Insurance Company Kenya Ltd emerge as the lowest evaluated bidders as can be discerned at page 13 of 56 to page 30 of 56 of the Evaluation Report.

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended that Tender No. 1 be awarded variously to Geminia Insurance Company Ltd & Britam General Insurance Company Kenya Ltd being the tenderers with the

lowest evaluated premiums for the different locations as tabulated at page 31 of 56 to page 39 of 56 of the Evaluation Report as follows:

Table 8 (i): Recommended Awards for Premium for Geminia Insurance Co Ltd

Coverage Duration: FY2024-2026			GEMINIA INSURANCE CO LTD
	Power Station / Location	Policy	KES (Inclusive of all Taxes) Annually
1	Turkwel	Fire & Special Perils and Con Loss	35,058,057.00
2	Sondu Miriu	Fire & Special Perils and Con Loss	44,735,333.00
3	Kiambere	Fire & Special Perils and Con Loss	54,326,929.00
4	Kindaruma	Fire & Special Perils and Con Loss	41,163,859.00
5	Gitaru	Fire & Special Perils and Con Loss	116,093,620.00
6	Kamburu	Fire & Special Perils and Con Loss	86,866,058.00
	Power Station / Location	Policy	KES (Inclusive of all Taxes) Annually
7	Masinga	Fire & Special Perils and Con Loss	19,518,349.00
8	Tana	Fire & Special Perils and Con Loss	17,552,871.00
9	Sagana & Mesco	Fire & Special Perils and Con Loss	4,535,475.00
10	Gogo	Fire & Special Perils and Con Loss	2,985,563.00
11	Muhoroni Gas Turbine	Fire & Special Perils	7,806,532.00
12	Kipevu I Diesel	Fire & Special Perils	10,807,110.00
13	Kipevu III	Fire & Special Perils and Con Loss	58,007,961.00
14	Ngong Wind	Fire & Special Perils and Con Loss	20,037,230.00

15	Buildings (All Over KenGen premises)	Fire & Special Perils and Con Loss	8,216,829.00
16	Wanjii	Fire & Special Perils and Con Loss	9,803,184.00
17	Sangoro	Fire & Special Perils and Con Loss	20,000,448.00
		Total Premium KES (All Taxes Included) Annually	557,515,408.00

(Amount in Words: Kenya Shillings Five Hundred and Fifty-Seven Million, Five Hundred and Fifteen Thousand, Four Hundred and Eight Only)

Table 8 (ii): Recommended Awards for Premium Britam General Insurance Co (K) Ltd

Coverage Duration: FY2024-2026			BRITAM GENERAL INSURANCE CO (K) LTD
			KES (Inclusive of all Taxes) Annually
I	Gitaru Water Plant	Fire & Special Perils and Con Loss	95,045.80
		Total Premium KES (All Taxes Included) Annually	95,045.80

(Amount in Words: Ninety-Five Thousand, and Forty Five and Cents Eighty Only)

(a) It is further recommended that the tender for the Provision of Insurance Services – Underwriters Only for Two Years, 2024- 2026 (KGN-LEG-004-2024) be co-insured variously to the two recommended-for-award underwriters as tabulated hereunder;

Table 9(i): Recommended Awards for Co-Insurance alongside Geminia Insurance Co Ltd

		INSURANCE PROGRAM	LOWEST EVALUATED PREMIUM
I	TURKWEL - FIRE & SPECIAL PERILS AND CON LOSS	[Lead - 40% of Award per Class] [Co-Insurer - 12% of Balance of Award per Class]	KES (Inclusive of all Taxes)- Annually
I	GEMINIA INSURANCE CO LTD	Lead	35,058,057.00

2	GA INSURANCE LTD	Co-Insurer	
3	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
2	SONDU MIRIU - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	44,735,333.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
6	MUA INSURANCE	Co-Insurer	
3	KIAMBERE - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	54,326,929.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
6	CIC GENERAL INSURANCE LTD	Co-Insurer	
4	KINDARUMA - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	41,163,859.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
6	CIC GENERAL INSURANCE LTD	Co-Insurer	

5	GITARU - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	116,093,620.00
2	MADISON GENERAL INSURANCE	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
6	KAMBURU - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	86,866,058.00
2	MADISON GENERAL INSURANCE	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
7	MASINGA FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	19,518,349.00
2	GA INSURANCE LTD	Co-Insurer	
3	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
8	TANA - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	17,552,871.00
2	GA INSURANCE LTD	Co-Insurer	
3	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	

9	SAGANA & MESCO - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	4,535,475.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	CIC GENERAL INSURANCE LTD	Co-Insurer	
5	KENINDIA ASSURANCE CO LTD	Co-Insurer	
6	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
10	GOGO- FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	2,985,563.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
6	CIC GENERAL INSURANCE LTD	Co-Insurer	
11	MUHORONI GAS TURBINE - FIRE & SPECIAL PERILS		
1	GEMINIA INSURANCE CO LTD	Lead	7,806,532.00
2	MADISON GENERAL INSURANCE	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	APA INSURANCE LTD	Co-Insurer	
5	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
7	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
12	KIPEVU I DIESEL - FIRE & SPECIAL PERILS		
1	GEMINIA INSURANCE CO LTD	Lead	10,807,110.00

2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
4	MADISON GENERAL INSURANCE	Co-Insurer	
5	CIC GENERAL INSURANCE LTD	Co-Insurer	
6	KENINDIA ASSURANCE CO LTD	Co-Insurer	
13	KIPEVU III - FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	58,007,961.00
2	MADISON GENERAL INSURANCE	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	
6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
14	NGONG WIND- FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	20,037,230.00
2	GA INSURANCE LTD	Co-Insurer	
3	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
4	APA INSURANCE LTD	Co-Insurer	
5	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
6	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
15	BUILDINGS - FIRE & SPECIAL PERILS		
1	GEMINIA INSURANCE CO LTD	Lead	8,216,829.00
2	GA INSURANCE LTD	Co-Insurer	
3	KENINDIA ASSURANCE CO LTD	Co-Insurer	
4	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
5	MUA INSURANCE	Co-Insurer	
6	CIC GENERAL INSURANCE LTD	Co-Insurer	

16	WANJII- FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	9,803,184.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	
5	MUA	Co-Insurer	
7	CIC GENERAL INSURANCE LTD	Co-Insurer	
17	SANGORO- FIRE & SPECIAL PERILS AND CON LOSS		
1	GEMINIA INSURANCE CO LTD	Lead	20,000,448.00
2	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	
5	MADISON GENERAL INSURANCE	Co-Insurer	
6	BRITAM GENERAL INSURANCE CO (K) LTD	Co-Insurer	

Table 9(ii): Recommended Awards for Co-Insurance alongside Britam General Insurance Co (K) Ltd

		INSURANCE PROGRAM	LOWEST EVALUATED PREMIUM
18	GITARU WATER PLANT - FIRE & SPECIAL PERILS	[Lead - 40% of Award per Class] [Co-Insurer - 12% of Balance of Award per Class]	KES (Inclusive of all Taxes)- Annually
1	BRITAM GENERAL INSURANCE CO (K) LTD	Lead	95,045.80
2	CIC GENERAL INSURANCE LTD	Co-Insurer	
3	GA INSURANCE LTD	Co-Insurer	
4	FIDELITY SHIELD INSURANCE CO LTD	Co-Insurer	
5	APA INSURANCE LTD	Co-Insurer	

6	OLD MUTUAL GENERAL INSURANCE	Co-Insurer	

Recommendation Notes:

- i. **Insurance Period & Renewals:** The insurance coverage period shall be 2 financial years (i.e July 2024 until June 2026). The contract will run for one (1) year, and renewable for a further one (1) year upon satisfactory performance and mutual agreement of the parties (on the terms and conditions of contract).
- ii. **Annual Premiums:** The underwritten premiums in the tables above are the Annual sums.
- iii. **Underwriter Payments:** Premiums shall be paid directly to each underwriter within the Lead & Co-Insurance program.
- iv. **Time of Payment:** Payments shall be made after receipt of the Policy document and execution of the contract.
- v. **Co-Insurance Memoranda:** The Co-Insurance Schedule/ Memorandum will require to have been executed by all the Co-Insurers, prior to submission of the Policy document to KenGen Plc, by the Lead Insurer. The Lead Insurer will facilitate this.
- vi. **The Lead Insurer will be eligible to secure 40% of the value of the Lowest Evaluated Premium for a particular risk/class of policy, while the 5No Co-Insurers will share, in equal proportions, the remaining 60% of the value of the Lowest Evaluated Premium in the said/same risk/class of policy.**

Professional Opinion

11. In a Professional Opinion dated 31st May 2024 (hereinafter referred to as the "Professional Opinion"), the General Manager - Supply Chain, Mr. Philip Yego, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of Tender No. 1 as recommended by the Evaluation Committee.

