

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 58/2024 OF 28<sup>TH</sup> JUNE 2024**

**BETWEEN**

**KENYAN ALLIANCE INSURANCE CO. LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**MOI TEACHING & REFERRAL HOSPITAL ..... 1<sup>ST</sup> RESPONDENT**

**MOI TEACHING & REFERRAL HOSPITAL ..... 2<sup>ND</sup> RESPONDENT**

**FIRST ASSURANCE COMPANY LTD ..... 3<sup>RD</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Moi Teaching & Referral Hospital in relation to Tender No. MTRH/T/86/2023-2024 for Provision of Medical Insurance Cover.

**BOARD MEMBERS PRESENT**

- |                      |   |                             |
|----------------------|---|-----------------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson           |
| 2. Dr. Susan Mambo   | - | Member                      |
| 3. Ms. Alice Oeri    | - | Member and Board Vice Chair |

**IN ATTENDANCE**

- |                     |   |                        |
|---------------------|---|------------------------|
| 1. Mr. James Kilaka | - | Acting Board Secretary |
|---------------------|---|------------------------|

2. Mr. Philemon Kiprop - Secretariat
3. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT KENYAN ALLIANCE INSURANCE CO. LIMITED**

1. Mr. Omayio - Advocate, Masaki & Gathu Advocates LLP
2. Mr. Wachira - Advocate, Masaki & Gathu Advocates LLP

### **1<sup>st</sup> & 2<sup>nd</sup> RESPONDENTS ACCOUNTING OFFICER, MOI TEACHING & REFERRAL HOSPITAL & MOI TEACHING & REFERRAL HOSPITAL**

Mr. Josphat Kirima - Advocate, Moi Teaching & Referral Hospital

### **3<sup>RD</sup> RESPONDENT FIRST ASSURANCE COMPANY LTD**

Mr. Gachuba - Advocate, Mwaniki Gachuba Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Moi Teaching & Referral Hospital, the Procuring Entity and 2<sup>nd</sup> Respondent herein, invited sealed tenders in response to Tender No. MTRH/T/86/2023-2024 for Provision of Medical Insurance Cover (hereinafter referred to as the "subject tender"). The invitation was by

way of an advertisement on 5<sup>th</sup> March 2024 in My Gov Publication, the Procuring Entity's website [www.mtrh.go.ke](http://www.mtrh.go.ke) and on the Public Procurement Information Portal (PPIP) website [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was scheduled on 3<sup>rd</sup> May 2024 at 10.00 a.m.

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

2. According to the Minutes of the subject tender's opening held on 28<sup>th</sup> March 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 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenders were submitted in response to the subject tender. The eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Star Discover Insurance
2.	Jubilee Health Insurance Limited

3.	Kenya Alliance Insurance Company Limited
4.	KCB Bancassurance Intermediary Limited
5.	Takaful Insurance of Africa
6.	CIC General Insurance Ltd
7.	AAR Insurance Kenya Limited
8.	First Assurance Company Limited

### **Evaluation of Tenders**

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the eight (8) tenders as captured in an Evaluation Report for the subject tender dated 12<sup>th</sup> April 2024 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

- i Preliminary/Mandatory Evaluation;
- ii Technical Evaluation;
- iii Financial Evaluation

### **Preliminary Evaluation – Compliance Evaluation**

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage One: Preliminary/Mandatory Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document. Tenderers were required to meet all the mandatory requirements at

this stage to proceed for registration and prequalification of the subject tender.

5. At the end of evaluation at this stage three (3) tenders were determined non-responsive, while five (6) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee was required to evaluate tenders using the criteria provided under Technical Evaluation Criteria of Stage III – Evaluation and Qualification Criteria at page 29 to 31 of the Tender Document. Bidders were required to score a minimum of 70% to proceed to the Financial Evaluation stage.
7. At the end of evaluation at this stage, two (2) tenders were determined non-responsive including the Applicant's tender while three (3) tenders were determined responsive having met the pass mark of 70% and proceeded to the Financial Evaluation stage.

### **Financial Evaluation**

8. The Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 32 of the Tender Document. The lowest technically evaluated bidder would be considered for award of the subject tender.

9. Following conclusion of evaluation of bids at this stage, the Evaluation Committee recommended as follows:

"....."

1. That B8 - First Assurance Company Limited being the lowest technically evaluated bidder at Ksh. 386,342,777.00, followed by B7-AAR Insurance Kenya Limited with a quote of Kshs. 620,491,188.00 and B2-Jubilee Health Insurance Limited of Ksh. 700,187,097.00
2. That since all the three Bidders who made it to financial evaluation exceeded budget allocation, the committee recommends to the Accounting Officer for negotiation under Sec 128 of Public Procurement & Asset Disposal Act, 2015.

<b>BIDDER NO.</b>	<b>Description of the item to be insured</b>	<b>Insurance premium per specified (tender price)</b>	<b>Name of Bidder</b>
<b>B2</b>	<b>Provision of medical cover for 3555 staff members</b>	<b>Ksh. 700,187,097.00</b>	<b>Jubilee Health Insurance Limited</b>
<b>B7</b>	<b>Provision of medical cover for 3555 staff members</b>	<b>Ksh. 620,491,188.00</b>	<b>AAR Insurance Kenya Limited</b>
<b>B8</b>	<b>Provision of medical cover for 3555 staff members</b>	<b>Ksh. 386,342,777.00</b>	<b>First Assurance Company Limited</b>

### **Negotiations and Recommendation**

10. According to the Minutes for Negotiation Committee of the subject tender held on 30<sup>th</sup> April 2024 and 2<sup>nd</sup> May 2024, the Procuring Entity wrote to the 3<sup>rd</sup> Respondent and requested that it provides a revision

of its tender price and give a final offer in view of the Procuring Entity's rationalized budget of Kshs. 311,000,000.00

11. During negotiations, the Procuring Entity's Evaluation Negotiation Committee indicated that the value of Kshs. 311,364,874.00 was available while the 3<sup>rd</sup> Respondent offered a final figure of Kshs. 350,000,000.00

12. Upon conclusion of the negotiations, the Negotiation Committee after reviewing the proposal of the 3<sup>rd</sup> Respondent found that the value of Kshs. 350,000,000 was above the available budget of Kshs. 311,364,874.00

### **Professional Opinion**

13. In a Professional Opinion Report No. 133/2023-2024 dated 14<sup>th</sup> June 2024 (hereinafter referred to as the "Professional Opinion"), the Ag. Manager, Supply Chain, Mr. Evans Kiprotich reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and confirmed that funds were available in line with the requirement under Section 53(8) of the Act and that a balance of Kshs. 350,000,000.00 was available under vote 500-480 (Medical Scheme) to support the procurement proceedings.

14. He recommended award of the subject tender to the 3<sup>rd</sup> Respondent as follows:

## PROPOSED AWARD SCHEDULE

<i>No.</i>	<i>Description of the item to be insured</i>	<i>Initial insurance premium Per Annum (Kshs. )</i>	<i>Negotiated insurance premium Per Annum (Kshs. )</i>	<i>Name of Bidder</i>
<i>1.</i>	<i>Provision of Medical Insurance Cover for 3555 staff members</i>	<i>Ksh. 386,342,777.00</i>	<i>Kshs. 350,000,000.00</i>	<i>M/s First Assurance Company Limited</i>
<i>Total Contract Sum</i>			<i>Kshs. 350,000,000.00</i>	

15. Thereafter the Professional Opinion was approved by Dr. Philip K Kirwa, the Accounting Officer and 1<sup>st</sup> Respondent herein on on 14<sup>th</sup> June 2024.

### **Notification to Tenderers**

16. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 14<sup>th</sup> June 2024.

### **REQUEST FOR REVIEW NO. 58 OF 2024**

17. On 28<sup>th</sup> June 2024, Kenyan Alliance Insurance Co. Limited, the Applicant herein filed a Request for Review dated 26<sup>th</sup> June 2024 together with an Affidavit/Statement on Support of Request for Review sworn on 26<sup>th</sup> June 2024 by John Kimani, its Principal Officer

(hereinafter referred to as 'the instant Request for Review') through Masaki & Gathu Advocates LLP seeking the following orders from the Board:

***a)The Decision of the Procuring Entity vide its Letter dated 14<sup>th</sup> June 2024 and referenced ELD/MTRH/SSE/7/4/VOL.XII/2017 issued on 15<sup>th</sup> June 2024 at 6.05 pm being the Notification of Intention to Award for Provision of Insurance Services for Moi Teaching & Referral Hospital be and are hereby declared null and void and the same be and are set aside.***

***b)An Order that the Procuring Entity is hereby directed to re-admit and re-evaluate the Applicant's bid in the financial stage alongside other entities which made it to financial stage in accordance with the Act and the Constitution.***

***c)That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent (Procuring Entity) be ordered award the Tender to the Applicant and or enter into negotiations with the Applicant being the Tenderer with the lowest bid.***

***d)An Order directing the Procuring Entity and its Chief Accounting Officer to pay costs of the Review; and***

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

18. In a Notification of Appeal and a letter dated 28<sup>th</sup> June 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 28<sup>th</sup> June 2024.

