

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 75/2024 OF 9TH AUGUST 2024

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

MANAGING DIRECTOR,

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

OLD MUTUAL GENERAL INSURANCE

KENYA LIMITED INTERESTED PARTY

Review against the decision of the Managing Director Kenya Railways Corporation in relation to Tender No. KR/SCM/100/2024-2025 for Provision of Staff Medical Insurance Services

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. QS Hussein Were | - | Panel Chairperson |
| 2. Mr. Stanslaus Kimani | - | Member |
| 3. Mr. Daniel Lang'at | - | Member |



IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

APA INSURANCE LIMITED

Mr. Mwaniki Gachuba

- Advocate, Mwaniki Gachuba Advocates

RESPONDENT

MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION

1. Mr. Kamau Muturi - Advocate, G.K. Muturi & Co. Advocates
2. Mr. Muchiri Kahoro - Advocate, G.K. Muturi & Co. Advocates
3. Mr. Nelson Nyabwari - Kenya Railways Corporation
4. Ms. Jedidah Kairianja - Kenya Railways Corporation

INTERESTED PARTY

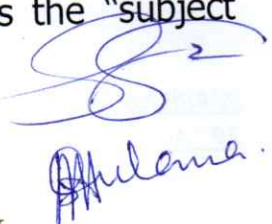
OLD MUTUAL GENERAL INSURANCE KENYA LIMITED

No Appearance

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Railways (the Procuring Entity) invited sealed bids in response to Tender No. KR/SCM/100/2024-2025 for Provision of Staff Medical Insurance Services (hereinafter referred to as the "subject



tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 16th April 2024 published in *MyGov* publication, on the Procuring Entity's website www.krc.co.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's initial submission deadline was on 29th April 2024 at 2.00 p.m.

Addenda

2. The Procuring Entity issued four (4) addenda namely (a) Addendum 1 dated 22nd April 2024 which revised the Technical Evaluation Criteria; (b) Addendum 2 dated 26th April 2024 which extended the subject tender's submission deadline to 7th May 2024 at 2.00 p.m.; (c) Addendum 3 dated 2nd May 2024 which provided further clarifications and revised the Preliminary and Technical Evaluation Criteria while also extending the subject tender's submission deadline to 10th May 2024; and Addendum 4 dated 8th May 2024 which extended the subject tender's submission deadline to 14th May 2024 at 2.00 p.m.

Submission of Tenders and Tender Opening

3. According to the Minutes of the tender opening held on 14th May 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board by the Procuring Entity pursuant to Section 67(3)(e) of the



Preliminary Evaluation

5. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness using the criteria set out in Addendum 3 dated 2nd May 2024 as Revised Preliminary/Mandatory Requirements. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.
6. At the end of evaluation, stage five (5) tenders were determined non-responsive, including the Applicant's tender while two (2) tenders were determined responsive. The responsive tenders proceeded for Technical Evaluation.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set in Addendum 3 dated 2nd May 2024 as Annex I: Revised Technical Evaluation Criteria. The pass mark for the technical qualification was set as 70%. The results of the Technical Evaluation were captured as follows:

Table 9 Bidder who met the technical requirements

S/NO	Bidder NO	Firm	Results of Technical Evaluation (%)
1.	3	Jubilee Health Insurance	62.5

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3.	7	Old Mutual General Insurance	71.8
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8. One (1) tender was determined non-responsive while one (1) tender by the Interested Party was determined responsive at this stage and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 35 of 82 to 36 of 82 of the Tender Document. The Procuring Entity would award the subject tender to the bidder with the highest combined cost (Technical + Financial).
10. The Evaluation Committee observed that the Interested Party's tender had the highest score and was the only one that proceeded for financial evaluation. It proceeded to recommend award of the subject tender to the Interested party at a contract price of Kenya Shillings One Hundred and Seventy-Nine Million, Six Hundred and Nine Thousand, Three Hundred and Two Shillings Only (Kshs. 179,609,302.00) inclusive of all taxes, per annum, renewable once based on satisfactory performance.

Evaluation Committee's Recommendation



11. The Evaluation Committee recommended award of the tender to the Interested Party at its quoted tender price of Kenya Shillings One Hundred and Seventy-Nine Million, Six Hundred and Nine Thousand, Three Hundred and Two Shillings Only (Kshs. 179,609,302.00) Inclusive of all taxes, per annum renewable once based on satisfactory performance.