12. Thereafter, the Professional Opinion was approved by Eng. Peter Njenga, Managing Director & CEO, and the Respondent herein on 31st May 2024.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of Tender No. 1 vide letters dated 31st May 2024.

Tender No. 2

Preliminary/Mandatory Evaluation

14. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary examination for Determination of Responsiveness Mandatory Requirements – (Brokers – Citizen & National Category) and Mandatory Requirements – (Brokers – AGPO Special Groups) of Section III- Evaluation and Qualification Criteria at page 23 to 25 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to be considered for the next stage of Financial Evaluation.
15. At the end of evaluation at this stage one (1) tender under the AGPO category, being the Applicant's tender, was rendered non-responsive while four (4) tenders were determined responsive and proceeded for Financial Evaluation. Further, two (2) tenders under Citizen/National

Category were rendered non-responsive while thirteen (13) tenders were determined responsive and proceeded for Financial Evaluation.

Financial Evaluation

16. The criteria for evaluation at this stage was set out under Financial Evaluation Criteria Under ITT 35.1 of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document. Evaluation would encompass, *inter alia*, an evaluation of the financial comparisons of costs/prices of (i) premiums quoted and (ii) premium rates indicated.
17. The bidders with the lowest evaluated costs would be considered for award(s) based on the Awards & Cover Placement Matrix provided at Section V, sub-part 3 of the Tender Document. In the event of a tie in the premiums quoted, the Evaluation Committee would consider (i) Technical Scores from the Prequalification phase and (ii) Applicable Excesses, Deductibles and Restrictive Policy Conditions and/or Warranties. Brokers were required to submit, alongside their Price Schedules/Proposals, duly dated, signed and stamped Underwriter's quotations from all the underwriters they have fronted which were to be signed by either the underwriter's principal officer or Managing Director.
18. At the conclusion of evaluation at this stage, under the AGPO category, the lowest evaluated bids were as follows:

Table 10: Lowest Evaluated Bids – Brokers (AGPO)

CLASS/ RISK	BROKERAGE FIRM	ANNUAL PREMIUM KES (All Taxes Included)	UNDERWRITER
MEDICAL MALPRACTICE – CLINICAL OFFICERS	AMANA INSURANCE BROKERS LTD	351,615.00	BRITAM GENERAL INSURANCE CO (K) LTD
DIRECTORS AND OFFICERS LIABILITY	AMANA INSURANCE BROKERS LTD	2,009,040.00	BRITAM GENERAL INSURANCE CO (K) LTD
ELECTRONIC EQUIPMENT	AMANA INSURANCE BROKERS LTD	872,670.00	BRITAM GENERAL INSURANCE CO (K) LTD
GOODS IN TRANSIT	AMANA INSURANCE BROKERS LTD	421,930.00	BRITAM GENERAL INSURANCE CO (K) LTD
ALL RISKS-CALIBRATION	AMANA INSURANCE BROKERS LTD	200,339.00	BRITAM GENERAL INSURANCE CO (K) LTD
		3,855,594.00	

GROUP PERSONAL ACCIDENT- PROFESSIONAL SPORTS	STANSFELD INSURANCE BROKERS LTD	754,415.00	CIC GENERAL INSURANCE LTD
POLITICAL VIOLENCE TERRORISM & SABOTAGE	STANSFELD INSURANCE BROKERS LTD	18,130,379.00	BRITAM GENERAL INSURANCE CO (K) LTD
		18,884,794.00	

GROUP PERSONAL ACCIDENT- BOARD DIRECTORS	SUREPOINT INSURANCE BROKERS LTD	66,819.00	MADISON GENERAL INSURANCE
MONEY	SUREPOINT INSURANCE BROKERS LTD	18,098.00	APA INSURANCE LTD
COMPANY MOTOR -SPEED BOAT	SUREPOINT INSURANCE BROKERS LTD	97,584.00	APA INSURANCE LTD
PUBLIC LIABILITY	SUREPOINT INSURANCE BROKERS LTD	2,511,290.00	MADISON GENERAL INSURANCE
PROFESSIONAL LIABILITY	SUREPOINT INSURANCE BROKERS LTD	2,410,540.00	GEMINIA INSURANCE CO LTD
DRONE	SUREPOINT INSURANCE BROKERS LTD	4,306,834.00	GEMINIA INSURANCE CO LTD
CENTRAL WORKSHOP-FIRE & PERILS	SUREPOINT INSURANCE BROKERS LTD	503,478.92	MADISON GENERAL INSURANCE
FIDELITY GUARANTEE	SUREPOINT INSURANCE BROKERS LTD	502,290.00	MADISON GENERAL INSURANCE
		10,416,933.92	
PLANT & MACHINERY ALL RISK- LAND RIGS	UTMOST INSURANCE BROKERS LTD	67,128,979.19	CIC GENERAL INSURANCE LTD
	Total Annual Premium (All Taxes Included)- KES	100,286,301.11	

19. Further, under the National/Citizen category, the lowest evaluated bids were as follows:

Table 13: Lowest Evaluated Bids – Brokers (Citizen/ National)

		KES (Inclusive of all Taxes) - Annually	UNDERWRITER
1	OLKARIA II - FIRE & CON LOSS		
	WAUMINI INSURANCE BROKERS LTD	102,919,241.55	GEMINIA INSURANCE CO LTD
2	EBURRU - FIRE & CON LOSS		
	CANOPY INSURANCE BROKERS LTD	8,731,053.00	CIC GENERAL INSURANCE LTD
3	WELLHEADS - FIRE AND CON LOSS		
	DISNEY INSURANCE BROKERS LTD	67,921,267.00	GEMINIA INSURANCE CO LTD
4	OLKARIA I (UNIT 4&5) - FIRE & CON LOSS		
	PACKAGE INSURANCE BROKERS LTD	130,277,410.93	BRITAM GENERAL INSURANCE CO (K) LTD
5	OLKARIA IV (UNIT 1&2) - FIRE & CON LOSS		
	UNIPOLAR INSURANCE BROKERS LTD	126,711,733.00	CIC GENERAL INSURANCE LTD
6	OLKARIA V- FIRE & CON LOSS		
	MACLY INSURANCE BROKERS LTD	134,632,194.00	GEMINIA INSURANCE CO LTD
7	OLKARIA I (UNIT 6) - FIRE & CON LOSS		
	ACENTRIA INSURANCE BROKERS LTD	65,679,337.00	GA INSURANCE LTD
8	COMPANY VEHICLES		
	FOUR M INSURANCE BROKERS LTD	39,150,812.00	APA INSURANCE LTD
9	GROUP PERSONAL ACCIDENT (WIBA PLUS)		
	AMRO INSURANCE BROKERS LTD	57,909,465.00	CIC GENERAL INSURANCE LTD
10	GROUP LIFE		
	MINET INSURANCE BROKERS LTD	91,212,341.00	OLD MUTUAL LIFE ASSURANCE KENYA LTD
11	TRAVEL INSURANCE		
	PACKAGE INSURANCE BROKERS LTD	\$3.45 per day	MADISON GENERAL INSURANCE

12	DIRECTOR'S MEDICAL		
	A-PLAN INSURANCE BROKERS LTD	3,912,240.00	CIC GENERAL INSURANCE LTD
13	ALL RISK		
	CANOPY INSURANCE BROKERS LTD	878,977.00	CIC GENERAL INSURANCE LTD
14	MARINE		
	UNIPOLAR INS BROKERS LTD - Sea	0.125%	CIC GENERAL INSURANCE LTD
	Air		
	War		
	Total Annual Premiums KES (All Taxes Included)	829,936,071.48	

The brokers above have been determined as the lowest evaluated bidders, for the respective Classes of risks and locations.