19. On 5<sup>th</sup> July 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed through Josphat Mutuma Kirima Advocate a Statement Against the Application for Request for Review sworn on 5<sup>th</sup> July 2024 by Evans Kipchumba Kiprotich, the Procuring Entity's Ag. Manager Supply Chain, together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

20. *Vide* a Hearing Notice dated 5<sup>th</sup> July 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 11<sup>th</sup> July 2024 at 11.00 a.m., through the link availed in the said Hearing Notice
21. *Vide* email dated 8<sup>th</sup> July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.
22. *Vide* an email dated 8<sup>th</sup> July 2024 and a Hearing Notice dated 8<sup>th</sup> July 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the online hearing of the instant Request for Review had been rescheduled to 16<sup>th</sup> July 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
23. On 9<sup>th</sup> July 2024, the 3<sup>rd</sup> Respondent filed via email through Mwaniki Gachuba Advocates a Notice of Appointment of Advocates dated 9<sup>th</sup> July 2024.
24. On 11<sup>th</sup> July 2024, the 3<sup>rd</sup> Respondent filed via email through Mwaniki Gachuba Advocates a Preliminary Objection dated 10<sup>th</sup> July 2024 and

a 3<sup>rd</sup> Respondent's Response dated 10<sup>th</sup> July 2024. Physical copies of the aforementioned documents were filed with the Board on 12<sup>th</sup> July 2024.

25. On 12<sup>th</sup> July 2024, the Applicant filed through its advocates an Affidavit/Statement in Further of Support of Request for Review sworn on 12<sup>th</sup> July 2024 by John Kimani.

26. On 15<sup>th</sup> July 2024, the 3<sup>rd</sup> Respondent filed via email through Mwaniki Gachuba Advocates an Affidavit sworn on 15<sup>th</sup> July 2024 by Stephen Lokonyo.

27. On 16<sup>th</sup> July 2024, the 3<sup>rd</sup> Respondent filed through its advocates Written Submissions dated 16<sup>th</sup> July 2024.

28. At the hearing of the instant Request for Review on 16<sup>th</sup> July 2024, the Board read out the pleadings filed by parties in the matter and directed that the hearing of the preliminary objection by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents 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.

29. 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**

### **3<sup>rd</sup> Respondent's submissions on its Preliminary Objection**

30. In his submissions, counsel for the 3<sup>rd</sup> Respondent, Mr. Gachuba, placed reliance on the 3<sup>rd</sup> Respondent's documents filed before the Board in the instant Request for Review.

31. Mr. Gachuba submitted that the 3<sup>rd</sup> Respondent's preliminary objection was filed within the prescribed timelines and was properly before the Board. He pointed out that the Preliminary Objection raised seven grounds of objection which were well supported in law. He argued that the Authority to Sue filed by the Applicant late in the day did not meet the provisions under Section 37(2) and 40 of the Company's Act.

32. Counsel submitted that the Applicant being a limited liability company is required to comply with the Company's Act in terms of execution of documents and as such, the Applicant's Authority to Sue was not executed as prescribed under the Company's Act and failed to meet the prescribed threshold in law.

33. He referred the Board to the 3<sup>rd</sup> Respondent's Affidavit and submitted that Mr. John Kimani who swore the Affidavits filed by the Applicant had no authority to do so and was not the Applicant's Principal Officer.

He pointed out that the said John Kimani has been on leave since 25<sup>th</sup> May 2024 and ceased being the principle officer of the Applicant on 15<sup>th</sup> June 2024. Counsel argued that no evidence had been tabled by the Applicant to denounce the facts deponed in the 3<sup>rd</sup> Respondent's Affidavit and pointed out that the Board was dealing with forgeries, impersonation and perjury. He further argued that the affidavit in support of the Request for Review was thus incompetent in view of Regulation 203 (1)(2)(a) of Regulations 2020. In support of his argument, counsel referred the Board to the holding by Justice Mumbi in *East African Portland Cement Ltd v Capital Markets Authority & 4 others (2014) eKLR*.

34. With respect to grounds 4, 5, and 6, counsel referred the Board to paragraph 8, 12, and 13 of the Applicant's Affidavit which summarized where the Respondent went wrong in evaluation of its tender and submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had clarified in great detail why the Applicant's bid was disqualified and among the salient points as expounded at paragraphs 10, 11, 12 and 13 of the 3<sup>rd</sup> Respondent's Written Submissions was that the Applicant's Principle Officer did not have a Bachelor of Commerce Insurance option or Economics or Business Statistics or Actuarial Science or its equivalent having presented a Bachelor of Science degree.

35. Counsel submitted that ITT 27 of the Tender Document empowered the Applicant to write to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for any clarification and this was anchored on Section 65(3) of the Act and

Section 6 of the Fair Administration Action Act 2015. He argued that the Applicant having known that it did not present a principle officer with the requisite qualifications and experience, it was the duty of the Applicant to find out from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents how its tender would be treated at evaluation which it didn't. He further referred the Board to ITT 43.1 of the Tender Document and submitted that the Applicant had an opportunity to seek clarification on the reason why its tender was disqualified which it also didn't and as such, the Applicant has no locus standi before the Board. In support of his argument, counsel referred the Board to the case of *Republic v Public Procurement Administrative Review Board & 3 others ex parte AAR Insurance Kenya Limited and Speaker of the National Assembly v James Njenga Karume [1992] eKLR*.

36. Mr. Gachuba submitted that the Applicant failed to demonstrate the loss or damage, if any, that it risks suffering or the loss or damage that it has suffered following the award of the 3<sup>rd</sup> Respondent's Tender which demonstration is a jurisdictional threshold issue under Section 167(1) of the Public Procurement and Asset Disposal Act, 2015. He referred the Board to the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*.

37. Counsel urged the Board to allow the preliminary objection as raised and strike out the instant Request for Review.

## **Applicant's submissions and response to the 3<sup>rd</sup> Respondent's Preliminary Objection**

38. In his submissions, counsel for the Applicant, Mr. Omayio placed reliance on the Applicant's documents filed before the Board in the instant Request for Review.
39. Mr. Omayio submitted that the Board had been taken through a ton of questions of evidence and in reference to the Mukhisa Biscuits case, a preliminary objection ought to be pegged on a question of law and not facts. Counsel pointed out that Mr. Gachuba was supporting his preliminary objection with averments made in the 3<sup>rd</sup> Respondent's Affidavit and referred to the case of *Zipporah Njoki Kangara v Rock & Pure Limited and 3 others*.
40. On whether the Applicant has *locus standi* before the Board, counsel pointed out that the Board is not strictly bound by the rules of evidence and the Civil Procedure Act. In support of his argument, counsel referred to the holding by the Supreme Court in *SGS International v IPPRA*.
41. He referred to the Board to the Applicant's Authority to Sue marked as annexure No. 5 which authorized the Applicant's advocates on record to institute the instant Request for Review and argued that what the Board ought to focus on are the substantive issues raised in the review filed pursuant to Section 167(1) of the Act. Counsel submitted that the 3<sup>rd</sup> Respondent's preliminary objection was

unmerited and ought to be dismissed. He pressed on that the issues raised by the 3<sup>rd</sup> Respondent ought to have taken the form of an application which would have allowed the Applicant to substantially respond to.

42. With regard to the substantive issues in the instant Request for Review, Mr. Omayio referred the Board to page 1092 of the Applicant's bundle of documents which indicates that the Applicant received its letter of notification of the outcome of evaluation of the subject tender on 15<sup>th</sup> June 2024 at 6.05 p.m which fell on a Saturday and in computing time when the Applicant ought to have filed the review, it did so within the stipulated statutory timelines having filed the instant Request for Review on the 12<sup>th</sup> day and the same was distinctly signed and could have been accompanied by a simple letter.
43. Counsel invited the Board to page No. 39 of the Applicant's Bundle of Documents containing the Tender Document and the Technical Evaluation Criteria. He pointed out that the total marks under the Technical Evaluation amounted to 96 marks and not 100 marks. He argued that a bidder was required to score a minimum of 70% and the Applicant was therefore erroneously allocated a total of 67.5% based on the 100% marks.
44. He argued that the 67.5 allocated to the Applicant divided by 96 and multiplied by 100 affords the Applicant a total of 70.3% which was

above the stipulated pass mark of 70% and ought to have progressed for financial evaluation.

45. Counsel pointed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's response to the Request for Review on scoring of the Applicant and submitted that under key personnel, marks ought to be awarded for the Principle Officer who was required to have a degree in commerce insurance option/economics/business statistics/actuarial science or its equivalent. He argued that the Applicant was awarded marks under the requirement for the Principle Officer to have a Master degree because the Principle Officer had a bachelor's degree. He pointed to the professional qualifications which the Applicant was also awarded marks under and indicated that these were competencies out of certificates which were done because of the Applicant's Principle Officer's Bachelor Degree in Computer Science which was not awarded any marks.

46. Counsel argued that Computer Science entails mathematics and statistics and the Applicant ought to have been awarded one mark under this category being an equivalent degree and there being no clarifications issued by the Procuring Entity on what was equivalent to the stipulated degree options.

47. With regard to awarding of marks under the Head of Medical or its Equivalent, counsel submitted that for experience in the industry of over 10 years, a bidder was required to score 2 marks and the

Applicant at page 584 had shown that its officer began her work in the industry in the year 2006 and at the time of submission of bids, the said officer had an experience of 17 years and it was erroneous for the Procuring Entity to score the Applicant 1.5 marks instead of 2 marks.

48. With regard to awarding of marks under Accounts Manager or its equivalent, counsel submitted that the Applicant's personnel under this head had over 10 years' experience and as such, the Applicant was erroneously awarded 1.5 marks instead of 2 marks.
49. With regard to the requirement for Similar Services under Technical Requirement No. 11, counsel submitted that the Procuring Entity denied the Applicant 5 marks having introduced the word each which was not there during the invitation for bidders to submit their bids. Counsel argued that bidders were required to submit evidence of having completed at least 3 similar assignments in the last three years of at least Kshs. 240,000,000/- and in response to this requirement, the Applicant submitted 5 similar assignments which were beyond Kshs. 240M because what was expected was not for each contract to be at least Kshs. 240M but the summation of all contracts to be Kshs. 240M.
50. Counsel further pointed out that the word 'each' used under Technical Requirement 11(a) came belatedly after submission of tenders since the four documents listed thereunder were required to be attached for

a bidder score 4 marks leading the Applicant to lose out on the same under this category.