Professional Opinion

12. In a Professional Opinion dated 16th July 2024, the Ag.GM –Supply Chain Management, Mr. John Kanyoti, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to Old Mutual General Insurance Kenya Limited at its quoted tender price of Kenya Shillings One Hundred and Seventy-Nine Million, Six Hundred and Nine Thousand, Three Hundred and Two Shillings Only (Kshs. 179,609,302.00) Inclusive of all taxes, per annum renewable once based on satisfactory performance.
13. The Professional Opinion was approved by the Managing Director of the Procuring Entity, and the Respondent herein Mr. Philip J Mainga EBS, on 17th July 2024.

Notification to Tenderers




14. Tenderers were notified of the outcome of evaluation process *vide* letters dated 17th July 2024.

REQUEST FOR REVIEW NO. 75 OF 2024

15. On 9th August 2024, APA Insurance Limited hereinafter referred to as ("the Applicant"), filed a Request for Review dated 9th August 2024 together with Supporting Affidavit sworn on 9th August 2024 by David Mumo, its Head of Health, through Mwaniki Gachuba Advocates seeking the following orders from the Board:

- a) The Respondent's notification of intention to award issued to the Applicant be annulled and set aside.***
- b) The Respondent's notification of intention to award issued to the Interested Party be annulled and set aside.***
- c) The Respondent be directed to disqualify the Interested Party's Tender at the preliminary examination stage for failure to submit a Form of Tender and failure to submit premium for two years period and or be directed to reject the Interested Party's Tender at the financial evaluation stage for being abnormally low priced.***
- d) The Respondent be directed to re-admit the Applicant's Tender and subject it to technical evaluation.***



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

16. In a Notification of Appeal and a letter dated 9th August 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 9th August 2024.
17. The Respondent filed, through G.K Muturi & Company Advocates a Notice of Appointment dated 16th August 2024.
18. *Vide* a letter dated 16th August 2024, the Acting Board Secretary sent a reminder to the Respondent referring to the Notification of Appeal for the instant Request for Review dated 9th August 2024 and notified the Respondent of the provisions under Regulation 205(3) & (4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") with regard to the five days within which it was required to submit a response being on or about 14th



August 2024 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

19. On the same day of 16th August 2024, the Respondent through its advocates on record responded to the Board's letter of 16th August 2024 contesting the contents therein while indicating that the confidential documents concerning the subject tender would be submitted to the Board pursuant to Section 67(3)(e) of the Act by close of business on the same day.
20. *Vide* a Hearing Notice dated 16th August 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 21st August 2024 at 2.30 p.m. through the link availed in the said Hearing Notice.
21. On 19th August 2024, the Respondent filed through its advocates a 1st Respondent's Memorandum of Response dated 19th August 2024.
22. *Vide* email dated 19th August 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.



23. Vide email dated 19th August 2024, counsel for the Respondent, Mr. Muturi requested the Board to reschedule the hearing date since he had a pre-planned hospital visit.
24. On 19th August 2024, the Applicant filed a Preliminary Objection dated 19th August 2024.
25. Vide a Hearing Notice dated 20th August 2024, the Acting Board Secretary, notified parties and all tenderers of rescheduling of the online hearing of the instant Request for Review to 22nd August 2024 at 2.30 p.m. through the link availed in the said Hearing Notice.
26. On 21st August 2024 the Respondent filed through its advocate a 1st Respondent's Replying Affidavit sworn on 21st August 2024 by Stanley Gitari, Written Submissions dated 21st August 2024 and a List of Authorities dated 21st August 2024.
27. Vide email dated 22nd August 2024 sent at 12:23 hrs, counsel for the Applicant Mr. Gachuba sought for an adjournment to enable him file the Applicant's rejoinder to the Respondent's Memorandum of Response.
28. In response, vide email dated 22nd August 2024 sent at 13:50 hrs, counsel for the Respondent, Mr. Muturi indicated that he was opposed to the request for adjournment by the Applicant.



Handwritten signature in blue ink, possibly reading "Muturi".