Evaluation Committee's Recommendation

20. The Evaluation Committee recommended that Tender No. 2 be awarded variously to different brokers with the lowest evaluated premiums for each policy as tabulated hereinabove and as can be discerned at page 65 of 100 to page 71 of 100 of the Evaluation Report.

Professional Opinion

21. In a Professional Opinion dated 3rd June 2024 (hereinafter referred to as the "Professional Opinion"), the General Manager- Supply Chain, Mr. Philip Yego, reviewed the manner in which the subject

procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of Tender No. 2 as recommended by the Evaluation Committee.

22. Thereafter, the Professional Opinion was approved by Eng. Peter Njenga, Managing Director & CEO, and the Respondent herein on 3rd June 2024.

Notification to Tenderers

23. Tenderers were notified of the outcome of evaluation of Tender No. 2 vide letters dated 4th June 2024.

REQUEST FOR REVIEW NO. 52 OF 2024

24. On 11th June 2024, Sapon Insurance Brokers Limited, the Applicant herein filed a Request for Review dated 10th June 2024 (hereinafter referred to as the 'instant Request for Review') together with a Statement in Support of Request for Review dated 10th June 2024 signed for and on behalf of the Applicant by John K. Lagat through AL & C LLP Partners Advocates seeking the following orders from the Board in verbatim:

- a) An order quashing and/or declaring null and void, the Letter of Regret dated 4th June 2024 issued by the Respondent to the Applicant.***
- b) A declaration that the Respondent's tender documents and the awards made thereunder for Tender Nos. KGN-LEG-004-2024 TENDER FOR THE PROVISION OF INSURANCE SERVICES - UNDERWRITERS FOR THE YEARS 2024-2026 and TENDER NO.KGN-LEG-005-2024 TENDER FOR THE PROVISION OF INSURANCE BROKERAGE SERVICES FOR THE YEARS 2024-2026 are in breach of the Constitution, PPAD Act and the Regulations, 2020, rendering them incurably flawed.***
- c) An order for the termination of, or directing the Respondent to terminate, Tender Nos. KGN-LEG-004-2024 TENDER FOR THE PROVISION OF INSURANCE SERVICES - UNDERWRITERS FOR THE YEARS 2024-2026 and TENDER NO.KGN-LEG-005-2024 TENDER FOR THE PROVISION OF INSURANCE BROKERAGE SERVICES FOR THE YEARS 2024-2026, and to re-advertise the same in compliance with the directives issued by the Review Board in this matter, the Constitution, PPAD Act and the Regulations, 2020.***

d) Award the costs associated with the Request for Review to the Applicant.

e) Any other relief that the Review Board deems fit to grant under the circumstances.

25. In a Notification of Appeal and a letter dated 11th June 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent 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 11th June 2024.

26. On 14th June 2024, the Respondent filed through TRIPLEOKLawLLP Advocates a Notice of Appointment of Advocates dated 14th June 2024, a Notice of Preliminary Objection dated 14th June 2024, a Memorandum of Response by the Managing Director, Kenya Electricity Generating Company to the Request for Review Dated 10th June 2024 dated 14th June 2024, a Respondent's Replying Affidavit to the Request for Review Dated 10th June 2024 sworn by Daniel Kitili Nzioka, the

Procuring Entity's Procuring Manager together with a Respondent's Bundle and Index of Documents containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

27. *Vide* email dated 14th 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 three (3) days.

28. *Vide* a Hearing Notice dated 14th June 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 20th June 2024 at 2.30 p.m. through the link availed in the said Hearing Notice.

29. On 19th June 2024, the Applicant filed through its advocates on record a Further Affidavit sworn on 19th June 2024 by John K. Lagat.

30. On 20th June 2024, the Respondent's filed through its advocates a Further Affidavit sworn on 20th June 2024 by Daniel Kitili Nzioka, Written Submissions dated 20th June 2024 and a Respondent's List of Authorities dated 20th June 2024.

31. On 20th June 2024, the Applicant filed through its advocates Written Submissions dated 20th June 2024.
32. At the hearing of the instant Request for Review on 20th June 2024, the Board read out pleadings filed by parties in the matter and directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.
33. The Board allocated time for parties to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondent's submission on its Preliminary Objection

34. In her submissions, counsel for the Respondents, Ms. Oduor, relied on the Notice of Preliminary Objection dated 14th June 2024 and filed on even date before the Board.
35. On the preliminary objection, counsel submitted on whether the Notice of Preliminary Objection as filed is proper and in relying on

Regulation 209 of Regulations 2020 argued that the Respondent was served with the Request for Review on 11th June 2024, filed and served the Notice of Preliminary Objection on 14th June 2024 which was within the 3-day period provided under Regulation 209 of Regulations 2020. The Respondent further submitted that once an issue of jurisdiction is raised, the Board must first determine the same first since without jurisdiction, the Board cannot take any further steps in the matter. In support of this argument, the Respondent referred to the holding in *Seven Seas Technologies Limited v Eric Chege [2014] eKLR*.

36. On the issue of whether the Board lacks jurisdiction to hear and determine the instant Request for Review for failure by the Applicant to include the successful bidder as a party to the proceedings, the Respondent pointed out that the Request for Review only has two (2) parties being the Applicant and Respondent and while making reference to Section 170 of the Act, submitted that this Board lacks jurisdiction to hear the request for review as filed due to the failure of the Applicant to enjoin the successful bidder since Section 170 uses the word "*shall*" which is couched in mandatory terms and it is not an option for an Applicant to decide whether or not to enjoin a successful bidder as a party to a request for review.

37. In support of its argument, counsel referred the Board to the holding in *PPARB Application No 64 of 2023 – Trident Insurance Company Limited v Managing Director Kenya Industrial Estates* and averred that and *PPARB Application No 34 of 2020 Petro Oil limited Vs Kenya Ferry*

Services Limited and Others and argued that in compliance with Section 87(3) of the Act in issuing the letter of Regret to the Applicant, it stated who the successful bidders were and there is no excuse for the Applicant's failure to comply with Section 170 of the Act.

38. The Respondent submitted that the importance of joinder of the successful bidders cannot be understated as it ensures that they are given an opportunity to be heard prior to the Board issuing orders in a request for review and which may include setting aside the decision to have the tender awarded to them and this is in line with Article 47 and 50 of the Constitution on the right to a fair hearing.

39. Counsel submitted that failure by the Applicant to enjoin the successful bidders in breach of Section 170 of the Act renders the instant Request for Review incompetent and the fact that the Board Secretary notified the successful bidder is not a defense to the Applicant's failure to comply.

40. On whether the Request for Review was filed outside the 14 days statutory period stipulated under Section 167 of the Act as to divest the Board of jurisdiction to hear and determine the matter, the Respondent made reference to provisions under Section 167 of the Act and Regulation 203 of Regulations 2020 and submitted that it is not open for an Applicant to choose which of the options stipulated under the Act and Regulations to relying on when lodging an application for review. Counsel further submitted that to the extent that the Request

for Review is based on the allegation that the two tender documents are in breach of the Constitution, the Act and the PPDA Regulations thereby incurably defective, the Applicant by dint of Section 167 of the Act and Regulation 203(2)(c) ought to have filed the request for review within 14 days from 13th May 2024 when both tenders were issued and when it became aware of breached complained of which was before it was even issued with the regret letter in the subject tender.

41. Counsel relied on the decision by the Board in *PPARB Application No 91 of 2021 Total Security Surveillance Limited Vs The Governor/Accounting Officer Central Bank of Kenya and Central Bank of Kenya & Winguard Services Ltd and PPARB Application Number No. 48 of 2021, Fahmyasin Company Limited versus The Accounting Officer, Kenya Urban Roads Authority & Another* in support of her argument and argued that even if its assumed that the Applicant was in receipt of the Addendum issued on 22nd May 2024, 14 days from the 22nd May 2024 lapsed on 5th June 2024.

