

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 74/2024 OF 9<sup>TH</sup> AUGUST 2024**

**BETWEEN**

**CELMEL INSURANCE AGENCY.....APPLICANT**

**AND**

**THE CHIEF EXECUTIVE OFFICER,  
SOCIAL HEALTH AUTHORITY.....RESPONDENT**

Review against the decision of the Accounting Officer, Social Health Authority in respect of Tender No. SHA/001/2024-2025 for Provision of Insurance Services.

**BOARD MEMBERS PRESENT**

- |                      |   |                   |
|----------------------|---|-------------------|
| 1. Mr. Jackson Awele | - | Panel Chairperson |
| 2. Dr. Susan Mambo   | - | Member            |
| 3. Mr. Joshua Kiptoo | - | Member            |

**IN ATTENDANCE**

Ms. Sarah Ayoo	-	Secretariat
Mr. Anthony Simiyu	-	Secretariat

**PRESENT BY INVITATION**

**APPLICANT****CELMEL INSURANCE AGENCY**

Mr. Kipngetich Eman

Advocate, AL & C LLP Partners Advocates

**RESPONDENT****THE CHIEF EXECUTIVE OFFICER, SOCIAL HEALTH AUTHORITY**

Mr. Andrew Kutto

Advocate, Social Health Authority.

Mr. Rueben Kandagor

Representative , Social Health Authority

**BACKGROUND OF THE DECISION****The Tendering Process**

1. The Social Health Authority, the Procuring Entity together with the Respondent herein, vide an advert in the PPIP Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and Social Health Authority website ([www.sha.go.ke](http://www.sha.go.ke)), invited interested suppliers to submit their bids in response to Tender No. SHA/001/2024-2025 for Provision of Insurance Services (herein "the subject tender"). Tenderers were required to submit their sealed tenders before the tender closing date of Monday, 12<sup>th</sup> August 2024 at 0:00 a.m.

**Addendum**

2. Subsequently, on 8<sup>th</sup> August 2024 the Procuring Entity issued an addendum offering clarifications in response to various inquiries that were made by different suppliers who had expressed interest in participating in the tender. The tender closing date was maintained as 12<sup>th</sup> August 2024.

## **REQUEST FOR REVIEW**

3. Shortly thereafter, on 9<sup>th</sup> August 2024, the Applicant through the firm of AL & C Partners LLP Advocates filed a Request for Review dated 9<sup>th</sup> August 2024 supported by a Statement dated 9<sup>th</sup> August 2024 by Festus Wanjohi, the Applicant's General Manager, seeking the following orders from the Board in verbatim:

***a) A declaration that the Respondent's tender document for Tender No: SHA/001/2024-2025 FOR THE PROVISION OF INSURANCE SERVICES is in breach of the Constitution, PPAD Act and the Regulations 2020, rendering it incurably flawed;***

***b) An order for the termination of, or directing the Respondent to quash and terminate, TENDER NO: SHA/001/2024-2025 FOR THE PROVISION OF INSURANCE SERVICES and re-advertise the same in compliance with the directives issued by the Review Board in this matter, the Constitution, PPAD Act and the Regulations 2020.***

***c) Award the costs associated with the Request for Review to the Applicant;***

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

4. In a Notification of Appeal and a letter dated 9<sup>th</sup> August 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 9<sup>th</sup> August 2024.

5. On 15<sup>th</sup> August 2024, the Ag. Board Secretary sent a reminder to the Respondent drawing their attention to the statutory obligation to offer a response to the Request for Review and the consequences of non-compliance.
6. On 16<sup>th</sup> August 2024, the Respondent filed a letter of even date seeking to be excused from the delay in filing their Response while attributing the delay to receipt of the Notification of Appeal on 9<sup>th</sup> August 2024 after working hours.
7. On the same day, 16<sup>th</sup> August 2024 the Respondent filed their Memorandum of Response through the Procuring Entity's Corporation Secretary and equally forwarded the Confidential Documents under Section 67(3) of the Act
8. On 16<sup>th</sup> August 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 20<sup>th</sup> August 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

9. On 19<sup>th</sup> August 2024 the Board Secretary shared a notice notifying parties that the online hearing had been rescheduled from 11:00 a.m. on 20<sup>th</sup> August 2024 to 12:30 p.m. on the same day.
10. On the same day, 19<sup>th</sup> August 2024, the Applicant through their lawyers sent an email to the Board indicating they were unable to proceed with the hearing at 12:30 p.m. on 20<sup>th</sup> August 2024 since Counsel having conduct of the matter was scheduled for a medical procedure at AAR Hospital at 1:00 p.m. on the same day.
11. The Board Secretary sent the Applicant an email advising the Applicant to have a representative present for the slated 12:30 p.m. online hearing on 20<sup>th</sup> August 2024 where their request for an adjournment would be considered.
12. On 20<sup>th</sup> August 2024 at 12:30 p.m., when the Board convened for the online hearing, the Applicant was represented by its Advocate, Mr. Kipngetich, while the Respondent represented by a representative from the Procuring Entity's procurement department, Mr. Rueben Kandagor.
13. Mr. Kandagor informed the Board that the Procuring Entity's Corporation Secretary was expected to be present on behalf of the Respondent but was yet to join the online hearing session. The Board adjourned the session to 1:00 p.m. to allow Mr. Kandagor time to prompt the Corporation Secretary to join the online session.