APPLICATION FOR ADJOURNMENT

29. When the matter came up for hearing on 22nd August 2024 at 2:30 hrs, Mr. Gachuba indicated that he was not ready to proceed reason being that he had been served with the Respondent's Memorandum of Response on the evening of 19th August 2024 and that the Applicant intended to file a rejoinder to the Respondent's Memorandum of Response noting that according to the rules of the Board, the Applicant had 3 days to do so and the same were to lapse on 22nd August 2024.
30. Counsel indicated that he had worked in the draft rejoinder but the Applicant had not yet sent its approval hence the request for adjournment to enable him file the said rejoinder together with written submissions. He apologized for the late request and indicated that he had sent an email earlier on indicating that he would be making an application for adjournment of the matter. He further indicated that he was aware that the Board had until the 30th August 2024 to render its decision in the matter and proposed for the matter to be canvassed by way of written submissions to enable the Board have ample time to make a determination within the remaining time.
31. In response, Mr. Muturi indicated that he was opposed to the application for adjournment and pointed out that Mr. Gachuba sent him an email at 12:33 hrs with the request for adjournment when he was in a hearing before Honourable Justice Mabeya which he had to adjourn so as to attend the hearing of the instant Request for Review.



32. Counsel submitted that Mr. Gachuba ought to have made his request for more time in good time and pointed out that he did not even respond to the Respondent's request on 19th August 2024 for the Board to adjourn hearing of the matter when he had made a similar application. He further submitted that the Applicant had responded to the Respondent's Memorandum of Response vide the Preliminary Objection raised against the same. He indicated that Regulations 2020 do not provide for the Applicant to file rejoinders and that he was ready to proceed with the hearing noting that he would not be available on Friday or Monday and if the Applicant wanted to canvass his case by way of Written Submissions he could do so but due to the technical issues in the matter, on his part he was ready to highlight the Respondent's case.

33. In a rejoinder, Mr. Gachuba submitted that on 21st August 2024, the Respondent had served him with another Replying Affidavit which the Applicant was entitled to look at and this was part of the delay by the Applicant to file its rejoinder. He argued that it was the Applicant's right under the Board's rules to file a rejoinder to any matter served upon the Applicant within 3 days and he purposed to file and serve the said rejoinder by close of business on 22nd August 2024. He further argued that the Applicant's Preliminary Objection did not deal with the merit of the issues raised in the Respondent's Memorandum of Response hence the need to file the Applicant's rejoinder.



34. Having considered parties' submissions on the application for adjournment, the Board declined to adjourn the hearing of the instant Request for Review for the following reasons:

- a) The Applicant had prior notice that the hearing of the matter having been previously slated for hearing on 21st August 2024 at 2:30 hrs had been rescheduled for hearing on 22nd August 2024 at 2:30 hrs.
- b) The Applicant had ample time to seek for the adjournment on either the 19th, 20th, 21st or on the morning of 22nd August 2024 but made the request barely 2 hrs to the hearing.
- c) Considering the circumstances of the matter and non-availability of counsel for the Respondent at any near date it was important for the Board to get parties oral submissions on the matter and it would not be fair and just to canvass the matter by way of written submissions only.
- d) Having taken into consideration the rules referred to by Mr. Gachuba, nothing prevented the Board within those rules to proceed with hearing of the instant Request for Review considering that the Applicant had been served on 19th August 2024 and if it had any intention to file its rejoinder, it ought to have done so within the time preceding the slated hearing of the matter.



35. Mr. Gachuba then sought to file and serve the Applicant's rejoinder before proceeding with highlighting the Applicant's case and the said request was granted.

36. On 22nd August 2024 at 15:13 hrs the Applicant filed, through its advocates, a Reply to the Respondent's Memorandum of Response dated 22nd August 2024.

37. The Board having confirmed service of the Applicant's rejoinder upon the Respondent directed that, in order to save time, the preliminary objection raised by the Applicant would be heard together with the substantive Request for Review in accordance with Regulation 209(4) of Regulations 2020 which grants the Board the discretion to hear preliminary objections as part of the substantive request for review and deliver one decision. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

38. The Applicant, led by Mr. Gachuba, relied on its documents filed before the Board and went on to submit that the instant Request for Review seeks to review the decision of the Respondent to disqualify the Applicant's tender at the Preliminary Evaluation stage. He indicated that the decision was communicated vide email of 26th July 2024 addressed to ashok.shah@apainsurance.org.