42. It is the Respondent's case that in any event, the Applicant having not been qualified as an underwriter could not have participated in Tender Number KGN-LEG-004-2024 Tender For The Provision Of Insurances Services Underwriters for the Years 2024-2026 and urged the Board to find that the Request for Review was time barred and that it should only limit itself to issues that have been filed within the 14 days period after the issuance of the letter of regret to the Applicant. The Respondent submitted that to the extent that the grounds in the

Request for Review that were time barred were in regard to, *inter alia*, (a) whether the terms of the two tender documents are contrary to and in breach of provisions of the Constitution, the Leadership and Integrity Act, the Act and Regulations 2020, (b) whether Addendum No 2 was issued contrary to Article 227 of the Constitution, (c) whether there was collusion in the 2 restricted tenders disproportionately favouring the underwriters over , insurance brokers undermining fair competition and equal bidding opportunities as mandated by regulatory directives, (d) whether the Respondent deviated from the standard tender document guidelines issued by the PPRA in drafting and preparing the 2 tenders and in breach of Sections 9, 58 and 70 of the Act.

43. On whether the Request for Review was signed by counsel for the Applicant without the authority of the Applicant thus rendering it fatally defective thus divesting the Board of its jurisdiction, the Respondent submitted that the Request for Review as filed is signed by Counsel for the Applicant while no authority of Counsel to sign the same has been attached and that the said failure renders the Request incompetent and the same ought to be dismissed.
44. On whether the Statement in support of the Request for Review was signed by an unauthorized person, the Respondent made reference to Regulation 203(2)(b) of Regulations 2020 and submitted that the Statement in support of the Request for Review as well as Further Affidavit have been signed by one John Lagat while no evidence has

been attached that he has the authority of the Applicant to sign the Request for Review particularly in light of the fact that the Power of Attorney presented in its bid document, the Managing Director is identified as the one with such authority. The Respondent referred the Board to the decision in *PPARB No 51 of 2020 On the Mark Security Limited vs Accounting Officer Kenya Revenue Authority and Skaga Ltd.*

45. Counsel urged the Board to allow the preliminary objection as raised.

Applicant's submissions and response to the Respondent's Preliminary Objection

46. In his submissions, counsel for the Applicant, Mr. Ayisi, relied on the Request for Review dated 10th June 2024 together with a Statement in Support of Request for Review dated 10th June 2024 signed for and on behalf of the Applicant by John K. Lagat, Further Affidavit sworn on 19th June 2024 by John K. Lagat, Written Submissions dated 20th June 2024 filed before the Board.

47. The Applicant contends that the crux of the instant Request for Review is that (a) the Respondent acted contrary to Regulation 74 in giving different reasons for the rejection of the Applicant's tender, (b) the Respondent acted contrary to provisions of Section 3 and Article 227 of the Constitution in failing to adhere to ITT 40.1 of the Tender Document, and (c) the Respondent acted contrary to Section 3 and Article 227 of the Constitution in floating two tenders i.e. Tender Nos. KGN-LEG-004-2024 TENDER FOR THE PROVISION OF INSURANCE

SERVICES - UNDERWRITERS FOR THE YEARS 2024-2026 and TENDER NO.KGN-LEG-005-2024 TENDER FOR THE PROVISION OF INSURANCE BROKERAGE SERVICES FOR THE YEARS 2024-2026 which were for the same services and was not transparent to bidders on the decision that led to the policies in the two tenders being separated.

48. In response to the issues raised in the Respondent's Notice of Preliminary dated 14th June 2024, the Applicant submitted that the said preliminary objection was not supported by any provision of law and that pursuant to Regulation 205 of Regulations 2020, the burden is not on the Applicant to involve the successful bidders in a request for review application since such burden is placed on the Board Secretary. The Applicant made further reference to the provisions under Section 170 of the Act and averred that this ground of objection has no basis in law and that a misjoinder cannot lead to dismissal of a request for review.

49. The Applicant contends that the genesis of the instant Request for Review is the letter of regret dated 4th June 2024 which contains all the breaches that the Applicant relies upon to challenge the Tender Documents with respect to Tender No. 1 and Tender No. 2. The Applicant further contends that the Respondent in making awards under the respective impugned Tender Documents has been carrying out a continuous breach and as such, the Applicant was within the provisions of Section 167 of the Act in presenting the instant Request for Review as is.

50. The Applicant argued that nothing within the provisions of the Act and the Regulations 2020 prevents a duly qualified advocate from signing a request for review on behalf of its client.
51. The Applicant contends that pursuant to Regulation 203 of Regulations 2020, the Applicant can make such statements as it deems necessary in support of a request for Review. As such, it had sufficiently demonstrated that Mr. John K. Lagat was a director of the Applicant and was lawfully authorized to sign the Statement in support of the instant Request for Review on behalf of the Applicant.
52. It is the Applicant's case that no law had been advanced to back the ground that the Request for Review was fatally defective and in the circumstances, the Respondent's preliminary objection lacked merit.
53. The Applicant submitted that all the persons who signed the Applicant's bid document were duly authorized by the Applicant to do so and the same can be confirmed from the confirmation issued by the Applicant.
54. On the substantive issues in the instant Request for Review on whether the Respondent acted contrary to the provisions in the Tender Document, the Applicant averred that the Addendum sent via email on 22nd May 2024 past business hours at 6.14 p.m. was an illegal notice having been issued outside working hours since issuing an addendum

past business/working hours clearly demonstrates the unfairness in the entire procurement process especially in the event a bidder was away from office and could only see the email on the next day, and as such, it would be unfair to penalize the said bidder for a mistake that was not theirs.

55. Counsel submitted that the instructions in the said addendum were clear and that the Applicant was to sign the Addendum as having received it and was to incorporate the same in its bid document.

56. The Applicant contends that the reason issued for its disqualification has no basis and in support of its argument, relied on the holdings in *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Selex Sistemi Integrati (2008) eKLR*, *M/S Export Trading Co. Ltd v Kenya Ports Authority [2016] eKLR*, and in *Republic v Public Procurement Administrative Review Board & Another Ex-Parte Gibb Africa Ltd (2012) eKLR*.

57. It is the Applicant's case that the Respondent failed to evaluate and award the tenders in line with Section 80(2) of the Act and was in breach of the provisions under ITT 40.1 of the Tender Document since as can be seen from its Regret letter under the AGPO category, the total business going by the definition in ITT 40.1 is Kshs. 100,286,300/- which therefore means that not one broker was to be awarded more than 15%. The Applicant pressed on that in tabulating 15% of 100,286,300/- the maximum business a party was to be

awarded was Kshs. 15,042,945/- yet from the letter of regret it was clear that Stansfeld Insurance Brokers got an award for Kshs. 18,884,794/- which was clearly above the set 15%. Further, that Utmost Insurance Brokers got an award of Kshs. 67,128,979.19/- which was also way above the 15% as provided for under ITT 40.1 of the Tender Document.

58. The Applicant further contends that under the Citizen/National category, the total business was Kshs. 829,926.017.5. and as such, 15% of the said Kshs. 829,926.017.5 is Kshs 124,490,410.7 yet bidders like Package Insurance Brokers Limited, Unipola Insurance Brokers Limited and Macly Insurance Brokers Limited were issued with awards way above the capping of Kshs. 124,490,410.70/-.

59. The Applicant referred the Board to the holdings in *KAG East Africa Ltd v Kenya Airports Authority [2019] eKLR*, *Republic v Public Procurement Administrative Review Board & Another Ex-Parte Transcend Media Group Limited (2018) eKLR*, and *Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited (2014) eKLR* in support of its arguments.

60. On whether the two Tender Documents were discriminatory as against Insurance Brokers, the Applicant submitted that the two documents were at a collision since contrary to the principles under Article 227 of the Constitution, it was never disclosed to the brokers

the criteria applied to enlist certain specific policies to the underwriters and others to the brokers and nor was a logical reason issued by the Respondent in response.