14. When the Board reconvened at 1:00 p.m. the Procuring Entity's Corporation Secretary was still not present. Mr. Kandagor confirmed to the Board that he was still unable to reach the Corporation Secretary.
15. It is then that the Board indicated that it would proceed to give directions on the matter. The Board observed that it had seen the Applicant's email to the Board Secretary on a request for adjournment and asked Counsel for the Applicant to speak to the contents of this email. Counsel for the Applicant, Mr. Kipngetich indicated that Mr. Sichangi, an Advocate from the firm of AC and L LLP Advocates, who has personal conduct of the matter on behalf of the Applicant, was previously ready to proceed with the hearing at the earlier scheduled time of 11:00 a.m. with the anticipation that he would conclude the hearing in time for a medical procedure he was previously scheduled to undergo at 1:00 p.m. on the same day at AAR Hospital. Further, that the change of time from 11:00 a.m. to 12:30 p.m. altered things with the result that it would be impossible for Mr. Sichangi to attend to both the hearing and his scheduled medical appointment at AAR Hospital. He was therefore requesting for an adjournment of the day's hearing to 23<sup>rd</sup> August 2024.
16. Mr. Kandagor, indicated that the Respondent was not opposed to the request for adjournment.
17. The Board proposed that the plenary hearing be adjourned to 22<sup>nd</sup> August 2024 with the alternative that the parties file their respective Written Submissions and the Board proceeds to consider the filed documents without convening a subsequent plenary session.

18. Counsel for the Applicant Mr. Kipngetich confirmed that 22<sup>nd</sup> August 2024 was convenient for a plenary session and further that the Applicant would be filing their Written Submissions before then.
19. The Respondent's representative Mr. Kandagor equally confirmed that 22<sup>nd</sup> August 2024 was a convenient date for a plenary hearing.
20. Accordingly, the Board adjourned the online hearing session to 22<sup>nd</sup> August 2024 at 11:00 a.m. with parties being at liberty to file their Written Submissions, with the Applicant going first.
21. On 21<sup>st</sup> August 2024 the Applicant filed Written Submissions and a Bundle of Authorities of even date.
22. When the Board convened on 22<sup>nd</sup> August 2024 at 11:00 a.m. the parties were represented by their respective Advocates. This time, the Applicant and the Respondent were represented by Mr. Kipngetich and Mr. Kutto respectively,
23. The Board confirmed that subsequent to the last hearing session the only newly-filed documents were the Applicant's Written Submissions and Bundle of Authorities.
24. Counsel for the Respondent, Mr. Kutto indicated that he was yet to receive these documents by the Applicant with a disclaimer that he needed to verify this from the Respondent as the Respondent's email address was the one being used for purposes of service of processes in respect of the instant Request for Review. On the part of the Respondent, Counsel for

the Respondent, Mr. Kutto, confirmed that the Respondent had not filed any Written Submissions but he was nonetheless ready to proceed with the hearing as earlier scheduled.

25. In view of the foregoing, the Board gave hearing directions and the order of address directing that each party would have 10 minutes to address it with the Applicant getting a right to offer a rejoinder to the address by the Respondent .

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

26. Counsel for the Applicant, Mr. Kipngetich argued that the Respondent breached Circular No.03 /2023 by the Public Procurement Regulatory Authority, Section 3 of the Act and Articles 27(1) and 227 of the Constitution of Kenya, 2010 in the advertising the subject tender. He argued the Tender Document as advertised favoured insurance companies while discriminating against insurance agents, brokers and other insurance players. It was his contention that the tender was open to insurance companies only while excluding other insurance players, which Counsel argued was a departure from the Procuring Entity's previous tenders that were open to all insurance players and thus a breach of the Applicant's legitimate expectation.
27. Mr. Kipngetich maintained that the Tender Document as prepared is discriminatory against the Applicant and other industry players as it failed to disclose the reasons why it was only open to insurance companies. Specifically, the Applicant referred to the following clauses:
- i. Clause 4.1 on the definition of eligible tenderers



- ii. Mandatory Requirement 13 under Section III on the expectation that quotations were to be received from insurance providers/underwriters.
- iii. Stage 2 Technical Evaluation Stage for specifying a requirement that the insurance company must have been in existence for 2 years and having undertaken at least 10 similar assignments with a premium turnover of not less than 30 Million.
- iv. Stating that only underwriters /insurance company should provide professional indemnity

28. Counsel argued that the role of insurance brokers and agents in the insurance business could not be understated as they offer services that benefit an insured and act as agents for underwriters. Further, that insurance brokers and agents offer competitive terms compared to underwriters drawing from their market analysis and that ensures value for money.

29. Mr. Kipngetich argued that there was no transparency in how the Procuring Entity transitioned from its previous practice of allowing all insurance service providers to participate in tenders for provision of insurance services.

30. Counsel contended that the Procuring Entity risked great exposure in leaving all its risks to be covered by only one underwriter without the involvement of other insurance service providers as required under Circular No. 3/2023.