51. Mr. Omayio submitted that in view of the lost marks highlighted and basing the total marks at 96 marks, the Applicant scored 84% and ought to have progressed for financial evaluation. He reiterated that under category under Requirement No. 11, the Applicant attached various contract, recommendation and notification letters from page 887 of the Applicant's Bundle and policy documents from pages 945 in compliance to this requirement.

52. With regard to Technical Requirement No. 2 at page 30 and Requirement No. 6 at page 31 of the Tender Document, counsel submitted that the Applicant complied with respect to one client and ought to have been considered for pro-rated scoring

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

**1<sup>st</sup> and 2<sup>nd</sup> Respondent's submissions on their preliminary objection and the substantive issues raised in the instant Request for Review**

54. In his submissions, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mr. Kirima relied on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' documents filed before the Board including together with confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act

55. Mr. Kirima in support of the Preliminary Objection by the 3<sup>rd</sup> Respondent associated himself with submissions made on the same. With regard to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's preliminary objection, he submitted that the instant Request for Review was time barred having been filed on 28<sup>th</sup> June 2024 which was outside the 14 days' statutory period stipulated under Section 167(1) yet the Applicant was notified of the outcome of evaluation of its tender on 15<sup>th</sup> June 2024.
56. With regard to the substantive issues in the Request for Review, Mr. Kirima referred the Board to averments made in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Statement against the Application for Request for Review sworn on 5<sup>th</sup> July 2024 by Evans Kipchumba Kiprotich which categorically points out how the Applicant was scored. He reiterated that the scoring was properly done and the Applicant has not demonstrated that it provided what was required and ought not to have proceeded beyond the mandatory stage of evaluation.
57. Mr. Kirima referred the Board to paragraph 15 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's response and submitted that the Applicant's Power of Attorney did not meet the legal requirements of registration under the Registration of Documents Act and as such the Applicant ought to not have progressed beyond the Mandatory Evaluation stage. He further submitted that the Applicant's documents filed on 28<sup>th</sup> June 2024 are not sequentially serialized as pages appear as 494, 493 & 495, 510 & 511, 645, 647 & 646, 900, 902, 903, 901 & 904 and page 404

paginated in red is a bank document and therefore the whole application is not a replica of the original bidding document and the bid bond was not attached to the bid document.

58. Ms. Kirima urged the Board to dismiss the instant Request for Review with costs.

### **3<sup>rd</sup> Respondent's Rejoinder to its Preliminary Objection and submissions on the substantive issues in the Request for Review.**

59. In a rejoinder to the 3<sup>rd</sup> Respondent's Preliminary Objection, Mr. Gachuba submitted that the 3<sup>rd</sup> Respondent did set out the law relied upon in the preliminary objection which is provided under Regulation 209 of Regulations 2020 which makes it lawful for any party to file a preliminary objection. On the question of authorization, counsel referred to the provisions of Section 37(2) and 40 of the Companies Act and reiterated that there was no demonstration by the Applicant that the same had been complied with.

60. He further reiterated that the Board lacks jurisdiction to hear the matter by virtue of Section 65(3) of the Act read with ITT 27(3) and 43.1 of the Tender Document. He argued that the credibility of the 3<sup>rd</sup> Respondent's Affidavit was not disputed and that the instant Request for Review did not meet the requirements under Regulation 203 of Regulations 2020.

61. Counsel submitted that the Applicant did not demonstrate that it had suffered or risked suffering loss and damage and that the preliminary objection was based on pure points of law and what the 3<sup>rd</sup> Respondent did was to refer the Board to the relevant material before it since a preliminary objection must be based on proceedings before the Board.

62. With regard to the substantive issues raised in the Request for Review, Mr. Gachuba referred the Board to the 3<sup>rd</sup> Respondent's response and submitted that the fact that the Applicant was allocating itself marks shows that it ought to have approached the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to clarify the marks contested.

63. Counsel submitted that the Tender Document was specific on seeking clarifications and it is not clear where the Applicant got the marks it is allocating itself and only the Evaluation Committee can expound on marks allocated. He further submitted that there was no basis for the alleged unfair treatment and the Applicant simply failed to exercise its rights as stipulated under the Tender Document and are mistaken as to having been treated unfairly.

64. He urged the Board to dismiss the Request for Review with costs.

### **Applicant's Rejoinder**

65. In a rejoinder, Mr. Omayio referred the Board to Section 57 of the Interpretation and General Provisions Act which provides for

computation of time and submitted that going by the same, the Request for Review was filed within the stipulated statutory timelines of 14 days.

66. On the issue pertaining the Applicant's Power of Attorney, counsel submitted that there was no requirement for the same to be registered hence the reason why the Evaluation Committee progressed the Applicant's bid to the Technical Evaluation stage. He also reiterated that the Applicant's bid was chronologically serialized.
67. On the issue of award of marks, counsel submitted that based on the marks indicated in the Tender Document, a bidder was in a position of knowing how many marks it would be allocated based on documents it had submitted.
68. Counsel made reference to Articles 10 and 227 of the Constitution which the Procuring Entity was required to adhere to in the procurement process and reiterated that the total marks having not totaled to a 100, the pass mark of 70% ought to be based on the correct total marks.
69. Mr. Omayio submitted that the Applicant was not under any obligation to seek clarifications as insinuated by Mr. Gachuba and had the liberty of seeking a debrief or to approach the Board by lodging a request for review. He further submitted that the Applicant had demonstrated prejudice suffered in view of the fact that its tender price was the

lowest and ought to be considered under the financial evaluation stage.

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

### **CLARIFICATIONS**

71.When asked by the Board to clarify whether the issue of serialization was given as a reason for disqualification of the Applicant's bid document in the Applicant's notification letter, Mr. Kirima submitted that the same was not captured as a reason for disqualification.

72.When asked to clarify whether the total marks amounted to 96 and not 100, Mr. Kirima submitted that the total score amounted to 100 marks and in any case, the scoring criteria was specific to each requirement under the Technical Evaluation Criteria.

73.When asked to clarify whether the Degree in Computer Science was equivalent to those stipulated under Technical Requirement No. 1 and what would be considered as equivalent, Mr. Kiprotich, the Procuring Entity's Supply Chain Manager submitted that the equivalent degree had to relate to the subject matter under discussion being the insurance sector hence the options given and anything outside this bracket would not be considered and was not open for further interpretations.

74. When asked to expound on whether the Request for Review as filed was time barred, Mr. Kirima submitted that according to his calculations, the same ought to have been filed by 27<sup>th</sup> June 2024 when the 14 days lapsed.
75. When asked to clarify whether the contracts required under Technical Requirement No. 11 each had to be for Kshs. 240 M or for all to total to Kshs. 240M, Mr. Kirima submitted that each contract had to be for at least Kshs. 240M in view of the fact that requiring all to amount to Kshs. 240M would be lower than the insurance required under the subject tender.
76. When asked to explain to the Board whether the Applicant sought clarification on provisions under Technical Requirement No. 11, Mr. Omayio submitted that the provision was clear to the Applicant in view of the construction of the sentence therein and there was no need for the Applicant to seek any clarification on the same.
77. When asked to expound on whether paragraph 12 of the Request for Review was close to the Applicant pleading having suffered loss and damage, Mr. Gachuba submitted that the Applicant was not clear since it had not clearly stipulated the amount it stood to lose and only talks of its tender being the least quoted hence did not meet the requirements under Section 167(1) of the Act.

78. At the conclusion of the hearing, parties were also informed that the instant Request for Review having been filed on 28<sup>th</sup> June 2024 was due to expire on 19<sup>th</sup> July 2024 and that the Board would communicate its decision on or before 19<sup>th</sup> July 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

- i Whether the 3<sup>rd</sup> Respondent's Preliminary Objection as filed is proper.**
- ii Whether the 3<sup>rd</sup> Respondent's has substantiated its case with respect to the allegation that Mr. John Kimani does not have authority to sign, swear or make statements in support of the instant Request for Review on behalf of the Applicant as deposed in its Affidavit sworn on 15<sup>th</sup> July 2024 by Stephen Lokonyo.**
- iii Whether the Board has jurisdiction to hear and determine the instant Request for Review;**

In determining the third issue, the Board shall make a determination on the following sub-issues:

- a) Whether the instant Request for Review has been instituted within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;*
- b) Whether the Applicant has locus standi before the Board.*

Depending on the determination of the third issue;

- iv Whether the Evaluation Committee evaluated the Applicant's tender submitted in the subject tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.**
- v What orders should the Board grant in the circumstances?**

**Whether the 3<sup>rd</sup> Respondent's Preliminary Objection as filed is proper.**

80. The 3<sup>rd</sup> Respondent lodged a Preliminary Objection dated 10<sup>th</sup> July 2024 objecting to the hearing of the instant Request for Review. This

was filed via email on 11<sup>th</sup> July 2024 and a physical copy filed on 12<sup>th</sup> July 2024. The grounds of the 3<sup>rd</sup> Respondent's Preliminary Objection are that the Request for Review (a) is fatally incompetent having been filed without a resolution of the Applicant's Board of Directors authorizing the filing and having been drawn, executed and filed by Masaki & Gathu Advocates LLP without any written authorization contrary to Section 37(2) and 40 of the Companies Act, 2015, (b) is fatally incompetent having been sworn by John Kimani without any written authorization of the Applicant pursuant to Section 37(2) and 40 of the Companies Act, 2015, (c) is time barred by virtue of Section 167(1) of the Act, Section 6 of the Fair Administrative Action Act and ITT 27.3 of the Tender Document, (d) is incompetent by virtue of Regulation 203(1)(2)(a) of Regulations 2020, and (e) is incompetent by virtue of Section 167(1) of the Act for failure to demonstrate the loss or damage that the Applicant has suffered or risks suffering having been disqualified at the Technical Evaluation stage.