61. The Applicant further submitted that the Tender floated for underwriters was clearly intended to edge out brokers from business contrary to the allegation that underwriters cannot participate in bids by brokers noting that the tender documents and bids submitted will confirm that brokers have to work together with underwriters to give financial proposals which therefore means that in dealing with underwriters directly, brokers will not be able to offer their services as they will be edged out going by competitive prices that will be given by underwriters.
62. The Applicant indicated that from the two tenders, underwriters were now allowed to offer their services without brokers in different policies and to cover different risks and that the criteria in arriving at this was never communicated to brokers including the Applicant. It pointed out that for instance a risk like machinery breakdown which constitutes the core business of the procuring entity is not included in the brokers tender without any justifiable reason contrary to Section 3 of the Act.
63. The Applicant contends that there is an opaque nature of how the policies were divided and a lack of transparency on the decision making process which was contrary to its legitimate expectation.

64. The Applicant further contends that the Respondent failed to disclose that the only way it would get value for money was by having brokers involved in all risk policies since it is the brokers who issue the service through the underwriters at the time of risk claims and the said underwriter provides a security.
65. The Applicant submitted that a close look at the Tender Opening Minutes for both tender specifically on the financial proposal by the underwriters and brokers reveals a conspiracy in respect to bids submitted by underwriters since nine (9) underwriters had similar financial proposal while the bidder with a different proposal being Geminia Insurance Company Limited is unable to place cover due to lack of reinsurance support as demonstrated.
66. The Applicant further submitted that the Respondent suffers a major risk in having only one underwriter cover all its risks considering the value of the risks being covered and this was therefore a big risk on taxpayers' money.
67. The Applicant referred the Board to the holding in *Safaricom Ltd v Public Procurement Administrative Review Board & 2 others [2013] eKLR*, *Republic v Public Procurement Administrative Review Board & Another Ex-Parte East African Cables Ltd (2007) eKLR*, *Republic v Public Procurement Administrative Review Board & Another Ex-Parte Roben Aberdare (K) Ltd (2014) eKLR* and *The Public Procurement*

Regulatory Authority's (PPRA) circular no. 03/2023 in support of its case.

68. The Applicant urged the Board to allow the Request for Review as prayed.

Respondent's submissions and rejoinder on its preliminary objection

69. In her submissions, counsel for the Respondents, Ms. Oduor, relied on the Memorandum of Response by the Managing Director, Kenya Electricity Generating Company to the Request for Review Dated 10th June 2024 dated 14th June 2024, Respondent's Replying Affidavit to the Request for Review Dated 10th June 2024 sworn by Daniel Kitili Nzioka, the Procuring Entity's Procuring Manager, Further Affidavit sworn on 20th June 2024 by Daniel Kitili Nzioka, Written Submissions dated 20th June 2024, a Respondent's List of Authorities dated 20th June 2024 together with a Respondent's Bundle and Index of Documents containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act that were filed before the Board.

70. Counsel submitted that the Respondent's preliminary objection was based on Section 167 of the Act and not Section 163 as intimated by the Applicant's counsel, Mr. Ayisi.

71. She further submitted that the obligation under Section 170 of the Act is that of the Applicant and cannot be delegated to the Board under Regulation 205 of Regulations 2020 and as such, the Request for Review is incompetent.
72. In response to the substantive issues raised in the instant Request for Review which in its view were not time barred, the Respondent addressed the issue of whether the Applicant was unfairly and illegally disqualified on unjust grounds with respect to Tender No KGN-LEG-005-2024 and submitted that it acted within the law at all stages of the tender process and the evaluation of the Applicant's bid was done in accordance with the tender document and in compliance with Section 79 and 80 of the Act.
73. The Respondent submitted that MR 9 of the Tender Document required a bidder to submit a Power of Attorney and while relying on the contents of the Regret letter issued to the Applicant pointed to the Special Power of Attorney dated 23rd May 2024 submitted at page 56 of the Applicant's bid document and the Special Power of Attorney dated 12th January 2024 submitted at page 57 of the Applicant's bid document.
74. The Respondent averred that the Applicant relied on the Special Power of Attorney dated 23rd May 2024 attached at page 56 of the Applicant's bid document which was tender specific to MR 9 and stated that Esther Maindi as the Managing Director of the Applicant Company,

by virtue of the authority conferred on her do hereby authorize, empower and appoint HARRIET C KOSGEI (the Donee), ADVOCATE, COMMISSIONER OF OATHS ...of Post Office Box Number.... and ID No..... be my true lawful Attorney and Agent with full power and authority, to execute all requisite documents in regard to bid in relation to tender No KEN-LEG-005-2024 on my behalf and for the benefit of SAPON INSURANCE BROKERS LTD...

75. The Respondent further averred that the Donee of the Special Power of Attorney at page 56 was Harriet C Kosgei Advocate and Commissioner of Oaths of Post Office Box Number 36177-00100 Nairobi and that MR 9 specifically provided that the Power of Attorney ought to be signed and stamped by a Commissioner of Oaths yet it was witnessed by John Kipkorir, the General Manager of the Applicant and that Harriet signed the same as a Donee and not as a Commissioner of Oaths and as such, it cannot be said to have been duly commissioned since there was no requirement for a donee to be a commissioner of oaths and could not suffice as a commissioner.

76. The Respondent submitted that in any event, while the Applicant states that the Power of Attorney did not clearly set out the specimen signature of the Donee as the said Harriet, the Donee in the Power of Attorney dated 23rd May 2024 has two different specimen signatures hence the Special Power of Attorney as provided by the Applicant did not confirm to the tender requirement and the provision of the same

being a mandatory requirement, the Respondent acted properly in disqualifying the Applicant's bid.

77. In support of its argument, the Respondent relied on the holding in the recent Court of Appeal decision in *Civil Appeal No E012 of 2024 Sinopec International Petroleum Service Corporation VS PPARB, Accounting Officer KENGEN, KENGEN & JV LEX Oil Solutions Ltd & EPCM Consultants SA Ltd; Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR; R v PPARB Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR.*

78. On whether the Applicant's bid document was signed in accordance with the terms of the Tender Document, the Respondent referred the Board to MR4, 5, 6, 7, 11, 12, 13, and 14 of the Tender Document and the Regret letter issued to the Applicant which stated that various documents were signed by persons other than the Donee of the Special Power of Attorney provided by the Applicant contrary to the mandatory tender requirements and in view of the fact that a Donee had been expressly stated and the various tendering forms had instructions on how the same would be filled and signed. The Respondent pointed to several pages of the Applicant's bid document signed by persons other than the Applicant's Donee and reiterated that the importance of the Power of Attorney cannot be understated as a

mandatory document since it clearly sets out the person to whom the Applicant had delegated the power to sign all requisite documents relating to its tender. It relied on the holding by the Board in *PPARB Application Number 71 of 2017 Cargofinland Oy Vs KPA* in support of its argument.

79. Further, on whether Addendum No. 1 and 2 were properly signed by the Applicant, counsel submitted that MR 7 required a bidder to duly fill, sign and stamp the addendums and that the Applicant submitted Addendum No. 1 and 2 at page 51 and 52 of its tender documents which were signed by persons other than the donee stipulated in its Power of Attorney dated 23rd May 2024 and that the signatures therein did not match that of the donee or even the Managing Director, Esther Maindi though in any event, only the Donee could sign.

80. On whether the issue of whether it issued Addendum No. 2 within the law, the Respondent submitted that noting that the same was issued on 22nd May 2024, any challenge of the same ought to have been filed by 5th June 2024 and without any prejudice to this, contend that it was properly issued in line with Section 75 of the Act. Counsel argued that in a contradictory statement at paragraph 14 of the Applicant's Further Affidavit, it stated that it was only challenging Addendum No. 2 as the basis of rejection of its bid and as such, was approbating and reprobating in advancing its case in the instant Request for Review and such conduct is a basis for dismissal of the said allegation as held

by the High Court in *R vs Institute of Certified Public Secretaries of Kenya Ex- Parte Mundia Njeru Gateria, 2020 EKL.R.*

81. On whether the Respondent issued letters of intention to award awarding more than 15% of the value of business as provided in the Award criteria in the Tender Documents, the Respondent submitted that the Tender Document clearly provided for what is to be considered as a total business and the Applicant adopted a different definition from what was provided.