39. With regard to the preliminary objection, counsel submitted that the Memorandum of Response was time barred and ought to be struck out *in limine* by virtue of Article 259(6) of the Constitution of Kenya 2010, Section 56 and 57(a)(d) of the Interpretation and General Provisions Act and Regulation 205(3) of Regulations 2020.
40. He further submitted that the Regulation 205(3) of Regulations 2020 requires, in mandatory terms, for the accounting officer to file its memorandum of response together with confidential documents concerning the subject tender to the Board and that Regulation 205(4) of Regulations 2020 makes it a criminal offence for the accounting officer not to respond within the stipulated 5 days.
41. Mr. Gachuba indicated that he did not have the details as to when the confidential documents were submitted to the Board but if the Respondent's Memorandum of Response and confidential documents were filed on different dates, it would mean that the Respondent was in breach of Regulations 205 of Regulations 2020. He sought for the Memorandum of Response to be struck out *in limine*.
42. Counsel submitted that it was not in dispute that the Request for Review had been filed on 9th August 2024 and that the Respondent had 5 days to file their response and the same were to lapse on Friday, 16th August 2024 but only resulted to file the response on 19th August

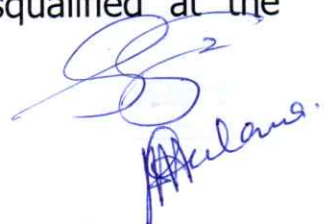


2024 which was out of time and as such, the preliminary objection ought to be allowed.

43. With regard to the substantive issues raised in the Request for Review, counsel referred the Board to paragraph 12 of the Supporting Affidavit to the Request for Review and indicated that the Applicant impugned the notification of intention to award the subject tender transmitted through an email dated 26th July 2024 at 6.35 p.m. and addressed to ashok.shah@apainsurance.org instead of the its attorney's email address parul.khimasia@apainsurance.org as indicated at page 123, 168 of its bid document or info@apainsurance.org as indicated at page 642 of its bid document. Counsel argued that the notification was sent to an email address that was not indicated as the operational email in the tender.

44. He pointed out that the Respondent had averred that they went into the Applicant's bid document and looked at the Applicant's CR 12 and fished out the said email address of ashok.shah@apainsurance.org yet this was not the communication email provided by the Applicant and there is no indication of the Respondent's motive in doing so. He submitted that the communication was not proper and that the Applicant lost time in getting the said communication on the notification from the Respondent.

45. The Applicant submitted that from the notification of intention to award, it was informed that its tender was disqualified at the



Preliminary Evaluation stage citing Section 79(1) of the Act on the grounds that the Applicant's audited accounts were defective and that there were discrepancies that were not explained, that the assets of the Applicant were restated, that is, for the year 2022 financial statement and did not appear in the 2021 accounts and that the Applicant did not sign and duly fill the Form Con 2 on the financial historical information.

46. The Applicant submitted further that Section 46 of the Act read with Regulation 28, 29 and 30 of Regulations 2020 provides that one of the requirements for appointment to the Evaluation Committee is to be a head of department or representative of the head of department and to have relevant expertise in the tender in question. Counsel indicated that he did not have information whether the Evaluation Committee was comprised of heads of departments of the Procuring Entity and whether those members of the Evaluation Committee were persons with the relevant expertise in the law and practice of insurance in Kenya and with the relevant expertise with respect to standard 4 and 17 of the International Financial Reporting Standards (hereinafter referred to as "IFRS").

47. The Applicant also submitted that if the Respondent had complied with Section 46 of the Act read with Regulation 28, 29 and 30 of Regulations 2020, the reasons advanced for the disqualification of the Applicant's tender would not have arisen.

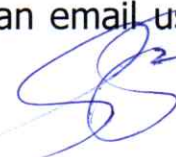


48. Counsel pointed to annexure DM5 at paragraph 16 of the Applicant's Supporting Affidavit to the Request for Review being copies of Insurance Regulatory Authority Circular No. 1C 03/2014 dated 12th April 2024 and Circular No. 1C 01/2014 dated 18th March 2024 and indicated that these were particular to the insurance industries that their financial statements must be reported in accordance with IFRS 17 and that was a directive that the Applicant complied with in its reporting. He argued that if the evaluators were persons with expertise in insurance law and financial reporting, they would have known that there was such a directive from the Regulator which the Applicant complied with and from the Evaluation Report before the Board, it was clear that the evaluators were not persons with relevant experience or expertise as they did not pay attention to the law of insurance in Kenya and to the reporting standards adopted by the Regulator in the Insurance Industry.