31. Citing ***Safaricom Limited v Public Procurement Administrative Review Board & 2 Others; Republic v Public Procurement Administrative Review Board Ex parte East Africa Cables [2007]eKLR*** and ***Republic v Public Procurement Administrative Review Board & another Ex parte Roben Aberdare (K) Limited [2014]eKLR*** Counsel for the Applicant argued that the Tender Document must be fair, equitable and non-discriminatory.
32. Mr. Kipngetich argued that the Respondent had not provided any material to show that the instant Tender Document is one that qualified to be a restricted or reserved tender under Sections 155 and 157 of the Act as read with Regulation 143 of the Regulations 2020.
33. Relying on ***Republic v Public Procurement Administrative Review Board Ex parte Kenya Power and Lighting Company Plc, Energy Sector Contractors Association & anor*** arguing that a public tender process should be fair.
34. Accordingly, the Applicant invited the Board to allow the Request for Review.

### **Respondents' Submissions**

35. Counsel for the Respondent, Mr. Kutto, argued that the Tender Document was not discriminatory and that the Applicant had not demonstrated any prejudice it stood to suffer. He maintained that the tender process in the subject tender was conducted in an open and competitive manner as it was open to all qualified and interested insurance companies.

36. Mr. Kutto argued that the Tender was not in breach of any provision of the Constitution or the Act. Counsel argued that the Respondent in advertising the tender considered the provisions of the Constitution, the Act, Regulations and Circulars from the Public Procurement Regulatory Authority on allowing all eligible and registered insurance companies to participate in the subject tender.
37. It was his contention that the Procuring Entity understood its insurance needs and considered it prudent to adhere to principles of fair competition by admitting only underwriters in the tender and did not intend to seek the services of an insurance broker as it was clear on its needs.
38. Counsel argued that under Section 4(1) of the Tender Document there was no ambiguity on the eligible candidates to participate the subject tender.
39. Counsel contended that the Procuring Entity was a new entity and thus it was erroneous for the Applicant to argue that there was a precedence as to how the Procuring Entity was procuring insurance services.
40. Mr. Kutto argued that whereas insurance brokers and agents offer advice to clients on their insurance needs, the Procuring Entity did not require this advice as they have internal expertise on which it could leverage on to establish its needs.
41. Accordingly, he sought the Request for Review to be dismissed.

## **Applicant's Rejoinder**

42. In his brief rejoinder, Counsel for the Applicant, Mr. Kipngetich, argued that the Procuring Entity was not a new entity as argued on behalf of the Respondent since it was the successor to the National Hospital Insurance Fund.
43. He argued that the Applicant stood to suffer loss as it was unable to participate in the subject tender as a consequence of its uncompetitive nature.
44. Further that the Respondents had not led any evidence as to why the tender was limited to insurance companies and not open to all insurance service providers, which fact flies in the face of Sections 155 to 157 in preference and reservation of tender.

## **CLARIFICATIONS**

45. The Board inquired from the parties on whether the Tender Document prohibited Joint Ventures between insurance companies and other insurance service providers. Counsel for the Applicant Mr. Kipngetich indicated that the provision for joint ventures under the Tender Document required that the joint venture partners be insurance companies with no window to insurance agents and brokers. Counsel for the Respondent Mr. Kutto indicated that the Tender Document made room for joint ventures.
46. The Board asked the Applicant to clarify on the context of its submissions on preference and reservation of tenders under Section 155 to 157 of the Act. Counsel for the Applicant argued that the submissions were made in respect of the Respondent's submission that the Procuring Entity

understood its insurance needs and that is why it restricted participation in the subject tender to insurance companies only.

47. The Board also asked the Respondent to confirm if insurance agents and brokers were eligible to participate in the subject tender. Mr. Kutto confirmed that they were not eligible on their own.
48. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 9<sup>th</sup> August 2024 the same had to be determined by 30<sup>th</sup> August 2024. Therefore, the Board would communicate its decision on or before 30<sup>th</sup> August 2024 to all parties via email.

### **BOARD'S DECISION**

49. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
  - I. ***Whether the Tender Document in the subject tender bears provisions that are discriminatory and in breach of the provisions of the Constitution of Kenya, 2010, Act and Regulations 2020?***
  - II. ***What orders should the Board issue in the circumstance?***

**Whether the Tender Document in the subject tender bears provisions that are discriminatory and in breach of the provisions of the Constitution of Kenya, 2010, Act and Regulations 2020?**

50. The Applicant instituted the instant Request for Review taking issue with the advertisement of the subject tender and arguing that it was discriminatory as it limited participation to insurance companies to the exclusion of the other players in the insurance sector and in particular brokers and agents. Counsel for the Applicant Mr. Kipngetich argued that this breached the Applicant's legitimate expectation since the Procuring Entity in its previous tenders had permitted the participation of all insurance service providers. Further, that no reason had been advanced as to why the subject tender was reserved for insurance companies only. Accordingly, the Applicant argued that the Tender Document in the subject tender was discriminatory.
51. On the flip side, the Respondent maintained that the subject tender was advertised in adherence to the Constitution, the Act, Regulations 2020 and various Circulars by the Public Procurement Regulatory Authority. Counsel for the Respondent, Mr. Kutto argued that tender was open to all eligible insurance companies. Further, that the Procuring Entity was clear on its procurement needs and did not intend to procure insurance brokerage or agency services. Additionally that the Procuring Entity was a new entity and thus it was erroneous on the part of the Applicant to suggest that the Procuring Entity had an established pattern of procuring insurance services.