81. In response to the 3<sup>rd</sup> Respondent's Preliminary Objection, the Applicant filed on 12<sup>th</sup> July 2024 an Affidavit/Statement in Further of Support of Request for Review sworn on 12<sup>th</sup> July 2024 by John Kimani. During the hearing, Mr. Omayio argued that the 3<sup>rd</sup> Respondent's Preliminary Objection was not proper since it was not based on pure points of law.

82. In a rejoinder, Mr. Gachuba argued that the 3<sup>rd</sup> Respondent's Preliminary objection was proper having been based on pure points of

law and having been filed in line with Regulation 209 of Regulations 2020.

83.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."***

84.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."***

85.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.

86. Having carefully studied the Board's records in the instant Request for Review, we note that the Board Secretary vide Hearing Notice dated 5<sup>th</sup> July 2024 initially notified parties that the matter would be heard on 11<sup>th</sup> July 2024. Parties were later on notified vide Hearing Notice dated 8<sup>th</sup> July 2024 that hearing of the instant Request for Review had been rescheduled to 16<sup>th</sup> July 2024. In view of the foregoing, any party who intended to object to the instant Request for Review ought to have filed its preliminary objection within three days from 8<sup>th</sup> July 2024, being the proper date of notification of when the instant Request for Review was slated to be heard.

87. In our considered view, the 3<sup>rd</sup> Respondent having filed its preliminary objection on 11<sup>th</sup> July 2024 filed the same within the timelines stipulated under Regulation 209(1) of Regulations 2020.

88. At this juncture, the Board is called upon to determine whether the 3<sup>rd</sup> Respondent's Preliminary Objection as filed is proper and based on points of law.

89. We note that one of the issues in dispute raised as a ground of objection in the 3<sup>rd</sup> Respondent's Preliminary Objection in the instant Request for Review pertains to whether or not Mr. John Kimani was authorized to swear and make any statements on behalf of the Applicant in support of the instant Request for Review.

90. We are therefore called upon to determine whether any of the evidence relating to authorization of Mr. John Kimani to swear and make statements/affidavits on behalf of the Applicant in support of the instant Request for Review as presented in these proceedings is contested to render the Preliminary Objection by the 3<sup>rd</sup> Respondent as not proper.

91. The parameters of consideration of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits or otherwise of the Preliminary Objection by the 3<sup>rd</sup> Respondent were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

***"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or***

***a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

92. At page 701 Sir Charles Newbold, P added:

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”***

93. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

94. Turning to the circumstances of the instant Request for Review, we note that on 12<sup>th</sup> July 2024, the Applicant filed an Affidavit/Statement in Further of Support of Request for Review sworn by John Kimani on 12<sup>th</sup> July 2024 wherein he deposes that he is duly authorized to sign all affidavits and statements in support of the instant Request for Review and that the Applicant’s Advocates on record were duly

authorized to institute the instant Request for Review as evidenced by an Authority to Sue dated 25<sup>th</sup> June 2024 sealed by the Applicant in the presence of its Director. On the other hand, the 3<sup>rd</sup> Respondent filed an Affidavit sworn on 15<sup>th</sup> July 2024 by one Stephen Lokonyo where he largely contests to Mr. John Kimani's authorization to sign all affidavits and statements in support of the instant Request for Review by virtue of a telephone conversation had with Mr. John Kimani who informed him, *inter alia*, that he was not aware of the instant Request for Review, he had ceased being the Applicant's Principal Officer on 15<sup>th</sup> June 2024 and had been on leave since 25<sup>th</sup> June 2024.

95. Having established that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by rival party, it is our considered view that the issue pertaining authorization of Mr. John Kimani to sign all affidavits and statements in support of the instant Request for Review is in contest and as such, the Board is required to inquire into evidence to ascertain whether or not Mr. John Kimani is authorized to sign any affidavits and statements in support of the instant Request for Review.

96. In the circumstances, the Board finds that the 3<sup>rd</sup> Respondent's Preliminary Objection dated 10<sup>th</sup> July 2024 as filed is proper save for ground of objection No. 3 of the Preliminary Objection dated 10<sup>th</sup> July 2024 which does not constitute a proper ground for a preliminary objection as it is incapable of disposing the instant Request for Review having noted that a preliminary objection raises a pure point of law

which is usually on the assumption that all the facts pleaded by the other side are correct.

**Whether the 3<sup>rd</sup> Respondent's has substantiated its case with respect to the allegation that Mr. John Kimani does not have authority to sign, swear or make statements in support of the instant Request for Review on behalf of the Applicant as deponed in its Affidavit sworn on 15<sup>th</sup> July 2024 by Stephen Lokonyo.**

97. The 3<sup>rd</sup> Respondent in an Affidavit sworn on 15<sup>th</sup> July 2024 by Mr. Stephen Lokonyo contends, *inter alia*, that (a) subsequent to the filing of the 3<sup>rd</sup> Respondent's response and Preliminary Objection, he had a telephone conversation on 13<sup>th</sup> July 2024 with Mr. John Kimani of Kenya Alliance Insurance Company Limited who is well known to him, (b) Mr. John Kimani informed him that he was not aware of the instant Request for Review which took him by surprise since the Statement in Support of the Request for Review was sworn by him on 26<sup>th</sup> June 2024 and the statement in Further Support of the Request for Review was also sworn by him on 12<sup>th</sup> July 2024, (c) Mr. John Kimani informed him that he ceased being the Principal Officer of Kenya Alliance Insurance Company Limited on 15<sup>th</sup> June 2024 and has no authority to represent the Applicant in the instant Request for Review there being a substantive Principal Officer by the name Mercy Ndegwa, (d) Mr. John Kimani has been on leave since 25<sup>th</sup> June 2024, (e) Mr. John Kimani did not appear before one Mr. Abel B. C. Asuma Commissioner for Oaths on 26<sup>th</sup> June and on 12<sup>th</sup> July 2024 to swear the Supporting

Statements in the instant Request for Review, and (f) Mr. John Kimani and Mr. Abel B. C. Asuma ought to be summoned pursuant to Section 17 of the Oaths and Statutory Declarations Act to appear before the Board during the hearing to give evidence regarding the lawfulness, veracity and propriety of the Statements made in support of the instant Request for Review on behalf of the Applicant.

98. It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

***"107. Burden of proof***

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. Incidence of burden***

***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***109. Proof of particular fact***

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

**111.....**

**112. Proof of special knowledge in civil proceedings**

*In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."*

99. Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies on the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

100. Courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as

Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

***"[47] It is a timeless rule of the common law tradition <sup>3</sup>/<sub>4</sub> Kenya's juristic heritage <sup>3</sup>/<sub>4</sub> and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.***

***[48] .....***

***[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

***[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition***

**No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:**

**"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."**

**[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.**

**[52] .....**

**[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1<sup>st</sup> respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.**

**.....**

**[64] ..... The petitioners having failed to discharge their evidential burden, the plea of unfair process stood**

***unproven, and there was no material before the Court to show unfair determination. ....”***

101. The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its burden of proof (initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

102. We are also guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial***

*legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].”*

103. Turning to the circumstances in the instant Request for Review, we note that the aforementioned allegations by the 3<sup>rd</sup> Respondent are entirely hinged on Mr. Stephen Lokonyo’s alleged telephone conversation with Mr. John Kimani on 13<sup>th</sup> July 2024. The 3<sup>rd</sup> Respondent adduced no evidence before the Board whatsoever to support any of its allegations let alone making an application for Mr. John Kimani and Mr. Abel B. C. Asuma to appear at the hearing for purposes of cross-examination and re-examination by counsels on the 3<sup>rd</sup> Respondent’s allegations.

104. This Board differently constituted in **PPARB Application No. 3 of 2023 Harleys Limited v The Accounting Officer, Kenya Ports Authority & Another** issued directions on cross-examination of Mr.

Daniel Amuyunzu at the hearing of the Request for Review on contents of his Affidavit in Support of the Memorandum of Response filed therein. In our considered view, nothing prevented the 3<sup>rd</sup> Respondent from seeking a similar application for cross-examination of Mr. John Kimani and Mr. Abel B. C. Asuma so as to support its case herein.

105. As such, the 3<sup>rd</sup> Respondent having failed to adduce any evidence in support of its allegations, the Board cannot assess whether or not the evidential burden of proof has shifted to the Applicant for it to disprove the 3<sup>rd</sup> Respondent's allegation. The 3<sup>rd</sup> Respondent has therefore failed to discharge the burden of proof of proving that Mr. John Kimani was not authorized to sign all affidavits and statements in support of the instant Request for Review.

106. Notably, Mr. Stephen Lokonyo in his Affidavit sworn on 15<sup>th</sup> July 2024 depones at paragraph 1 that he is **the Applicant's Principal Officer and Managing Director** who is duly authorized and conversant with the facts in the instant Request for Review and is therefore competent to swear the said affidavit by virtue of an Authority annexed and marked as Exhibit "SL1". A close look at the Authority to Swear Affidavit marked as "SL1" reveals that a Resolution was passed by the 3<sup>rd</sup> Respondent authorizing Stephen Lokonyo to plead and swear all necessary affidavits and pleadings on behalf of the 3<sup>rd</sup> Respondent. A clear discrepancy emerges as to capacity of Mr. Stephen Lokonyo which leaves the Board questioning his competence to swear the aforementioned affidavit in view of the fact that he depones that he is

the Applicant's Principal Officer and Managing Director yet an Authority to Swear made issued in support of his averments is by the 3<sup>rd</sup> Respondent and not the Applicant.