49. Mr. Gachuba stated that standard 17 required restatement as it was a transition standard and pointed to the Interested Party's copy of Financial Statement period up to June 2022 obtained from its website and marked as Annexure DM 6 at paragraph 17 of the Applicant's Supporting Affidavit and argued that the Interested Party also restated its 2022 statements which was clearly stated in its 2023 statement that 2022 is restated. He further submitted that the Applicant submitted in the same format as the Interested Party.



50. He stated further that it was not clear how the Interested Party's statements as presented in IFRS 17 were found to be okay and yet the Applicant's statements having been reported in the same standard were faulty.
51. Mr. Gachuba dismissed the reasons given as discrepancies stating that, in fact, there were no discrepancies and put blame on the persons who evaluated the tender as not being conversant with the law and practice of insurance in Kenya and the reporting standard 17. He submitted that any discrepancy referred to by the Respondent in its notification letter were well explained in the Applicant's financial statements hence reasons 1 and 2 for disqualification of the Applicant were unmerited and unfair.
52. With regard to the third reason for disqualification of the Applicant's tender, counsel averred that the information sought from the Applicant by the Procuring Entity in the subject tender was the cash flow from its operating activities. He pointed to the Applicant's Cash Flows annexed and marked as "DM 7" at paragraph 21 of the Applicant's Supporting Affidavit to the Request for Review and argued that this information was available to the Respondent.
53. Mr. Gachuba submitted that it was evident that the Respondent went into the Applicant's tender looking for the email used in transmitting the notification letter as averred at paragraph 20 of the Respondent's Memorandum of Response yet this was an email used in registering



as such, it ought to have been disqualified at the Preliminary evaluation stage.

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

Respondents' case

59. The Respondents, led by Mr. Kamau Muturi, relied on the documents that they filed before the Board, together with confidential documents concerning the tender.

60. The Respondent submitted that tenders were required to be evaluated in accordance with the Tender Document and the law and that the Applicant had failed to submit on whether its bid was compliant to the requirements in the Tender Document.

61. Mr. Muturi, on behalf of the Respondents submitted that the key aspects of the tender were paragraph 2 of Section III: Evaluation and Qualification Criteria. He submitted further that the Applicant's tender was disqualified for being non-complaint to Mandatory Requirement No. 8 and 19 of the Tender Document whereby Mandatory No. 8 required that any discrepancy in the Applicant's Audited Accounts must be explained in the notes failure to which the accounts would be rejected and Mandatory 19 required it to fill, sign and stamp Form Con 2.



62. He referred to pages 347, 348, 386, 487, 546 and 548 of the Applicant's tender and submitted that the Applicant attached audited accounts for the years 2023, 2022, 2021, 2020 and 2019 audited by various auditors: 2023 and 2022 accounts by CPA Freda Kagwiria Mitambo (P/No. 2174) of Deloitte & Touche; the 2021 account by CPA Fredrick Okwiri George Odhiambo (P/No. 1699) of Deloitte & Touche; and the 2020 and 2019 accounts by Kimacia Bernice Wangari (P/No. 1457) of PricewaterhouseCoopers LLP, but there were notable and significant discrepancies and non-compliance issues in that:

- a) The balances brought forward from 2021/2022 do not match the comparatives in the 2022/2023 accounts. For example, other receivables and payables in the 2023 statement of financial position for the year 2022 are listed as 50,422,000 and 62,388,000, respectively. In the restated accounts, these figures are stated as 329,667,000 and 309,157,000. This creates an unexplained variance of Kshs. 20,510,000 between the comparatives of 2021/2022 and 2022/2023.
- b) Additionally, the reinsurance contract assets for 2022 (restated) are listed as Kshs. 3,640,135 in the 2022/2023 accounts. However, this information is missing from the 2021/2022 report, indicating further the significant discrepancies and non-compliance.

63. Counsel submitted further that the reason for disqualification of the Applicant's bid was not because its accounts had discrepancies but



because despite the Applicant knowing that there were discrepancies, it failed to give an explanation for the discrepancies as required. It added that the Interested Party gave an explanation for the discrepancies in its bid at page 84 to 91 of its bid document.