52. Flowing from the above different positions, the Board is invited to establish whether the Tender Document in the subject tender is discriminatory.
53. For starters, we are mindful of the fact that there are various provisions of the Act that speak to Procuring Entities using in their procurement processes the various Standard Tender Documents provided by the Public Procurement Regulatory Authority:
54. Section 58 of the Act provides for the use of Standard Tender Documents in the following words:

***58. Standard procurement and asset disposal documents***

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

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

55. On its part, Section 60 of the Act reads:

***60. Specific requirements***

***(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair***

***and open competition among those who may wish to participate in the procurement proceedings.***

***(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***

***(3) The technical requirements shall, where appropriate—***

***(a) conform to design, specification, functionality and performance;***

***(b) be based on national or international standards whichever is superior;***

***(c) factor in the life of the item;***

***(d) factor in the socio-economic impact of the item;***

***(e) be environment-friendly;***

***(f) factor in the cost disposing the item; and***

***(g) factor in the cost of servicing and maintaining the item.***

***(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—***

***(a) there is no other sufficiently precise or intelligible way of describing the requirements; and***

***(b) the requirements allow equivalents to what is referred to***

56. Section 70 of the Act provides as follows:

***70. Standard tender documents***

***(1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.***



***(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings.***

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

***(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.***

***(5) A procuring entity may charge a fee for obtaining tender documents as prescribed by regulations and stated in the tender documents.***

***(6) The tender documents shall set out the following—***

***(a) the specific requirements prepared under section 60 relating to the goods, works or services being procured and the time limit for delivery or completion;***

***(b) if works are being procured, relevant drawings and bills of quantities shall be disclosed and the projects total estimated cost evaluated only on the basis of criteria disclosed, but a person shall not be disqualified on the basis that a bidder quoted above or below a certain percentage of engineer's estimates;***

***(c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;***

***(d) the tender number assigned to the procurement proceedings by the procuring entity;***

- (e) instructions for the preparation and submission of tenders including—***
- (i) the forms for tenders;***
  - (ii) the number of copies to be submitted with the original tender;***
  - (iii) any requirement that tender security be provided and the form and amount of any such security;***
  - (iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;***
  - (v) the procuring entity facilitation and the submission of tender documents by the tenderer through either soft or hard copy, but it will be the onus of the tenderer to ensure the adequate submission of said documents;***
  - (vi) the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents;***
  - (f) an explanation of where and when tenders shall be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;***
  - (g) a statement that those submitting tenders or their representatives may attend the opening of tenders;***
  - (h) a statement of the period during which tenders must remain valid;***
  - (i) the procedures and criteria to be used to evaluate and compare the tenders;***
  - (j) a statement that the accounting officer of a procuring entity may, at any time terminate the procurement***

***proceedings without entering into a contract in accordance with section 63 of the Act;***

***(k) a provision for providing details of sub-contractors for the bidder, where applicable, and a declaration that the sub-contractors have complied with this Act; and***

***(l) anything else required, under this Act or the regulations, to be set out in the tender documents.***

57. Regulation 68 of the Regulation 2020 speaks to the Standard Tender Documents in the following terms:

***68. Standard tender documents and formats***

***(1) Standard tender documents envisaged under sections 9(1)(f) and 70(1) of the Act, shall be developed by the Authority for use by all procuring entities as set out in the Eighth Schedule.***

***(2) The Authority shall issue and publicize the format of procurement documents to be used and issue standard forms by which a procuring entity shall carry out specific procurement procedures.***

***(3) The documents used by a procuring entity shall be clear and bear references to the procurement requirement, provision for dates and signatures of authorizing officers.***

***(4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments.***

***(5) The Authority may, from time to time, issue circulars and guidelines only on the content of procurement and disposal documentation.***

***(6) A procuring entity may, under section 70(5) of the Act, charge a fee not exceeding one thousand shillings for hard copies of a tender document or as may be set by the Cabinet Secretary from time to time.***

***(7) In determining the fee payable under paragraph (6) above, a procuring entity shall only have regard to the costs related to printing, copying, and distributing.***

***(8) A procuring entity shall not charge a fee under paragraph (6) above, where the tender document is—***

***(a) obtained electronically;***

***(b) an invitation for expression of interest;***

***(c) a registration of suppliers; or***

***(d) a pre-qualification document.***

***(9) Where a procuring entity charges a fee for a tender document, the procuring entity shall permit potential tenderers to inspect the document, prior to paying the fee for the document.***

58. From the above provisions of the Regulations 2020 and the Act, it is clear that statute contemplates among others that:

- i. The Public Procurement Regulatory Authority shall issue Standard Tender Documents for use by Procuring Entities in their procurement processes.
- ii. Procuring Entities shall customize the Standard Tender Documents supplied by the Authority to suit their procurement needs;

- iii. It is the responsibility of the Accounting Officer of a Procuring Entity in consultation with the relevant user departments to prepare the specific requirements in a Tender Document;
- iv. The requirements to be provided in a Tender Document must give a correct and complete description of what is being procured.
- v. The Tender Document must contain sufficient information to allow fair and open competition among interested suppliers.