107. In view of the foregoing, we find that the 3<sup>rd</sup> Respondent has failed to substantiate its case with respect to the allegation that Mr. John Kimani does not have authority to sign, swear or make statements in support of the instant Request for Review on behalf of the Applicant as deponed in its Affidavit sworn on 15<sup>th</sup> July 2024 by Stephen Lokonyo.

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

108. 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 doing anything concerning such a matter.

109. 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.”*

110. 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.”***

111. 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."***

112. 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."***

113. 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...."***

114. 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."***

115. 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.

116. 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."***

117. 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."***

118. 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.

119. 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.***

120. 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.

121. 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) .....***

122. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

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

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

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

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

123. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

124. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would

be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

**a) As to whether the instant Request for Review has been instituted within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;**

125. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend at ground 3 of its Statement Against the Application for Request for Review sworn on 5<sup>th</sup> July 2024 that the Request for Review offends the provisions of Section 167 of the Act read with Regulation 203 and the Fourteenth Schedule of Regulations 2020 for having been filed outside the statutory period of 14 days of notification of award. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mr. Kirima submitted that the Applicant having been notified of the outcome of evaluation of its bid document on 15<sup>th</sup> June 2024 ought to have lodged the instant Request for Review on or before 27<sup>th</sup> June 2024 and by filing the instant Request for Review on 28<sup>th</sup> June 2024, it was time barred.

126. In response, counsel for the Applicant, Mr. Omayio submitted that it was not in contest that the Applicant was served with the letter of Notification of Intention to Award dated 14<sup>th</sup> June 2024 on the evening

of 15<sup>th</sup> June 2024, being a Saturday. He invited the Board to consider the provisions of Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA") in computing time within which the Request for Review ought to have been filed before the Board.

127. The Board notes that it is not in contest that the Applicant was served with its letter of Notification of Intention to Award the subject tender dated 14<sup>th</sup> June 2024 on 15<sup>th</sup> June 2024. In computing time when the Applicant ought to have lodged the instant Request for Review, we are guided by Section 57 of the IGPA which provides as follows:

***"57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”***

128. In computing time when the Applicant ought to have sought administrative review before the Board being aggrieved by the decision of the Procuring Entity communicated on 15<sup>th</sup> June 2024, the 15<sup>th</sup> of June 2024 is excluded pursuant to Section 57(a) of the IGPA being the date the Applicant learnt of the outcome of evaluation of its tender. This means that 14 days started running from 16<sup>th</sup> June 2024 and lapsed on 29<sup>th</sup> June 2024. In essence, the Applicant had between 16<sup>th</sup> June 2024 and 29<sup>th</sup> June 2024 to seek administrative review before the Board with respect to the decision of the Procuring entity as notified in the subject tender.

129. In the circumstances, we find and hold that the instant Request for Review was filed within the statutory timelines of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of

Regulations 2020. Accordingly, this ground of objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fails.

**b) As to whether the Applicant has *locus standi* before the Board;**

130. The 3<sup>rd</sup> Respondent contends at grounds 1,2,6, and 7 of its Preliminary Objection dated 10<sup>th</sup> July 2024 that the instant Request for Review (a) is fatally incompetent having been filed without a resolution of the Applicant's Board of Directors authorizing the filing and having been drawn, executed and filed by Masaki & Gathu Advocates LLP without any written authorization contrary to Section 37(2) and 40 of the Companies Act, 2015, (b) is fatally incompetent having been sworn by John Kimani without any written authorization of the Applicant pursuant to Section 37(2) and 40 of the Companies Act, 2015, (c) is incompetent by virtue of Regulation 203(1)(2)(a) of Regulations 2020, and (d) is incompetent by virtue of Section 167(1) of the Act for failure to demonstrate the loss or damage that the Applicant has suffered or risks suffering having been disqualified at the Technical Evaluation stage.

131. In response, the Applicant contends at paragraphs 4 and 5 of its Affidavit/Statement in Further of Support of Request for Review sworn on 12<sup>th</sup> July 2024 by John Kimani that the Applicant's Board resolved to appoint the Applicant's firm on record to institute the instant

Request for Review and authorized Mr. John Kimani to sign all affidavits and statements in support of the instant Request for Review. In support of its averments, the Applicant annexed as exhibit marked "No-5" an Authority to Institute the instant Request for Review

132. We are cognizant of the provisions of Regulation 203(1) and (2)(a) &(b) of Regulations 2020 which provides as follows:

***"(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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations.***

***(b) be accompanied by such statements as the applicant considers necessary in support of its request***

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

133. With regard to whether the instant Request for Review as filed is fatally defective for being accompanied by a Statement that is not signed in line with Section 37(2) of the Companies Act and without authorization to file the Request for Review and sign the accompanying statement as provided under Regulation 203 (2)(b), we note that in **PPARB No. 34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologoes Limited v Accounting Officer Kenya Pipeline Company Limited & another**, the Board held as follows with regard

to the import of provisions under Regulation 203 (2)(b) of Regulations 2020:

"....."

***It is the Board's view that the use of the word 'necessary' in Regulation 203 (2)(b) of Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review....***"

134. In essence, a statement in support of a request for review ought to be made by an individual authorized to issue the same and one who possesses the facts and information contained therein.

135. We further note that Section 37(2) of the Companies Act provides that:

**"A document is validly executed by a company if it is signed on behalf of the company-  
(a) by two authorized signatories; or  
(b) by a director of the company in the presence of a witness who attests the signature."**

136. In essence, for a company to be deemed as having validly executed a document, the said document ought to be signed on behalf of the company by either two authorized signatories or by a director of the company in the presence of a witness who attests the signature.

137. Turning to the circumstances in the instant Request for Review, an Affidavit/Statement in Further of Support of Request for Review was sworn on 12<sup>th</sup> July 2024 by Mr. John Kimani who depones at paragraphs 4 and 5 as follows:

**4. THAT I am aware that the Applicant's Board did resolve to appoint the firm of Masaki & Gathu Advocates LLP to institute the instant Request for Review and that in the said resolution of the 25<sup>th</sup> June 2024; I was dully appointed to sign all the affidavits and statements in support of this instant applications. (See attached Annexure marked N0-5 the Authority to Institute the proceedings)**

**5. THAT I have been informed by our advocate on record that they inadvertently forgot to annex the said**

***authority to my initial Affidavit in support of the Request for review Application. I can confirm that there was indeed a resolution to commence the instant proceedings by the Applicant.***

138. From the above, we note that the Applicant annexed an Authority to Institute the proceedings as exhibit marked as "No-5" which reads in part as follows:

**"AUTHORITY TO SUE**

***KENYAN ALLIANCE INSURANCE CO. LIMITED of P.O. Box 30170-00100, hereby resolve to instruct the firm of MASAKI & GATHU ADVOCATES LLP to institute a Request for Review proceedings before the PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD (PPARB) and give authority to JOHN KIMANI, to sign all pleadings, affidavits, witness statements to be undertaken before the Board and subsequently before the Honourable Court.***

***DATED at NAIROBI this 25<sup>th</sup> June 2024***

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

139. It is not in dispute that the above Authority to Sue dated 25<sup>th</sup> June 2024 was filed after the instant Request for Review had been lodged with the Board on 28<sup>th</sup> June 2024. In establishing whether failure by the Applicant to file on 28<sup>th</sup> June 2024 its Board Resolution authorizing

Mr. John Kimani and the firm of Masaki & Gathu Advocates LLP to institute the instant Request for Review renders it as fatally defective and incompetent, we are guided by the holding by the High Court in **Republic v Registrar General & 13 Ors (2005) eKLR** where Justice Kimaru held:

***"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing.***

140. We are also cognizant of the provisions of Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

***"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."***

141. This Board 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") held as follows:

*"This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. We take cognizance of the holding by Justice Odunga in Leo Investments Ltd V Trident Insurance Company Limited (2014) eKLR which referred to the holding of Hewett, J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000 with regard to the necessity for a company resolution to back the institution of suits and held as follows:*

*"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute*

**proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.**

**Further, in Republic v Registrar General & 13 Ors (2005) eKLR Justice Kimaru held:**

**"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing."**

***In essence, it is a mandatory requirement that there must be express authority for any litigation by an incorporated company to be instituted. Lack of such authority is not merely procedural or technical issue as it goes to the roots of the operations of a company which can only act through its authorized agents. The actions of the authorized organs of the company binds the company and it is critical to establish the bona fide parties holding themselves out as acting on behalf of corporate entities. From the holding by Justice Kimaru above, in the Registrar General case, we find that such resolution by a company's directors authorizing a signatory to act on its behalf may be filed at any time before the suit is fixed for hearing. As such, it is our***

***considered view that the Applicant's had an opportunity to ratify its position and file a resolution authorizing Edwin Wachira to act on its behalf in the instant Request for Review as a signatory to institute the instant Request for Review and to swear the affidavits in support of the Request for Review on its behalf before this matter proceeded for hearing having been notified well in advance of the slated hearing date.***

***Consequently, we find that the sworn Statement of Support of the Request for Review is fatally defective and bad in law as the same was made contrary to Regulation 203 (2)(b) of Regulations 2020 for having been executed contrary to section 37(2) of the Companies Act."***

142. In the Toddy case, the Board recognized that it does have a duty to do substantive justice to parties while at the same time to consider if a matter before it is properly filed. It also took note of the necessity for a company resolution to back institution of suits as lack of such authority is not a mere procedural technicality but goes to the root of operations of a company which acts through authorized agents whose actions binds the company. The Board further held that such resolutions may be filed at any time before a matter proceeds for hearing.