64. With respect to mandatory requirement no. 19, Mr. Muturi submitted that the Applicant was non-compliant to this requirement since:

- a) It did not fully complete Form Con 2 on the Historical Financial Data, as it failed to indicate the cash flow from operating activities and did not provide any explanatory notes why it failed to do so as seen at page 692 and 348 of its bid document. Further that it only stamped and did not sign the said form.
- b) It provided inconsistent figures from the reinstated accounts, which had variances not fully explained in the financial notes. For example, in Form Fin 3.1 for the year 2022, Total Assets are indicated as 17,280,743,000, while in the audited accounts, they are stated as 19,115,961,000. Total Liabilities are listed as 11,855,967,000 in Form Fin 3.1, while the audited accounts show 13,977,091,000. Additionally, the bidder indicated a profit before taxes of 706,661,000.00 in Form Fin 3.1, whereas the audited accounts show 652,119,000.00.

65. Mr. Muturi averred that the Applicant's bid did not comply with the mandatory requirements no. 8 (discrepancies in accounts but not explained) and no. 19 (filling, signing and stamping Form Con 2) and



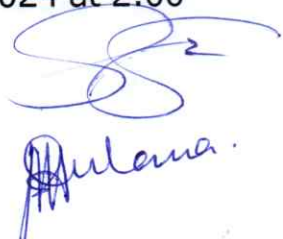
as such, the bid was non-responsive and therefore rightfully disqualified in accordance with Section 79 of the Act.

66. In support of his argument, he made reference to the holding by the High Court in *Republic v Public Procurement Administrative Review Board & 2 others ex-parte BABS Security Services Limited [2018] eKLR* and *Republic v Public Procurement Administrative Review Board & Another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR*.

67. Counsel stated that all bids must be fairly evaluated and it would be unfair for the Procuring Entity to waive and admit the Applicant's non-compliant bid as it would be in breach of Section 227 of the Constitution.

68. In response to the preliminary objection, counsel submitted that pursuant to Regulation 211 of Regulations 2020, the official business working hours is 8.00 a.m. to 5.00 p.m. The Respondent deponed that it was served with the Notification of Appeal on 9th August 2024 at 7:06 p.m. and that the documents it was served with were incomplete there being no annexures to the application leading it to contact the Board requesting to be served with the full application including the annexures.

69. Counsel pointed to Annexure 2 in the Respondent's Replying Affidavit indicating that the Application was served on 13th August 2024 at 2:00



p.m. and that in computing time within which the Respondent was required to file its response, the 5 days required to file its response lapsed on 18th August 2024 which was a Sunday. He further pointed to Section 57 of the Interpretation and General Provisions Act and submitted that where the last day falls on a Sunday, then the period automatically extends to the next working day which in this case was Monday, 19th August 2024 and as such, the Respondent's Memorandum of Response filed on 19th August 2024 was within the stipulated timelines.

70. Counsel while referring to the holding in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 argued that the Applicant's Preliminary Objection was incompetent and an abuse of the court process since a preliminary objection ought to be based on pure points of law argued on the assumption that all the facts presented by the opposing party are correct and not in dispute. He further argued that the facts leading to the Preliminary Objection by the Applicant were grounded on disputed facts concerning proper service of the Request for Review and computation of days and the necessity to ascertain the facts undermines the foundation of the Preliminary Objection rendering it incompetent *ab initio*.

71. Mr. Muturi submitted that the Applicant had not disputed that it received the notification letter through a valid email. He reiterated that the procurement process in the subject tender was carried out in accordance to the law and members of the Evaluation Committee as



appointed were qualified and competent and the Board ought not to consider allegations made by Mr. Gachuba from the bar.

72. The Respondent urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

73. In a rejoinder, Mr. Gachuba for the Applicant submitted that the Respondent had not specified when the confidential documents were filed.

74. He asked the Board to look through the Applicant's audited accounts which were submitted to IRA and had not been disputed by the said regulator. Counsel indicated that it was unbelievable that the said accounts were impugned by the Respondent when they had been adopted by the Regulator and contained clear explanatory notes and met all the 6 stipulated under mandatory requirement no. 8 hence were compliant to the stipulated provision in the Tender Document in addition to being compliant to requirement no. 19 of the Tender Document.

75. Mr. Gachuba urged the Board to satisfy itself as to compliance of the Interested Party's tender and reiterated that the Applicant was discriminated against in terms of compliance with the mandatory requirements.