59. The Board is also alive to the fact that both the Constitution of Kenya, 2010 and the Act prohibit discrimination.

60. Article 27 of the Constitution of Kenya, 2010 anchors the right to equality and freedom from discrimination in the following terms:

***Equality and freedom from discrimination.***

**27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

***(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***

61. Specifically, Article 227(1) of the Constitution of Kenya, 2010 outlines the principles of public procurement in the following terms:

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

***227. (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.***

62. Section 3(b) of the Act affirms equality and prohibits discrimination in the following terms:

***3. Guiding principles***

***Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

***(a) the national values and principles provided for under Article 10;***

***(b) the equality and freedom from discrimination provided for under Article 27;***

- (c) affirmative action programmes provided for under Articles 55 and 56;***
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);***
- (e) the principles of public finance under Article 201;***
- (f) the values and principles of public service as provided for under Article 232;***
- (g) principles governing the procurement profession, international norms;***
- (h) maximisation of value for money;***
- (i) promotion of local industry, sustainable development and protection of the environment; and***
- (j) promotion of citizen contractors.***

63. The Black's Law Dictionary, 9<sup>th</sup> Edition defines the word "discrimination" as:

***(1) "the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".***

64. Superior Courts of this country have on numerous occasions pronounced themselves on what discrimination entails and the essentials that a party alleging discrimination has to prove for their claim to be successful:

65. In ***Peter K Waweru v Republic [2006]eKLR***, the High Court offered a definition of the word “discrimination in the following terms:-

***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."***

66. In ***Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR*** the High Court considered a constitutional Petition challenging the Rules setting out the criteria for admission to the Roll of Senior Counsel, on allegations that the rules were discriminatory against lawyers who were not litigation lawyers. In analyzing the Petition, the Court offered an exposition on the import of discrimination:

**43. I agree with the Court's observation in the case of *Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to***



**persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. it is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation,(Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality.(National Coalition for Gay and Lesbian Equality v Minister for Justice-supra**

67. In ***Steve Omondi Odero & another v ESI (suing on behalf of EJZ (Minor) [2020] eKLR Neutral citation: [2020] KEHC 931 (KLR)***; the High Court considered an appeal against a decision of the HIV AIDS Tribunal that had penalized a school on an allegation of discrimination against a student on account of health status. In allowing the appeal, the Court outlined that discrimination takes the form of direct discrimination and indirect discrimination :

**74. It must be clear that in a claim for discrimination, a plaintiff is still required to prove direct discrimination or show that through the conduct of the defendant, the court can infer indirect discrimination. From the totality of the circumstances of the case before the tribunal, the respondent failed to prove direct discrimination or sufficient conduct from the appellants for drawing an inference of discrimination. The tribunal's holding that simply because NK sat for an interviewed amounted to discrimination, was an error.**

68. In ***James Nyasora Nyarangi & Ors v The Attorney General [2008]eKLR; Nairobi High Court Petition No. 298 of 2008***, the High Court considered a Petition challenged City by-laws that changed the bus terminus for various public transport vehicles that plied Route 58, as discriminatory. In considering the case, the court offered guidance on the spectrum of discrimination in the following terms:

***"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution.***

***Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:-***

***(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and***

***(ii) the differentia must have a rational relation to the object sought to be achieved by the law in question;***

***(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification”***

69. This Board in ***PPARB Application 54 of 2023; Celmel Insurance Agency v The Managing Director, Kenya Electricity Generating Company Plc*** had the following to say on the very subject of discrimination in respect of an insurance tender:

***111.From the foregoing, it is our considered view that the specific requirement of a Tender Document are within the preserve of a Procuring Entity and such discretion is vested on the Procuring Entity provided that it ensures the requirements of the Tender Document allow for competition amongst tenderers who are qualified and wish to participate in the tendering process. Where a legitimate reason exists as to why the Procuring Entity opts to set certain requirements and criteria in a tender document, this cannot amount to discrimination provided that the provisions of the Constitution and the Act are observed while setting the said requirements and criteria.***

***112.We are therefore not persuaded by the Applicant’s submission that the Tender Document as drafted is discriminative and aims to stifle competition. There is no evidence that insurance brokers and underwriters cannot come together under a joint venture as envisioned under Clause 4 of Section I- Instructions to Tenderers at page 5 of***

***the Tender Document and tender in the subject tender. This would certainly afford tenderers a higher chance of being awarded the subject tender noting for instance that in providing a scoring criteria at the Technical Evaluation Stage the differentia is in the scoring where every tender as submitted is scored depending on how to meet the pass mark of 75% to proceed for financial evaluation, the objective of the Procuring Entity to award the subject tender to a tenderer who is able to meet its obligations and handle the value of its assets and insurable interest would be met.***