82. Counsel referred the Board to paragraphs 14 to 20 of the Respondent's Further Affidavit on tabulations on the total business and submitted that while Tender No. KGN-LEG-005-2024 had a schedule for AGPO and another schedule for Citizen/National group, the tender in question is one (1), and its Total business is the summation of all the lowest evaluated premiums from all classes tendered out in Tender No. KGN-LEG-005-2024. This was contrary to tabulations by the Applicant and what it had considered as the total tender business based on only one group instead of both groups being AGPO and non AGPO group. Counsel asked the Board to note that prior to issuance of the two tenders, a prequalification had been undertaken under two tenders one being for underwriters and another for insurance brokers. She indicated that the prequalification having been concluded in April 2024, the same remains unchallenged to date and the Applicant was attempting to challenge the said prequalification in the instant Request for Review.

83. Counsel submitted that brokers are not agents of an underwriter and that the fact that a broker gets information from another underwriter does not amount to the underwriter submitting a bid under tender no. 005 and there was no basis for the allegation of collusion.
84. On whether the Respondent failed to use the standard tender document issued by the Public Procurement Regulatory Authority, counsel submitted that this allegation had not been substantiated and ought to be dismissed. She further submitted that the record clearly shows that the Respondent relied on the standard tender document.
85. On whether the Applicant was discriminated upon by the Respondent, counsel submitted that this had not been substantiated and referred the Board to its holding in *PPARB Application No. 29 of 2022 CIC General Insurance v Kenya Airports Authority*.
86. Counsel urged the Board to dismiss the instant Request for Review with costs and submitted that the matter was urgent noting that assets of the Procuring Entity were gazetted and were required to have continuous insurance.

Applicant's Rejoinder

87. In a rejoinder, Mr. Ayisi submitted that counsel for the Respondent had significantly dwelt on the aspect of signatures by different parties on behalf of the Applicant without presenting any material evidence to demonstrate that the names and signatures accompanying the

documents signed on behalf of the Applicant are from different parties. He further submitted that without any forensic or expertise report on handwriting and signature, there is no demonstration that whoever signed on behalf of a commissioner and applicant conclusively were from different parties.

88. Counsel referred the Board to paragraph 12 of the Applicant's Further Affidavit and paragraph 28 and 29 of the Applicant's Written Submissions addressing the issues the Applicant had with the email of 22nd May forwarding Addendum 2 in the tenders and argued that it was not right that the Applicant was bringing the issue of the addendum from the bar.

89. On the issue of the award capping, counsel submitted that the wording of ITT 40.1 of the Tender Document is clear that the total business should be to the lowest evaluated premiums for all classes being the AGPO category and Citizen category and the awards as issued by the Procuring Entity were contrary to ITT 40.1 of the Tender Document as they were in excess of the 15% provided therein and as such, there was a breach in how the awards were made.

90. Counsel further submitted that the Applicant's case was not challenging the prequalification and was restricted to the Tender Documents presented by the Procuring Entity which were opaque and lacked transparency in how the wordings of the Tender were done, how the risks and policies were divided and lack of information that

was shared to the respective pre-qualified bidders to ensure that they were aware of the reason why they could not be awarded in particular risk while they could be awarded in another one, and the criteria determining what goes to underwriters and what goes to brokers.

91. In response to the issue of underwriters submitting tenders on behalf of brokers, counsel submitted that brokers cannot make a financial proposal without the participation of an underwriter and there being two parallel tenders, it meant that the broker was disadvantaged since any financial proposal it gives is bound by a financial figure given by the underwriter, which could be confirmed from the letter of regret.

92. Mr. Ayisi further submitted that the Applicant had proven discrimination faced in view of provisions under Article 227 of the Constitution since the discrimination alleged arose from the lack of fairness and transparency and the breach that the Applicant suffers. He reiterated on that the successful bidder has no reinsurance support and the Procuring Entity's assets stood the risk of being left exposed.

93. He urged the Board to allow the Request for Review as prayed.

CLARIFICATIONS

94. When asked by the Board to clarify on when the Applicant learnt of the breach complained of with regard to the Addendum, Mr. Ayisi

submitted that the same came to be known by the Applicant at the point of receipt of the regret letter issued to it.

95. When asked to clarify whether the Applicant was a candidate in tender no. 004 which was restricted to prequalified underwriters, Mr. Ayisi submitted that the Applicant is a broker and not an underwriter though there were issues of discrimination from the said tender which the Applicant was suffering being the reason it was challenging the same.
96. When asked by the Board to clarify the time at which the Respondent sent the Addendum to bidders, Mrs. Oduor submitted that the Addendum was sent to bidders via email on Wednesday, 22nd may 2024 at 18:14 hours.
97. When asked by the Board to clarify on whether the Applicant, on receipt of the email alleged to be late containing the Addendum, was prejudiced and if it was able to present its tender document within time as required, Mr. Ayisi confirmed that the Applicant did present its document within time though it was an inconvenience on its end as it had to send its staff beyond the normal working hours back to the office to respond to the same.
98. When counsel for the Applicant was asked if he was aware of the alleged two copies of the Specific Power of Attorney, Mr. Ayisi indicated that he was no aware that there were two Specific Power of Attorneys as alleged. On her part, Mrs. Oduor pointed to page 56 the

Applicant's bid document and submitted that there was a Specific Power of Attorney specifically making reference to tender no. 004 and a second General Power of Attorney at page 57 of the Applicant's bid document. She reiterated that for both, there was a difference on who the donor was and who the donee was.

99. When asked how she came to the conclusion that the signatures were not the same, and if any forensics were used, Mrs. Oduor submitted that the Respondent used the power of attorney at page 56 of the Applicant's bid document which was tender specific and the signatures therein to be the specimen of the signatures of the donee which was compared against all the documents listed in the Applicant's regret letter. She indicated that the Applicant had admitted during the proceedings to getting someone else to sign the Addendum due to being pressed for time and did not demonstrate that all the signatures belonged to the donee.

100. On the issue of the Procuring Entity's assets being at risk, the Board sought to know whether the right evaluation procedure was adhered to in view of the urgency and the said assets being at risk to which Mrs. Oduor submitted that the Respondent followed due process in its evaluation of bids despite the urgency faced and was requesting the Board to render itself before the 2nd July 2024 when the matter is due to expire.

101. When asked why the donor used the same stamp to commission documents, Mr. Ayisi indicated that he had not had sight of the same and could not comment on the same. On the alleged admission, he said that no admission on his part that there was an erroneous signing of the Applicant's documents.

102. At the conclusion of the hearing, parties were also informed that the instant Request for Review having been filed on 11th June 2024 was due to expire on 2nd July 2024 and that the Board would communicate its decision on or before 2nd July 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

103. The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

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

In determining the first issue, the Board will make a determination on:

i Whether the Respondent's Notice of Preliminary Objection dated 14th June 2024 as filed is proper?

Depending on the determination of issue (i) above;

- ii Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act to invoke the jurisdiction of the Board.***

Depending on the determination of the above issue (ii) above;

- iii Whether the instant Request for Review as filed is fatally defective and incompetent for having been signed by the Applicant's Advocates and not the Applicant as to divest the Board of its jurisdiction.***

Depending on the determination of issue (iii) above;

- iv Whether the instant Request for Review as filed is fatally defective and incompetent for failure by the Applicant to include the successful bidder as a party to the instant Request for Review.***

Depending on the outcome of Issue A;

- B. Whether the Applicant's bid document was signed in accordance with the terms of the Tender Document.**
- C. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.**
- D. Whether the Procuring Entity adhered to the set out award criteria in the Tender Document.**
- E. Whether the allegations that the Procuring Entity failed to use the Standard Tender Document issued by the Public Procurement Regulatory Authority has been substantiated.**
- F. What orders should the Board grant in the circumstances?**

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

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

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

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

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

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

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

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

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

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

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

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

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

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

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before

delving into the interrogation of the merits of issues that may be in controversy in a matter."

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

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

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

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

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

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

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

115. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

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

167. Request for a review

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

(2)

(3)

.....