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76. He submitted that none of the superior courts have declared the exceptions under Sections 79(2), 81, 82 and Regulation 74(2) and 75 as unconstitutional and the Respondent ought to have followed the provisions of the Tender Document under ITT 26, 27, 28, 29, 30, and 31 in determining responsiveness of the Applicant's bid.

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

CLARIFICATIONS

78. When asked to clarify whether the Applicant complied with filling, signing and stamping Form Con 2 as stipulated under Mandatory Requirement No. 19, Mr. Muturi submitted that Form Con 2 required a bidder to fill, sign and stamp and referred to page 692 of the Applicant's bid and indicated that the Applicant partially filled it and failed to fill in the Financial Data, did not sign the said form and only stamped the said form.

79. As to where in the Applicant's bid document the Applicant offered explanations to the discrepancies in its audited accounts, Mr. Gachuba stated that the Respondent did not expound on what the discrepancies were and the Applicant did not know what was meant by discrepancies. He indicated that the Respondent did not point out to the Applicant the alleged discrepancies in the notification letter. He added that every financial statement submitted by the Applicant had explanatory notes save for the issue of restatement in the 2022



accounts since there was a shift from IFRS standard 4 to 17 as directed by IRA which discrepancy had been explained as per the submitted circulars by IRA. He reiterated that every financial statement had explanatory notes. For instance for the financial year 2019, explanatory notes can be seen at pages 431 onwards and.

80. He further submitted that in the case the explanatory notes were not clear, the Respondent had provided at ITT 26.1 of the Tender Document that it will seek clarifications and ought to have sought clarifications which unfortunately, the Evaluation Committee did not make use of.

81. With regard to compliance with Mandatory Requirement No. 19 by the Applicant, Mr. Gachuba submitted that there is a column on the cash flows operating activities that appears blank and that the Applicant had filed in its rejoinder where the said information was found and available in its bid document for each of the financial statements adding that the Applicant did not anticipate that the Respondent would be mechanical in its evaluation of the Tender Document.

82. Asked to confirm if there were discrepancies in the accounts submitted in the Applicant's bid document, Mr. Gachuba stated that there were no discrepancies in the Applicant's bid and if any existed, it was the duty of the Respondent to point them out clearly in the notification letter or seek clarifications from the Applicant. He indicated that the only discrepancy or compliance issue that was categorically



stated was that accounts of year 2022 were restated and the Applicant had explained that because of the shift from IFRS standard 4 to 17 as directed by IRA, there was a requirement to restate the 2022 financial statement and the Interested Party's financial statements were as well affected.

83. Mr. Muturi, on his part, submitted that there were discrepancies in the Applicant's bid which were actually indicated in the Applicant's notification letter.

84. On the required format of the financial statements submitted in the subject tender and if there was any other format acceptable to the Procuring Entity, Mr. Muturi submitted IFRS was not a requirement in the Tender Document and that the requirement of the subject tender was for a bidder's books of account to be compliant and for any discrepancies to be explained which was the difference between the Applicant's and Interested party's bid document.

85. Asked on what the Procuring Entity meant in the Tender Document by restated accounts and if there are any other types of accounts, Mr. Muturi submitted that the issue of restatement applied to the second reason for disqualification of the Applicant's bid document and that as to the restated accounts, no explanations were given by the Applicant which was the mandatory requirement.

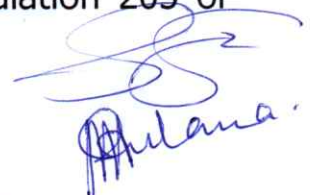


86. As to whether there were any double standards in evaluation of the Interested Party's tender in view of the discrepancies noted in the Applicant's tender, Mr. Muturi submitted that the difference between the Applicant and the Interested Party is that the Interested Party complied with the mandatory requirement by explaining in its bid document the discrepancies in its accounts and its documents were properly filled.

87. When asked to confirm if indeed the Applicant received its notification letter, Mr. Gachuba submitted that the said email was received by Mr. Ashok Shah on 26th July 2024 at 6.35 p.m. and that Mr. Ashok Shah is not a member of the Applicant's Management and he forwarded the email to the management on 30th July 2024. He reiterated that this was not the email address declared to be used for purposes of the tender.

88. On his part, Mr. Muturi submitted that the notification letter was sent to the correct email address provided in the Applicant's bid document and that the email addresses referred to by the Applicant were bouncing and as such, the notification was not going through. He reiterated that the notification was sent to the Applicant's chairman and as such, communication was proper and no complaint was addressed to the Procuring Entity on lack of notification and no prejudice was suffered by the Applicant.