70. Equally in ***PPARB Application No. 79 of 2022;CIC General Insurance Limited v The Accounting Officer, Kenya Airports Authority & Anor*** this Board pronounced itself on a Request for Review challenging a requirement in a Tender Document alleging it was discriminatory. In determining the matter this Board pronounced itself thus:

***"...from the James Nyasora case the Board notes that discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. Additionally, it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important if not necessary to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. The law does not prohibit***

**discrimination but rather unfair discrimination. For the Applicant to succeed on the issue of discrimination, it must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution...**

***...Consequently, despite the fact that insurers offering motor insurance have been treated differently from insurers offering other types of insurance such as travel, life insurance, property insurance etc, this cannot be termed as discrimination and does not amount to unfavourable bias as there is a clear relation between the differentia and the object of the mandatory requirement MR-13.***

***In light of the above, and bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that the specific requirement of a Tender Document are within the preserve of the Procuring Entity. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and open competition and are applicable to all parties who which (sic) to participate in the subject tender.***

***It is therefore the finding of the Board that the Respondents did not breach the provisions of Article 227(1) of the Constitution read together with Section 3 and Section 58(2) of the Public Procurement and Asset Disposal Act providing for the Mandatory Requirement under Item MR-13 in the Tender Document which requires that the insurance underwriter must have a portfolio balance***

***between motor and non-motor business with gross underwritten premium for motor business exceeding an average of 30% of the total general business for each of the last three consecutive years i.1 2021, 2020 and 2019.***

71. Drawing from the above matters, it is apparent to the Board that:

- i. Discrimination constitutes a failure to treat all persons equally without reasonable distinction.
- ii. Discrimination which is disallowed by the Constitution of Kenya, 2010 is that which is unjustifiable and without any rational basis.
- iii. Not every differentiation amounts to discrimination.
- iv. For a discrimination claim to succeed, a Claimant must inter-alia lead evidence demonstrating direct or indirect discrimination.
- v. Where a Procuring Entity has a legitimate reason in stipulating a specified requirement in its Tender Document, this does not constitute discrimination.
- vi. Where a Tender Document permits suppliers to submit their bids under joint ventures, an interested supplier cannot claim that a tender requirement is discriminatory simply because the supplier finds difficulty in complying with the specified requirement.

72. Turning to the instant Request for Review, the Applicant took issue with various provisions of the Tender Document i.e.:

- i. Clause 4.1 on the definition of eligible tenderers
- ii. Mandatory Requirement 13 under Section III on the expectation that quotations were to be received from insurance providers/underwriters.

- iii. Stage 2 Technical Evaluation Stage for specifying a requirement that the insurance company must have been in existence for 2 years and having undertaken at least 10 similar assignments with a premium turnover of not less than 30 Million.
- iv. Stage 2 Technical Evaluation Stage for stating that only underwriters /insurance company should provide professional indemnity.

73. The impugned provisions of the Tender Document are hereinafter reproduced for ease of reference:

74. Clause 4.1 under Section I- Instructions To Tenderers at page 7 of the Tender Document speaks to the eligibility of tenderers to participate in the subject tender:

***4. Eligible Tenderers***

***4.1 A Tenderer may be a firm that is a private entity, a state-owned enterprise or institution subject to ITT 4.7 or any combination of such entities in the form of a joint venture (JV) under an existing agree mentor (sic) with the intent to enter in to such an agreement supported by a letter of intent. Only insurance service providers registered by Insurance Regulatory Authority are eligible to tender and sign contracts. In the case of a joint venture, all members shall be jointly and severally liable for the execution of the contract in accordance with the Contract terms. The JV shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the tendering process and, in the event the JV is***

***awarded the Contract, during contract execution. Members of a joint venture may not also make an individual tender, be a subcontractor in a separate tender or be part of another joint venture for the purpose of the same Tender. The maximum number of JV members shall be specified in the TDS.***

75. From the above, it is apparent that:

- i. A private entity, a state-owned enterprise or institution or any combination of such entities under a joint venture are eligible to participate in the subject tender.
- ii. Only insurance service providers registered by the Insurance Regulatory Authority are eligible to tender and sign the contract in the subject tender.
- iii. In the case of a joint venture, all joint venture partners are liable for the performance of the entire contract
- iv. In the case of joint venture, the joint venture partners shall nominate a representative who shall have authority to conduct all business on behalf of the joint venture.
- v. Joint venture partners are prohibited from submitting their separate tenders in the subject tender.

76. Further ITT 4.1 under Section II-Tender Data Sheet TDS at page 27 of the Tender Document provides that there shall be no specified number of joint venture partners in any joint venture:

<b><i>ITT Reference</i></b>	<b><i>PARTICULARS OF APPENNDIX TO INSTRUCTIONS TO TENDERS</i></b>
<b><i>...</i></b>	<b><i>...</i></b>



<b>4.1</b>	<b><i>Maximum number of members in the Joint Venture (JV) shall be: N/A</i></b>
------------	---

77. Mandatory Requirement 13 under Section III- Evaluation and Qualification Criteria requires that tender quotations shall be made by insurance underwriters.