143. The Board has on numerous occasions had the opportunity to hear and determine reviews where board resolutions have been filed after institution of a request for review and parties allowed to ratify their position prior to hearing of the matter by filing the said resolution where an objection has been raised. Such was the case in **PPARB Application No. 111 of 2023 Damey Construction Company Limited v Kenya Pipeline & Another** dated 18<sup>th</sup> December 2023 and filed on 19<sup>th</sup> December 2023 (hereinafter referred to as “the Damey Construction case”) where the Board in determining whether the Applicant had locus standi to institute the review proceedings established that **a Board Resolution dated 8<sup>th</sup> December 2023** had authorized the Applicant to institute the review proceedings and as such found at paragraphs 94 and 95 as follows:

*"Turning to the circumstance in the instant Request for Review, the Board Resolution having been furnished to the Board prior to the scheduled hearing of the matter on 3<sup>d</sup> January 2024 at 12.30 p.m. is enough proof of express authorization by the Applicant's joint venture partners, Murad Electromed LLC and Tingashare Ltd, for the Applicant to institute the proceedings herein, as a tenderer, challenging the decision of the Respondents in the subject tender.*

*As such, the Board finds that the Applicant is a recognized party before the Board under Section 167(1) of the Act read with Section 170 of the Act and has locus*

***standi to bring the instant review before the Board. Accordingly, this ground of objection by the Respondents fails.”***

144. In view of the foregoing, we are of the considered view that the firm of Masaki & Gathu Advocates LLP were duly authorized to institute the instant Request for Review and that Mr. John Kimani was duly authorized by the Applicant to swear, sign and make all statements in support of the instant Request for Review in line with Regulation 203(2)(b) of Regulations 2020 and Section 37(2) and 40 of the Companies Act. Accordingly, this ground of objection by the 3<sup>rd</sup> Respondent fails.

145. With regard to whether the instant Request for Review is incompetent by virtue of Section 167(1) of the Act for failure to demonstrate the loss or damage that the Applicant has suffered or risks suffering having been disqualified at the Technical Evaluation stage, this Board is cognizant of the holding in the James Oyondi case where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no locus standi before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

**"That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;**

**"(1) subject to the provisions of this part, a candidate or a tender, 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."**

**It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review**

**applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.**  
[Emphasis]

146. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

147. Having carefully perused the Request for Review dated 26<sup>th</sup> June 2024, we note that the Applicant pleaded at paragraph 12 as follows:

***"12. As a result of the conduct of the Procuring Entity aforesaid, the Applicant has suffered and stands to suffer monumental financial loss and damage unless the***

***decision of the Procuring Entity is annulled by this Board.”***

148. From the foregoing, it is clear that the Applicant at the very least claimed that it has suffered and stands to suffer monumental loss and damage due to the decision of the Procuring Entity. This is in itself an express claim and demonstration by the Applicant that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition by the 3<sup>rd</sup> Respondent fails.

149. In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

**Whether the Evaluation Committee evaluated the Applicant’s tender submitted in the subject tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.**

150. The Applicant contends the manner in which its bid in the subject tender was evaluated leading to its disqualification at the Technical Evaluation stage. It is the Applicant's case that the Evaluation Committee inadvertently fell into error when it scored the Applicant 67.5% instead of 85% which would have been above the 70% required to progress the Applicant further into the Financial Evaluation stage leading it to emerge as the successful bidder since its bid had the lowest tender price.

151. We understand the Respondents' response on this issue to be that the Applicant's tender failed to meet the requirements provided in the Tender Document and was non-responsive as stipulated under Section 79(1) of the Act. The Respondent contend that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Constitution and the Act.

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

153. Having considered parties' submissions herein, we note that objective of public procurement is to provide quality goods and

services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

**"227. Procurement of public goods and services**

**(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

- a) .....**
- b) .....**
- c) ..... and**
- d) ....."**

154. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

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

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

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

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

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

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

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

156. We note that the Applicant was notified in a letter of Notification of Intention to Award dated 14<sup>th</sup> June 2024 that its tender was unsuccessful in the subject tender for the reason that:

***"The tenderer scored 67.5% on technical aspect which was below the pass of 70%."***

157. The Tender Document provided for Technical Evaluation Criteria at page 29 to 31 of the Tender Document as follows:

**STAGE TWO: TECHNICAL EVALUATION**

<i>NOS</i>	<i>ITEM</i>	<i>CRITERIA</i>	<i>MARKS</i>
<i>1.</i>	<i>Key Personnel</i>	<i>Provide signed CV and Certified Academic and Professional qualifications certificates for at least five (5) key personnel relevant to the Tender under consideration.</i>	

NOS	ITEM	CRITERIA	MARKS
		<p><b>(i) Principle Officer.(As per IRA)</b></p> <p><b>(a) Master and Degree from any of the following fields; Finance, Marketing, B.Com, Finance or Actuarial Science.....2 marks</b></p> <p><b>(b) Bachelor's degree in commerce insurance option/Economics/Business/Statistics / actuarial science or its equivalent.....1 mark</b></p> <p><b>(c) Possess the following qualifications - ACII/CII/AIIK/IK professional Qualifications.....1 mark</b></p> <p><b>(d) 15 years' experience in insurance industry.....2 mark</b></p> <p><b>(e) CEO as per IRA requirement;.....1 marks</b></p> <p><b>(f) Appointment letter from IRA.....0.5 mark</b></p> <p><b>(g) Valid IIK Association of Actuarial Membership.---0.5 mark</b></p> <p><b>(ii) Quality Assurance officer or equivalent</b></p> <p><b>(a) Bachelor's Degree in commerce economics/Business/marketing/actuarial science/any medical field-Doctor/clinical officer/Nursing officer/...1 mark</b></p> <p><b>(b) Registered with professional body.....1 marks</b></p> <p><b>(c) Valid practicing license.....0.5 marks</b></p> <p><b>(d) Five(5) years' experience in insurance.....1 marks</b></p> <p><b>(iii) Head of Medical or its equivalent</b></p> <p><b>(a) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</b></p> <p><b>a) ACII/AIIK/CII professional qualifications.....1 mark</b></p> <p><b>b) Valid AIIK Membership.....0.5 mark</b></p> <p><b>c) Experience in the industry</b></p>	<p><b>9marks</b></p> <p><b>3.5 marks</b></p> <p><b>3.5 marks</b></p>

NOS	ITEM	CRITERIA	MARKS
		<ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul> <p>(iv) <i>Head of Medical or its equivalent</i></p> <p>(a) <i>Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</i></p> <p>c) <i>ACII/AIHK/CII professional qualifications.....1 mark</i></p> <p>d) <i>Valid AIHK Membership.....0.5 mark</i></p> <p>e) <i>Experience in the industry</i></p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul> <p>(v) <i>Accounts Manager or its equivalent</i></p> <p>(a) <i>Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</i></p> <p>(b) <i>CPA(K)ACII/AIHK/CII professional qualifications.....1 mark</i></p> <p>c) <i>Valid AIHK Membership.....0.5 mark</i></p> <p>d) <i>Experience in the industry</i></p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> </ul>	<p>3.5 marks</p> <p>3.5 marks</p>

<i>NOS</i>	<i>ITEM</i>	<i>CRITERIA</i>	<i>MARKS</i>
		<ul style="list-style-type: none"> <li>• <i>Over 10 years' experience.....2 marks</i></li> </ul>	
2	<i>Clientele</i>	<i>Submit recommendations and reference letters from at least from five (5) corporate clients for provision of Medical Insurance cover of annual average gross premium of Kshs.300,000,000 (attaché evidence of LPO and contract)</i>	8 marks
3.	<i>Data Management</i>	<i>Tenderer to provide information on how it will manage data in casethe tender is successful</i>	3 marks
4	<i>Coverage</i>	<p><i>Provide a country wide list of approved health providers where you have credit facilities (MTRH reserves the right to confirm directly with these providers the existence of credit facilities)</i></p> <ul style="list-style-type: none"> <li>a) <i>1-15 counties.....2 marks</i></li> <li>b) <i>16-30 counties.....3marks</i></li> <li>c) <i>30 counties and above.....5 marks</i></li> </ul>	5 marks
5.	<i>Compliance</i>	<p><i>The tenderer to commit adherence to technical specifications as below provide below :-</i></p> <ul style="list-style-type: none"> <li><i>(i) Outpatient services</i></li> <li><i>(ii) Inpatients services</i></li> <li><i>(iii) Maternity services</i></li> <li><i>(iv) Dental services</i></li> <li><i>(v) Optical services</i></li> </ul>	5 marks
6.	<i>Claim Handling Procedure</i>	<p><i>Proof of claim procedure and turnaround time through at least six (6) cases demonstrating when the claims were made and payment done.....3 marks</i></p> <ul style="list-style-type: none"> <li><i>(i) Valid certified invoices and payment proof of claims for amounts not less than kshs.50,000.....2marks</i></li> <li><i>(ii) Write up for the same claims procedure....2marks</i></li> </ul>	7 marks
7	<i>Claim Settlement</i>	<p><i>Five (5) recommendation letters from Level 6 Hospitals or Private Hospital with bed capacity of over 200, issued within the last three years on credit facility and settlement within 30 days.</i></p> <ul style="list-style-type: none"> <li>• <i>1 recommendation letter.....1 marks</i></li> <li>• <i>2 recommendations letters.....2 marks</i></li> <li>• <i>3 recommendation letters.....3 marks</i></li> <li>• <i>4 recommendation letters.....4 marks</i></li> <li>• <i>5 recommendations letters.....5 marks</i></li> </ul>	5 marks
8	<i>Scheme Administration and quality assurance</i>	<i>Provide on letter head, a detailed plan clearly explaining the Bidder's plan on how to execute the scheme management /Administration</i>	5 marks
9.	<i>Financial</i>	<i>Bidders are required to provide evidence of availability of financial resources to support the resulting contractual</i>	8 marks