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

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

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

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

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

203. Request for a review

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

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

(a);

(b);

(c) be made within fourteen days of —

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

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

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

(d)

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

(4)

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

i As to whether the Respondent's Notice of Preliminary Objection dated 14th June 2024 as filed is proper?

119. The Respondent lodged on 14th June 2024 a Notice of Preliminary Objection dated 14th June 2024 objecting to the Request for Review and prayed for the same to be struck out and/or dismissed with costs.

The grounds of the Respondent's preliminary objection are that the Board is divested of jurisdiction to hear and determine the instant Request for Review since (a) the Request for Review as filed is defective for want of compliance with Section 170 of the Act since the successful bidders were not joined as parties, (b) the Request for Review was filed outside the stipulated statutory timelines, (c) the Request for Review was signed by counsel on record without lawful authority to sign the same, (d) the Statement filed in support of the Request for Review was signed by a person with no legal authority to sign making the review unsupported, and (e) the Request for Review is fatally defective. Mrs Oduor submitted while relying on Regulation 209 of Regulations 2020 argued that the preliminary objection was proper in view of the fact that the Respondent was served with the Request for Review on 11th June 2024 and proceeded to file and serve the Notice of Preliminary Objection on 14th June 2024 which was within the 3-day period provided under Regulation 209 of Regulations 2020.

120. On its part, the Applicant in response to the Preliminary Objection, contends that the preliminary objection as raised ought to be dismissed. Mr. Ayisi submitted that no law had been advanced to back the ground that the Request for Review was fatally defective and in the circumstances, the Respondent's preliminary objection lacked merit.

121. A reading of Regulation 209(1) of Regulations 2020 provides as follows:

"Preliminary Objection

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification."

122. Regulation 206 of Regulations 2020 referred to above provides as follows:

"206. Notice of Hearing

(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.

(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations."

123. Our interpretation of Regulation 206 and 209(1) of Regulations 2020 is that any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection to the hearing of the request for review within three days from the date of being notified by the Board Secretary of the date fixed to hear the request for review. It is our understanding that any preliminary objection filed by any of the parties to a request for review ought to be filed within three days from the date such party is notified of the date fixed for hearing of the request for review and not three days

from the date of notification of filing of the request for review contemplated under Regulation 205(1) and (5) of Regulation 2020.

124. Having considered parties' pleadings and submissions, we note that the Respondent's Notice of Preliminary Objection dated 14th June 2024 was filed on the same day of 14th June 2024. We also note that the Board Secretary vide a Hearing Notice dated 14th June 2024 notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 20th June 2024 at 2.30 p.m. through the link availed in the said Hearing Notice. This therefore means that any party that intended to object to the hearing of the instant Request for Review ought to have filed the same within three (3) days from 14th June 2024 being the day parties were notified of the hearing.

125. It is our considered view that the Respondent having filed its preliminary objection on 14th June 2024 was within the stipulated timelines and is therefore properly before the Board.

ii Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act to invoke the jurisdiction of the Board.

126. Section 167(1) of the Public Procurement and Asset Disposal Act 2015 requires that an applicant must lodge a Request for Review against the procuring entity's decision declaring its tender as unsuccessful within Fourteen (14) days from the date of notification

that it's tender was unsuccessful. The said Section 167(1) of the Act provides as follows:-

Section 167 (1): "Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

127. The Board notes as a matter of fact that the Procuring Entity forwarded the letter of notification to the Applicant on 4th June, 2024 time started running from the next day namely on 5th June, 2024 the 14 days window period was to lapse on 18th June, 2024, the instant Request for Review having been filed on 11th June, 2024 is effectively within the aforementioned window period. Having found that the Applicant filed the instant Request within time, it therefore follows that Board's jurisdiction is not divested on this ground and will proceed to consider the next limb of preliminary objection below.

iii As to whether the instant Request for Review as filed is fatally defective and incompetent for having been signed by the Applicant's Advocates and not the Applicant as to divest the Board of its jurisdiction.

128. The Respondent contends at grounds 3, 5 and 6 of its Notice of Preliminary Objection dated 14th June 2024 that the Board lacks jurisdiction to hear and determine the instant Request for Review as drawn and filed and that the Request for Review is signed by Counsel on record without lawful authority to sign the same thus rendering it is fatally defective.

129. In response, the Applicant contends at paragraph 6 of its Further Affidavit sworn on 19th June 2024 by John Lagat that the Request for Review was properly signed by counsel duly instructed by the Applicant and was within the Applicant's Right of Representation as provided under Article 50 of the Constitution. The Applicant submitted that this ground of preliminary objection ought to be dismissed as it lacks merit.

130. This Board is cognizant of the provisions of Regulation 203(1) of Regulations 2020 which provides:

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

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

(r 203(1))

FORM FOR REVIEW

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD**

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

BETWEEN

.....APPLICANT (Review Board)

AND

.....RESPONDENT (Procuring Entity)

**Request for Review of the decision of the(Name of
the Procuring Entity ofdated theday of
.....20 in the matter of Tender No
.....of20for(Tender
description)**

REQUEST FOR REVIEW

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

1.

2.

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

1.

2.

SIGNED.....(APPLICANT)

DATED onday of...../20

FOR OFFICIAL USE ONLY

Lodged with the Secretary,

Public Procurement Administrative Review Board on....

Day of20...

SIGNED

Board Secretary

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

requires to be in the prescribed form, made by the Applicant and signed by the Applicant.

133. The question of competence of a request for review lodged with the Board in light of failure by an Applicant to sign the same when represented by counsel is one that the Board has determined in numerous instances.

134. Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

"Reg. 208 Representation by person of own choice

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

135. The above provision is in tandem with Order 9 of the Civil Procedure Rules, 2010 which provides for recognized agents and advocates who are duly appointed to act on behalf of others in court proceedings. Order 9 rule 7 provides for a Notice of appointment of advocate as follows:

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

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

136. The Board is also cognizant of the provisions of Section 26(2) of the Statutory Instruments Act which provides that:

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

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

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

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

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

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

139. The import of the above provisions under Section 26(2) of the Statutory Instruments Act and Section 72 of the Interpretation and General Provisions Act as well as the Alfred Mutua case is that where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently

does not affect the substance of that document or statutory instrument. As such, any deviation in a request for review application must not be substantive and ought not to be misleading.

140. Turning to the circumstances in the instant Request for Review, we note that the Applicant's Request for Review dated 10th June 2024 and filed on 11th June 2024 reads in part as follows:

"

REPUBLIC OF KENYA
IN THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD
APPLICATION NO. OF 2024

BETWEEN

SAPON INSURANCE BROKERS LIMITED

..... APPLICANT

-AND-

THE MANAGING DIRECTOR,

KENYA ELECTRICITY GENERATING COMPANY

PLC.....RESPONDENT

(Request to review the decision by the Managing Director, Kenya Electricity Generating Company PLC (hereinafter referred to as Respondent) of P.O Box 47936 – 00100 Nairobi

to advertise KGN-LEG-004-2024 TENDER FOR THE PROVISION OF INSURANCE SERVICES - UNDERWRITERS FOR THE YEARS 2024-2026 AND TENDER NO.KGN-LEG-005-2024 TENDER FOR THE PROVISION OF INSURANCE BROKERAGE SERVICES FOR THE YEARS 2024-2026 (hereinafter referred to as the tenders).

REQUEST FOR REVIEW

We, SAPON INSURANCE BROKERS LIMITED, the above named Applicant of P.O Box 47628-00100, Nairobi, Email: sapon@sapon.co.ke, (hereinafter referred to as "the Applicant"), hereby request the Public Procurement Administrative Board to review the Respondents' above referred to tenders on the grounds;

.....

And on further grounds stipulated in the statement annexed hereto.

By this Memorandum, the Applicant requests the Review Board for:

.....