<b><i>No.</i></b>	<b><i>Item</i></b>	<b><i>Scoring (Yes/No)</i></b>
<b><i>MR 1</i></b>	<b><i>...</i></b>	
<b><i>...</i></b>	<b><i>...</i></b>	
<b><i>MR13</i></b>	<b><i>Must attach a written confirmation letter of comfort from the Re-insurer on the <u>quotation provided by the underwriter accompanied with the Re-Insurance treaty.</u></i></b>	

78. Stage 2 Technical Evaluation Stage under Section III- Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document specifies a requirement that the insurance company must have been in existence for 5 years and having undertaken at least 10 similar assignments with a premium turnover of not less than 50 Million.:

<b><i>Description</i></b>	<b><i>Requirements</i></b>	<b><i>Marks</i></b>
<b><i>Experience</i></b>	<b><i>The insurance Company must have been in existence for not less than 5 years (1 point per year of existence) (10 marks)</i></b>	<b><i>5</i></b>

<b>Broker Experience</b>	<b><i>i. The insurance Company must have undertaken at least ten (10) similar assignments with premium turnover of not less than 30 million confirmation of the same is required. (10 Marks)</i></b> <b><i>II. Proof of claim settlement from the five similar assignments with premium of not less than 50 million. Confirmation (10 Marks)</i></b>	<b>20</b>
...	...	..

79. Additionally, the Applicant took issue with a requirement that only underwriters /insurance company should provide professional indemnity while referring to page 33 of the Tender Document attached to the Request for Review:

<b>Description</b>	<b>Requirements</b>	<b>Marks</b>
...	...	...
<b>Financial Requirements</b>	<b><i>The Underwriter must have a Professional Indemnity Insurance Cover from a reputable insurance company of Kshs. 50 million. The professional indemnity cover should be valid for the full period of the tender validity period and if awarded the contract, remain so for the term of the policy. Compensation shall be</i></b>	<b>15</b>

	<b><i>claimed against this cover if the Underwriter is negligent or fails to perform any of its obligations or provides below the standard set out herein or is in breach of its material obligations under the contract (10 Marks)</i></b>	
--	---	--

80. The above requirement was expunged from the Tender Document through Addendum 1 dated 8<sup>th</sup> August 2024 under Clarification No. 8. Accordingly no analysis shall be made on this requirement.
81. Flowing from the above, it would follow that the Applicant's grievance is that the Tender Document contained requirements that favoured the participation of insurance companies to the exclusion of other insurance service providers.
82. Counsel for the Respondent Mr. Kutto, argued that the Procuring Entity in the subject tender had the internal expertise that could adequately guide it on its insurance needs and thus did not require the expertise of insurance brokers or agents in the procuring of insurance services. That this is what informed its move to seek out interested suppliers of insurance services without an intermediary. We note that this submission was not controverted by the Applicant in its rejoinder submissions or responses.
83. The Board has looked at the circumstances obtaining in the present case and finds that the Respondent's justification for its specification in the

tender document that it required documents from insurance companies is a reasonable and/or rational explanation for the exclusion of intermediaries for this particular tender. We say so appreciating that the Procuring Entity is a statutory department charged with the responsibility of ensuring the provision of healthcare services to contributors of the Social Health Insurance Fund. By its very function it deals with players in the health sector including medical health insurance service providers. The rebuttable presumption in the event is that the Procuring Entity bears reasonable knowledge and understanding on the handling of medical insurance matters. Indeed, the Board notes that brokers and insurance agents are defined under section 2(1) of the Insurance Act as follows;

***"agent" means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker;***

***"broker" means an intermediary involved with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage commission for or on behalf of an insurer, policyholder or proposer for insurance or reinsurance and includes a medical insurance provider;***

84. From these definitions, it is immediately evident that brokers and agents cannot be classified as one and the same with insurers. A further examination of the insurance Act additionally shows that the two sets of players in the insurance industry under different regulatory checks for licensing and operation and accordingly cannot be said to be of the same category as to justify the argument that they should be treated as of the same category. In the circumstances, we accept as reasonable the uncontroverted submission by the Procuring Entity that it believes it can obtain the services required directly from an insurer using its internal

capacities. No evidence of direct discrimination or conduct evincing indirect discrimination has been established by the Applicant as regards the tender specifications to warrant the reliefs sought in the Application.

85. Additionally, the Board has had a chance to look at the Public Procurement Regulatory Authority's Circular 03/2023 and the same reads as follows:

***To:***

***All Principal Secretaries/ Accounting Officers***

***The Clerk, Senate***

***The Clerk, National Assembly***

***All Clerks, County Assemblies***

***The Chief Registrar of the Judiciary***

***All Regional Coordinators***

***All County Commissioners***

***All Heads of Constitutional Commissions and Independent Offices***

***All Chief Executive Officers, State Corporations and SAGAs***

***All Accounting Officers, County Departments***

***All Vice Chancellors, Public Universities***

***All Ambassadors/ High Commissioners, Kenya Diplomatic Missions***

***All NG-CDF Fund Managers***

***All NGAAF Managers***

***All Managing Directors, Public Water Companies***

***All Principals, Public Colleges and Tertiary Institutions***

***All Public Primary and Secondary School***

***All Trust Secretaries, Pension Funds for Public Entities***

***All Managers, City Boards and Municipalities***

***Heads of All Other Public Institutions***

## **PROCUREMENT OF INSURANCE SERVICES- TENDER REQUIREMENTS**

***The Public Procurement and Asset Disposal Act, 2025 (the Act) came in to effect on 7<sup>th</sup> January 2016. In order to fully operationalize the Act, the National Treasury issued the Public Procurement and Asset Disposal Regulations, 2020 on 2<sup>nd</sup> July 2020 (the Regulations). The Act gives effect to Article 227 of the Constitution of Kenya, 2010 (the Constitution) which provides that public procurement should be conducted in a system that is fair, equitable, transparent, competitive and cost effective.***