<i>NOS</i>	<i>ITEM</i>	<i>CRITERIA</i>	<i>MARKS</i>
		<i>obligations in either form of liquid assets, line of credit or any other financial means. Minimum of Kshs.330,000,000/- shall be required for the tender</i>	
<i>10</i>	<i>Turn over</i>	<i>Bidders are required to provide minimum <u>average annual turnover</u> of Kenya Shillings 825,000,000/- received within the last <u>three</u> years Prorated as 251-350m.....1 marks 351-450m.....2 marks 451-550m.....4 marks 551-650m.....6marks 651-750.....8 marks 751-800.....10 marks. 801-850 and above.....12 marks</i>	<i>12 marks</i>
<i>11</i>	<i>Similar services</i>	<i>Bidders must submit evidence of having completed at least (3) three similar assignments in the last three (3) years of at least Kshs. 240,000,000/-equivalent.  a) That the three (3) contracts with premium of above Kshs.240,000,000 million must attach the following in each; i. Notification letters. ii. Contract Document iii. Recommendation letters iv. Policy Documents.</i>	<i>5marks  4marks</i>
<i>12</i>	<i>Credit worthiness</i>	<i>Current and valid reference letter from firms bank addressed to the CEO MTRH recommending the tender under consideration on the status of his capacity</i>	<i>4 marks</i>
<i>13</i>	<i>Accreditation</i>	<i>Any relevant positive credit ratings from recognized body in Kenya</i>	<i>2 marks</i>
		<b>TOTALS MARKS</b>	<b>100%</b>

**NOTE:** Previous service providers with long overdue pending claims will not be evaluated. Pass marks of 70%

158. We note that according to the Evaluation report, the Applicant was scored as follows:

**STAGE TWO: TECHNICAL EVALUATION**

NOS	ITEM	CRITERIA	MARKS	B3
1.	Key Personnel	<p><b>Provide signed CV and Certified Academic and Professional qualifications certificates for at least five (5) key personnel relevant to the Tender under consideration.</b></p> <p><b>(i) Principle Officer.(As per IRA)</b></p> <p><b>(a) Master and Degree from any of the following fields; Finance, Marketing, B.Com, Finance or Actuarial Science.....2 marks</b></p> <p><b>(b) Bachelor's degree in commerce insurance option/Economics/Business/Statistics / actuarial science or its equivalent.....1 mark</b></p> <p><b>(c) Possess the following qualifications - ACII/CII/AIHK/IHK professional Qualifications.....1 mark</b></p> <p><b>(d) 15 years' experience in insurance industry.....2 mark</b></p> <p><b>(e) CEO as per IRA requirement;.....1 marks</b></p> <p><b>(f) Appointment letter from IRA.....0.5 mark</b></p> <p><b>(g) Valid IHK Association of Actuarial Membership.--0.5 mark</b></p> <p><b>(ii) Quality Assurance officer or equivalent</b></p> <p><b>(a) Bachelor's Degree in commerce economics/Business/marketing/actuarial science/any medical field-Doctor/clinical officer/Nursing officer/...1 mark</b></p> <p><b>(b) Registered with professional body.....1 marks</b></p> <p><b>(c) Valid practicing license.....0.5 marks</b></p> <p><b>(d) Five(5) years' experience in insurance.....1 marks</b></p> <p><b>(iii) Head of Medical or its equivalent</b></p> <p><b>(a) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</b></p>	<p><b>9marks</b></p> <p><b>3.5 marks</b></p> <p><b>3.5 marks</b></p>	<p><b>2</b></p> <p><b>0</b></p> <p><b>1</b></p> <p><b>0</b></p> <p><b>1</b></p> <p><b>0.5</b></p> <p><b>0.5</b></p> <p><b>1</b></p> <p><b>1</b></p> <p><b>0.5</b></p> <p><b>1</b></p> <p><b>1</b></p>

NOS	ITEM	CRITERIA	MARKS	B3
		<p>d) ACII/AIIK/CII professional qualifications.....1 mark</p> <p>e) Valid AIIK Membership.....0.5 mark</p> <p>f) Experience in the industry</p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul> <p>(iv) Head of Medical or its equivalent</p> <p>(a) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</p> <p>f) ACII/AIIK/CII professional qualifications.....1 mark</p> <p>g) Valid AIIK Membership.....0.5 mark</p> <p>h) Experience in the industry</p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul> <p>(vi) Accounts Manager or its equivalent</p> <p>(c) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</p> <p>(d) CPA(K)ACII/AIIK/CII professional qualifications.....1 mark</p> <p>e) Valid AIIK Membership.....0.5</p>	<p>3.5 marks</p> <p>3.5 marks</p>	<p>1</p> <p>0.5</p> <p>1.5</p> <p>0</p> <p>1</p> <p>0.5</p>

<b>NOS</b>	<b>ITEM</b>	<b>CRITERIA</b>	<b>MARKS</b>	<b>B3</b>
		<p><i>mark</i></p> <p><i>f) Experience in the industry</i></p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul>		2
2	<i>Clientele</i>	<i>Submit recommendations and reference letters from at least from five (5) corporate clients for provision of Medical Insurance cover of annual average gross premium of Kshs.300,000,000 (attaché evidence of LPO and contract)</i>	8 marks	0
3.	<i>Data Management</i>	<i>Tenderer to provide information on how it will manage data in casethe tender is successful</i>	3 marks	3
4	<i>Coverage</i>	<p><i>Provide a country wide list of approved health providers where you have credit facilities (MTRH reserves the right to confirm directly with these providers the existence of credit facilities)</i></p> <ul style="list-style-type: none"> <li><i>d) 1-15 counties..... 2 marks</i></li> <li><i>e) 16-30 counties.....3marks</i></li> <li><i>f) 30 counties and above.....5 marks</i></li> </ul>	5 marks	5
5.	<i>Compliance</i>	<p><i>The tenderer to commit adherence to technical specifications as below provide below :-</i></p> <ul style="list-style-type: none"> <li><i>(vi) Outpatient services</i></li> <li><i>(vii) Inpatients services</i></li> <li><i>(viii) Maternity services</i></li> <li><i>(ix) Dental services</i></li> <li><i>(x) Optical services</i></li> </ul>	5 marks	5
6.	<i>Claim Handling Procedure</i>	<p><i>Proof of claim procedure and turnaround time through at least six (6) cases demonstrating when the claims were made and payment done.....3 marks</i></p> <ul style="list-style-type: none"> <li><i>(iii) Valid certified invoices and payment proof of claims for amounts not less than kshs.50,000.....2marks</i></li> <li><i>(iv) Write up for the same claims procedure....2marks</i></li> </ul>	7 marks	0 0 2
7	<i>Claim Settlement</i>	<p><i>Five (5) recommendation letters from Level 6 Hospitals or Private Hospital with bed capacity of over 200, issued within the last three years on credit facility and settlement within 30 days.</i></p> <ul style="list-style-type: none"> <li>• <i>1 recommendation letter.....1 marks</i></li> </ul>	5 marks	5



159. We have studied the Applicant's original tender submitted to the Board by the 1<sup>st</sup> Respondent as part of the confidential documents in respect to the subject tender and note as follows:

**STAGE TWO: TECHNICAL EVALUATION**

NOS	ITEM	CRITERIA	MARKS	B3	Board's Observati
1.	Key Personnel	<p>Provide signed CV and Certified Academic and Professional qualifications certificates for at least five (5) key personnel relevant to the Tender under consideration.</p> <p>(i) Principle Officer.(As per IRA)</p> <p>(a) Master and Degree from any of the following fields; Finance, Marketing, B.Com, Finance or Actuarial Science.....2 marks</p> <p>(b) Bachelor's degree in commerce insurance option/Economics/Business/Statistics / actuarial science or its equivalent.....1 mark</p> <p>(c) Possess the following qualifications - ACII/CII/AIHK/IHK professional Qualifications.....1 mark</p> <p>(d) 15 years' experience in insurance industry.....2 mark</p> <p>(e) CEO as per IRA requirement;.....1 marks</p> <p>(f) Appointment letter from IRA.....0.5 mark</p> <p>(g) Valid IHK Association of Actuarial Membership.--- 0.5 mark</p> <p>(ii) Quality Assurance officer or equivalent</p> <p>(a) Bachelor's Degree in commerce economics/Business/marketing/actuarial science/any medical field-Doctor/clinical officer/Nursing officer/...1 mark</p> <p>(b) Registered with professional body.....1 marks</p>	<p>9marks</p> <p>3.5 marks</p> <p>3.5</p>	<p>2</p> <p>0</p> <p>1</p> <p>0</p> <p>1</p> <p>0.5</p> <p>0.5</p> <p>1</p> <p>1</p> <p>0.5</p>	<p>➤ All ma under Princi Office justific</p> <p>➤ 0 marl as the Degree Comp Scienc not an equiva to the ones stipula</p>

NOS	ITEM	CRITERIA	MARKS	B3	Board's Observati
		<p>(c) Valid practicing license.....0.5 marks</p> <p>(d) Five(5) years' experience in insurance.....1 marks</p> <p>(iii) Head of Medical or its equivalent</p> <p>(a) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</p> <p>g) ACII/AIHK/CII professional qualifications.....1 mark</p> <p>h) Valid AIHK Membership.....0.5 mark</p> <p>i) Experience in the industry</p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul> <p>(iv) Head of Medical or its equivalent</p> <p>(a) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</p> <p>i) ACII/AIHK/CII professional qualifications.....1 mark</p> <p>j) Valid AIHK Membership.....0.5 mark</p> <p>k) Experience in the industry</p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul>	<p>marks</p> <p>3.5 marks</p> <p>3.5 marks</p>	<p>1</p> <p>1</p> <p>1</p> <p>0.5</p> <p>1.5</p> <p>1.5</p>	<p>➤ Ought have scored marks since t Applic at pag 494 to availec proof 1 its person had ov 18 yea experi in the insura indust</p>