**DATED AT NAIROBI this ____10th ____ day of
____June____ 2024**

***Signed for and on behalf of the Applicant, SAPON INSURANCE
BROKERS LIMITED***

(SIGNED)

***AL & C LLP PARTNERS ADVOCATES
ADVOCATES FOR THE APPLICANT***

Drawn & Filed By: -

AL & C LLP Partners Advocates

No. 31/33 Muthithi Road,

Westlands, (SIGNED)

P.O Box 788-00606

Email: alcpartnersllp@gmail.com

Nairobi

FOR OFFICIAL USE ONLY

Lodged with the Secretary, Public Procurement Administrative

Review Board on the 10th 11th (Signed) June 2024

Signed _____ (SIGNED) _____

Board Secretary (STAMPED)

141. From the above Request for Review filed by the Applicant, the Board notes that it (a) is made in the name of the Applicant and not its Advocates in that it indicates the name of the Applicant, its postal and email address at paragraph 1 of the Request for Review, (b) sets out

the request to review the two tenders while laying out 20 grounds for review and orders sought from the Board, (c) it has been signed off on behalf of the Applicant by the Applicant's advocates AL & C LLP Partners Advocates (d) it was lodged and received by the Board's Secretary on 11th June 2024 as evidenced by the signature endorsed by the Board's Secretary.

142. The question that the Board must now address is what is the effect of the Applicant's Advocates signing off, on the Applicant's behalf, the Request for Review made in the name and address of the Applicant.

143. In **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") the Board was faced with circumstances similar to those in the instant Request for Review and held at pages 69 to 70 as follows

".....
Having perused the Applicant's Request for Review dated 1st February 2023 and filed on even date, we note that the same (a) indicates the name of the Applicant, its postal address, telephone number and email address at paragraph 1 of the Request for Review; (b) sets out the request to review the subject tender while laying out eight grounds for review and orders sought from the Board; (c) has been signed off

by the Applicant's advocates on record being Migos-Ogambo & Waudo Advocates; (d) was lodged and received by the Board's Secretary on 1st February 2023 as evidenced by the signature endorsed Board's Secretary. As such, the Applicant indicates that they are requesting the Board to review the decision of the Respondents but at the end of the Request for Review, the same is signed by their Advocate, Migos Ogamba & Waudo Advocates contrary to the provisions of Reand the form at page 140 of the blank Tender Document.

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

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

Accordingly, this ground of the 1st and 2nd Respondents' Notice of Preliminary Objection dated 6th February 2023 and filed on even date succeeds."

144. It is not lost to us that the decision in the Toddy case was quashed by the High Court in **Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board & others Ex-Parte Toddy Civil Engineering Company Limited**. However, the above decision of the High Court was appealed at the Court of Appeal in **Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others** and the Court of Appeal in its judgement delivered on 19th June 2023 upheld the Board's decision. As such the decision of the Board in the Toddy case is binding to date.

145. The Board pointed out that the Applicant in the Toddy case was requesting the Board to review the decision of the Respondents yet the said request for review was signed by its advocates. The Board also pointed out and acknowledged that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. However, failure by the Applicant to provide its Advocates address of service for purposes of its Request for Review and instead availed its own address yet the said advocates signed off the Request for Review was consequential and misleading.

146. Such was the holding by this Board differently constituted in **PPARB Application No. 34 of 2023 Wodex Technologies Limited v The Accounting Officer, National Health Insurance Fund & Another** (hereinafter referred to as "the Wodex Case") where the Board held at pages 79 to 81 as follows:

"

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

In our considered view, the import of the words "whose address of service for purpose of this Request for Review shall be care of Caroline Oduor & Associates Advocates" in the Applicant's Request for Review dated 30th May 2023 and filed on 31st May 2023 connote that any document or information delivered to the Applicant's

Advocate's address indicated in the Request for Review is considered to have been delivered to the Applicant itself and is binding on the Applicant.

.....

Being guided by the Supreme Court's holding in the Alfred Mutua case, it is our considered view that the deviation by the Applicant in the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review compared to the circumstances in the Toddy case, where the Applicant did not provide its Advocates address of service for purposes of its Request for Review and instead availed its own address yet its Advocates signed off the Request for Review which can not be said to be inconsequential but is in fact misleading.

.....”

147. By the time the Board made its decision in the Wodex case, the Court of Appeal had not rendered its decision *in Civil Appeal No. E295 and 296 of 2023*. However, the Board did establish that the circumstances in the Wodex case were distinguishable from those in the Toddy case in that the Applicant in the Wodex case had indicated that its address for service for purposes of the Request for Review would be care of its

Advocates on record which was taken to mean that any document or information delivered to the Applicant's advocates address as indicated in the Request for Review is considered to have been delivered to the Applicant itself and was binding on the Applicant.

148. In the recent case of **PPARB Application No. 7 of 2024, Emcure Pharmaceutical Limited v Chief Officer Kenya Medical Supplies Authority & Another** (hereinafter referred to as "the Emcure Case"), the Board made a determination at pages 65 to 76 on the question of whether the Request for Review was fatally defective having been signed by Mwaniki Gachuba Advocates on behalf of the Applicant and found at paragraph 156 and 157 as follows:

"In essence, the Board was alive to the fact that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. Notably, the Toddy case is distinguishable from the instant Request for Review since the Request for Review therein was made by the Applicant but signed by the Applicant's Advocates whereas, in the instant Request for Review, we have established from the Request for Review application that the Applicant's address of service for purposes of the Request for Review has been indicated to be its advocates, Mwaniki Gachuba Advocates, on behalf of the Applicant, Emcure Pharmaceuticals Limited. As such, the

deviation by the Applicant in the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review compared to the circumstances in the Toddy case, where the Applicant did not provide its Advocates address of service for purposes of its Request for Review and instead availed its own address yet its Advocates signed off the Request for Review which cannot be said to be inconsequential but was in fact misleading.

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

149. In view of the foregoing, we find that the deviation by the Applicant in the instant Request for Review is substantive and contrary to the provisions under Regulation 203 read with the Fourteenth Schedule of Regulations 2020 as the Applicant herein did not provide in its Request for Review its advocates address of service for purpose of the Request for Review at paragraph 1 of the Request for Review and instead availed its own address yet its advocates signed the Request for Review dated 10th June 2024 which cannot therefore be said to be inconsequential in view of past determinations and precedent set.

150. Further, unlike the Emcure case where the Applicant submitted evidence from the contents of its filed Specific Power of Attorney and Authority to Swear proving that its advocate was duly authorized to sign the Request for Review on its behalf, nothing in the instant Request for Review has been adduced by the Applicant to prove that the Applicant's advocates, AL & C LLP Partners Advocates, were lawfully authorized to sign the instant Request for Review on behalf of the Applicant.

151. In the circumstances, we find that failure by the Applicant to sign the instant Request for Review and the same being signed by its advocates, renders it fatally defective and bad in law thus the Request for Review is not incompetent. As such, this ground of the Respondent's preliminary objection succeeds.

152. In the absence of a competent request for review before the Board, the Board has no jurisdiction to hear and determine the instant Request for Review and this means that we down our tools at this stage and shall not proceed to make a determination of the other issues framed hereinabove.

What orders should the Board grant in the circumstances?

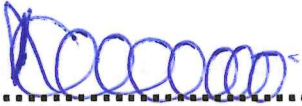
153. We have hereinbefore held that we have no jurisdiction to hear and determine the instant Request for Review. It therefore follows that the instant Request for review is struck out for want of fatally defective and incompetent.

FINAL ORDERS

154. 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 10th June 2024 and filed on 11th June 2024:


- A. The Request for Review dated 10th June 2024 and filed on 11th June 2024 with respect to Tender No. KGN-LEG-004-2024 for Provision of Insurance Services – Underwriters Only for the Year 2024-2026 and Tender No. KGN-LEG-005-2024 for Provision of Insurance Brokerage Services for the Year 2024-2026 be and is hereby struck for being fatally defective and incompetent.**
- B. The Procuring Entity is hereby ordered to proceed with the procurement process with respect to Tender No. KGN-LEG-004-2024 for Provision of Insurance Services – Underwriters Only for the Year 2024-2026 and Tender No. KGN-LEG-005-2024 for Provision of Insurance Brokerage Services for the Year 2024-2026 to their logical conclusion.**
- C. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 28th Day of June 2024.


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PANEL CHAIRPERSON

PPARB


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SECRETARY

PPARB