***As indicated above, one of the objectives of Article 227 of the Constitution is effective competition among potential tenderers. The same is echoed under Section 3 of the Act as one of the guiding principles. It is therefore critical that procuring entities observe and adhere to the set-out principles in processing their procurement. It is the responsibility of the procuring entity to determine the tendering requirement including the eligibility criteria and mandatory requirements for potential bidders as guided by Sections 555 of the Act and specifying it in the tender document and invitation to tender pursuant to Sections 70 and 74(1)(h) of the Act. However, the tendering requirements should not extinguish competition and fairness among bidders as it is contrary to the objectives of Article 227 of the Constitution and Section 3 of the Act.***

***With regard to the procurement of insurance services, the Authority has received numerous complaints from the insurance industry players and prospective bidders on procuring entities setting prohibitive/restrictive requirements as part of the tender evaluation criteria in the bidding documents.***

***Upon our review of the complaints raised and analysis of the tender documents uploaded in the Public Procurement Information Portal, we have noted that some procuring entities are requiring bidders to provide requirements that are prohibitive and are not proportionate to the estimated cost of services being procured. These include but not limited to evidence of profit, annual gross premium, professional indemnity cover limit and paid up capital limit. This, in our view restricts competition amongst interested bidders and contravenes Article 227 of the Constitution of Kenya, 2010 and Sections 60 and 80(3) of the Public Procurement and Asset Disposal Act, 2015 (the Act).***

***We have sought guidance from the Insurance Regulatory Authority (IRA) on the matter and IRA has guided that since it issues licenses to insurers who have met the stipulated registration requirements, including having adequate capital to support the business, any insurer authorized by IRA to transact any class of insurance business should be eligible to bid for any insurance business in the Republic of Kenya.***

***The purpose of this Circular is to therefore, bring to the attention of all procuring entities of the above advisory from the Insurance Regulatory Authority and to remind all***

***accounting officers of the need to ensure that the developed specific requirements relating to the goods, works or services being procured promote fair and open competition among those who may wish to participate in the procurement proceedings. In addition, the evaluation criteria should be objective and take into consideration the estimated cost of the goods, works or services being procured and be aligned to registration requirements provided for under the Insurance Act.***

***For avoidance of doubt, provision of insurance services, being part of procurement budget, is subject to preference and reservations pursuant to section 157(5) of the Act which states that, "An accounting officer of a procurement entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations."***

***Further, we clarify that when using the open tender method, procuring entities should allow participation of all eligible registered insurance service providers.***

***We therefore remind all Accounting Officers that it is an offence under the Act to breach the rules on specific procurement requirements or prepare skewed or tailored technical specifications, as provided under Section 60 of the Act.***



***All Accounting Officers are required to note and bring the contents of this Circular to the attention of all officers involved in public procurement and asset disposal activities within their jurisdiction.***

***Signed***

***Patrick K. Wanjuki***

***DIRECTOR GENERAL***

86. The tenure of the above circular is that Procuring Entities should not stipulate tender requirements that demand interested suppliers to meet prohibitive requirements beyond those stipulated under insurance laws.
87. In the instant case, there has not been any allegation that the requirements in the Tender Document are at a variance with the Insurance Act or other relevant and applicable laws. Indeed as above demonstrated, the Insurance Act does not require that insurance business must be placed through an intermediary. To attempt to impose that requirement on the Procuring Entity would be a usurpation of the procuring Entity's statutory mandate and ultra vires the powers of the Board.
88. In view of the foregoing, the Board finds that the Tender Document in the subject tender does not bear provisions that are discriminatory and in breach of the provisions of the Constitution of Kenya, 2010, Act and Regulations 2020.

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

89. The Board has found that the Tender Document in the subject tender does not bear provisions that are discriminatory and in breach of the provisions of the Constitution of Kenya, 2010, Act and Regulations 2020.
90. The upshot of our finding is that the Request for Review dated 9<sup>th</sup> August 2024 in respect of Tender No. SHA/001/2024-2025 for Provision of Insurance Services fails in the following specific terms:

### **FINAL ORDERS**

91. 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 9<sup>th</sup> August 2024 :

**1. The Request for Review dated 9<sup>th</sup> August 2024 be and is hereby dismissed.**

**2. The Respondent be and is hereby directed to proceed with Tender No. SHA/001/2024-2025 for Provision of Insurance Services to its logical conclusion in accordance with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.**

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

**Dated at NAIROBI, this 30<sup>th</sup> Day of August 2024.**



.....

.....

**PANEL CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**