NOS	ITEM	CRITERIA	MARKS	B3	Board's Observati
		<p>(vii) Accounts Manager or its equivalent</p> <p>(e) Bachelor's degree in commerce insurance option/Economics/Business/Statistics Actuarial science or its equivalent.....1 marks</p> <p>(f) CPA(K)ACII/AIHK/CII professional qualifications.....1 mark</p> <p>g) Valid AIHK Membership.....0.5 mark</p> <p>h) Experience in the industry</p> <ul style="list-style-type: none"> <li>• 0-2 years' experience.....0.5 marks</li> <li>• 3-5 years' experience.....1 mark</li> <li>• 6-10 years' experience.....1.5 marks</li> <li>• Over 10 years' experience.....2 marks</li> </ul>		0 1 0.5 2	➤ Ought have scored marks since person submit by the page 5 to 504 over 1 years' experi having worke since y 2011.
2	Clientele	Submit recommendations and reference letters from at least from five (5) corporate clients for provision of Medical Insurance cover of annual average gross premium of Kshs.300,000,000 (attaché evidence of LPO and contract)	8 marks	0	Did not comply an pro rated scoring no provided f under this requireme
3.	Data Management	Tenderer to provide information on how it will manage data in casethe tender is successful	3 marks	3	
4	Coverage	Provide a country wide list of approved health providers where you have credit facilities (MTRH reserves the right to confirm directly with these providers the existence of credit facilities)	5 marks	5	
		<p>g) 1-15 counties.....2 marks</p> <p>h) 16-30 counties.....3marks</p> <p>i) 30 counties and above.....5 marks</p>			
5.	Compliance	The tenderer to commit adherence to technical specifications as below provide below :- (xi) Outpatient services (xii) Inpatients services	5 marks	5	

NOS	ITEM	CRITERIA	MARKS	B3	Board's Observati
		(xiii) Maternity services (xiv) Dental services (xv) Optical services			
6.	Claim Handling Procedure	Proof of claim procedure and turnaround time through at least six (6) cases demonstrating when the claims were made and payment done.....3 marks (v) Valid certified invoices and payment proof of claims for amounts not less than kshs.50,000.....2marks (vi) Write up for the same claims procedure....2marks	7 marks	0 0 2	
7	Claim Settlement	Five (5) recommendation letters from Level 6 Hospitals or Private Hospital with bed capacity of over 200, issued within the last three years on credit facility and settlement within 30 days. • 1 recommendation letter.....1 marks • 2 recommendations letters.....2 marks • 3 recommendation letters.....3 marks • 4 recommendation letters.....4 marks • 5 recommendations letters.....5 marks	5 marks	5	
8	Scheme Administration and quality assurance	Provide on letter head, a detailed plan clearly explaining the Bidder's plan on how to execute the scheme management /Administration	5 marks	5	
9.	Financial	Bidders are required to provide evidence of availability of financial resources to support the resulting contractual obligations in either form of liquid assets, line of credit or any other financial means. Minimum of Kshs.330, 000,000/- shall be required for the tender	8 marks	8	
10	Turn over	Bidders are required to provide minimum <u>average</u> annual turnover of Kenya Shillings 825,000,000/- received within the last <u>three</u> years Prorated as 251-350m.....1 marks 351-450m.....2 marks 451-550m.....4 marks 551-650m.....6marks 651-750.....8 marks 751-800.....10 marks. 801-850 and above.....12 marks	12 marks	12	
11	Similar services	Bidders must submit evidence of having completed at least (3) three similar assignments in the last three (3) years of at least Kshs. 240,000,000/-equivalent.	5marks	0	Only one contract i.e County Government Meru submitted & page 556 m this

NOS	ITEM	CRITERIA	MARKS	B3	Board's Observati
		<p>c) That the three (3) contracts with premium of above Kshs.240,000,000 million must attach the following in each;</p> <p>ix. Notification letters.  x. Contract Document  xi. Recommendation letters  xii. Policy Documents.</p>	4marks	0	<p>requiremer and as such Applicant t score 0 mar out of the 5 marks.</p> <p>For the Me County Governmer contract, Applicant t score 1 mar for availing Contract Document.</p>
12	Credit worthiness	Current and valid reference letter from firms bank addressed to the CEO MTRH recommending the tender under consideration on the status of his capacity	4 marks	4	
13	Accreditation	Any relevant positive credit ratings from recognized body in Kenya	2 marks	2	
		<b>TOTALS MARKS</b>	<b>100%</b>	<b>67.5%</b>	We note th the total marks unc this criteri amount to 96% and 1 the stipula 100%

**NOTE: Previous service providers with long overdue pending claims will not be evaluated. Pass marks of 70%**

160. From the foregoing, we note that the total marks under the Technical Evaluation amounted to 96 marks and not 100 marks as indicated and this is what ought to have guided the Evaluation Committee in computation of marks to get a justified score. We also note that the

Applicant was denied marks under Requirement No. 1: Key Personnel – Head of Medical or its equivalent experience in the industry and Accounts Manager or its equivalent experience in the industry. The Applicant however did not comply with the requirement under Key Personnel – Bachelor’s Degree in Commerce, Insurance option/ Economics/ Business/ Statistics/ Actuarial Science or its equivalent since the Degree submitted in Computer Science is not an equivalent of the aforementioned degrees.

161. We also note that the Applicant failed to substantiate its allegation that the word ‘each’ as used under Technical Requirement No. 11 at page 31 of the Tender Document was added later and that it was only required to submit evidence of having completed a least 3 similar assignments in the last three years all amounting to at least Kshs. 240,000,000. The Board notes that under Technical Requirement No. 11, a bidder was required to submit in its bid document 3 similar assignments competed in the last 3 years each amounting to at least Kshs. 240,000,000/- so as to score the stipulated 5 marks. In an attempt to meet this requirement, we note that Applicant submitted 5 recommendation and reference letters as evidence but amongst these only the assignment with County Government of Meru amounted to Kshs. 309,055,287/- and was over and above the stipulated Kshs. 240,000,000/- and as such, the Applicant ought to have been scored at least 1 mark for availing evidence of the same. In the same vein, no prorated scoring was provided for under Technical Requirement No.

2 and 6 at pages 30 and 31 of the Tender Document and the Applicant ought not to be scored on the same.

162. It is not lost to us that during the hearing, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent argued that the Applicant's Power of Attorney was not registered and that the Applicant's bid was not sequentially serialized. Having carefully studied the Tender Document, we note that Mandatory Requirements 10 and 12 provided as follows:

***"10. All pages of the bidder's documents (including attachments) MUST be chronologically serialized.***

.....

***12. Letter from the firm giving authority the person signing the tender to represent the firm (Power of Attorney), without material deviation, reservation, or omission. The document should be duly signed and witnessed."***

163. Our interpretation of the above mandatory requirements is that a bidder was required to submit a Power of Attorney that was duly signed and witnessed. There is no requirement for the same to be registered. Additionally, a bidder was required to serialize its bid document chronologically. Having carefully studied the Applicant's bid document and having compared the same to the 3<sup>rd</sup> Respondent's bid document, we find that the Applicant complied with both Mandatory Requirement NO. 10 and 12 by submitting a duly signed and witnessed Power of Attorney and chronologically serializing its bid document.

164. It is our considered view that the Applicant's bid in the subject tender was not fairly evaluated against the Technical Evaluation Criteria provided at page 29 to 31 of the Tender Document.

165. We are therefore left with the inevitable conclusion and hereby find that the Evaluation Committee failed to evaluate the Applicant's tender submitted in the subject tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.

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

166. We have found that the Board has jurisdiction to hear and determine the instant Request for Review.

167. We have established that the Evaluation Committee failed to evaluate the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we nullify the award in the subject tender and notification letters dated 14<sup>th</sup> June 2024 issued by the 1<sup>st</sup> Respondent and order the 1<sup>st</sup> Respondent to direct the Evaluation Committee to re-admit the Applicant to the Technical Evaluation stage for re-evaluation and make good anything done wrongly taking into consideration the Board's findings in this decision.

168. The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

### **FINAL ORDERS**

169. 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 26<sup>th</sup> June 2024 and filed on 28<sup>th</sup> June 2024:

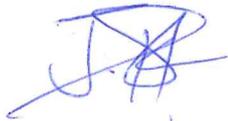
- A. The 3<sup>rd</sup> Respondent's Preliminary Objection dated 10<sup>th</sup> July 2024 and filed on 12<sup>th</sup> July 2024 and the Preliminary Objection contained in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent Statement Against the Application for Request for Review sworn on 5<sup>th</sup> July 2024 by Evans Kipchumba Kiprotich and filed on even date be and are hereby dismissed.**
  
- B. The Notification of Intention to Award issued to the 3<sup>rd</sup> Respondent dated 14<sup>th</sup> June 2022 with respect to Tender No. MTRH/T/86/2023-2024 for Provision of Medical Insurance Cover, be and is hereby nullified and set aside.**
  
- C. The Notifications of Intention Award addressed to the unsuccessful tenderers including the Applicant dated 14<sup>th</sup> June 2024 with respect to Tender No. MTRH/T/86/2023-2024 for Provision of Medical Insurance Cover, be and are hereby nullified and set aside.**

**D. The 1<sup>st</sup> Respondent is hereby ordered to re-admit the Applicant's tender to the Technical Evaluation stage for re-evaluation and make good the anomalies that the Board has pointed out herein in the procurement process of the subject tender within 14 days in accordance with the provisions of the Tender Document, Regulations 2020, the Act and Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.**

**E. Further to Order No. D above, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby directed to proceed with the procurement process to its logical conclusion.**

**F. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 19<sup>th</sup> Day of July 2024.**



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**PANEL CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**