89. When asked to expound on the available recourse that the Board has on failure by an accounting officer to adhere to Regulation 205 of



Regulations 2020 in view of the available sanctions, Mr. Gachuba submitted that the Board's recourse is in Section 36(1) of the Act which provides that the Board can escalate the matter to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") under Section 35, 36, 37, and 38 of the Act and where a criminal element is discovered, PPRA can escalate the matter to the police or anticorruption body, whichever is applicable.

90. On his part, Mr. Muturi submitted that the Respondent complied with Regulation 205 of Regulations 2020 having filed its response and submitted the confidential documents to the Board and the recourse was not to strike out the said documents but to forward any issue to PPRA for investigations. He further indicated that any sentence would be addressed by the Courts.

91. When asked to clarify the period provided for the subject tender and how long it was required to run, Mr. Gachuba submitted that paragraph 4 of the Form of Tender referring tenderers to Terms of Reference indicated that the contract was to run for 2 years subject to performance and Form G, Schedule of Prices at column 4 indicated period as 2 years and the Schedule of Requirements at column 5 provides for 2 years hence the subject tender was for 2 years and each bidder was required to submit a price for year 1 and year 2. He indicated that there was an admission by the Respondent that the Interested Party only submitted a tender price for premiums of only 1 year.



92. On his part, Mr. Muturi submitted that there was no admission that the Interested Party's tender as submitted was for one year. Counsel referred the Board to paragraph 21 of the Respondent's Memorandum of Response and submitted that Clause 2.2 of Section I: Instructions to Tenderers provided the duration as 1 year or the period provided in the Tender Data Sheet (TDS) which takes precedence in case of any inconsistency and this was reiterated in the TDS under ITT 2.2 where it was indicated that the intended date commencing providing the insurance service was upon signing of the contract and the contract duration was 1 year renewable for another one year based on satisfactory performance. He indicated that the Interested Party's bid amount as indicated was per annum and would apply for any subsequent duration being year 2 and this was indicated in its Form of Tender.

93. When asked to expound on the criteria to be applied to determine satisfactory performance, Mr. Muturi submitted that the criteria would be based on the terms of the Contract and if the bidder had complied with the terms of the contract attached to the Tender Document and, in any event, a bidder may decline to extend the contract.

94. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 9TH August 2024 was due to expire on 30th August 2024 and the Board would communicate



its decision on or before 30th August 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

95. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

- A. Whether the Respondent's response in the instant Request for Review is time barred and ought to be struck out.**
- B. Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of Section 80(2) of the Act.**
- C. Whether the Procuring Entity improperly evaluated and awarded the subject tender to the Interested Party against the provisions of the Act.**
- D. What orders the Board should grant in the circumstances**

As to whether the Respondent's response in the instant Request for Review is time barred and ought to be struck out.

96. The Applicant at ground 1 of its Preliminary Objection dated 19th August 2024 sought for the Respondent's Memorandum of Response



to be struck out in *limine* by virtue of Article 259(6) of the Constitution, Section 56 and 57(a)(d) of the Interpretation and General Provisions Act and Regulation 205 (3) of Regulations 2020.

97. In opposition, the Respondent contends that its Memorandum of Response was filed within the stipulated statutory timelines contemplated under Regulation 205 of Regulations 2020 and referred the Board to its Replying Affidavit sworn on 21st August 2024 by Stanley Gitari.

98. It is the Respondents case that it was served with the Notification of Appeal and letter accompanying the Request for Review vide email on Friday, 9th August 2024 at 19:06 hours after its offices had closed and being a government entity, and service beyond its official hours would be deemed to be received on the next working day being Monday, 12th August 2024.

99. The Respondent contends that the documents served upon it by the Board accompanying the Notification of Appeal and letter dated 9th August 2024 were incomplete as there were no annexures to the Request for Review and a complete set was served upon it physically on 13th August 2024 at 14:00 hours and as such, it had five (5) days from the 13th August 2024 to file its response which were to lapse on 18th August 2024 which fell on a Sunday, which was a non-working day hence the next working day being Monday 19th August 2024 was the deadline of filing its response.



100. The Board is cognizant of the provisions of Regulation 205 of Regulations 2020 which state that:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

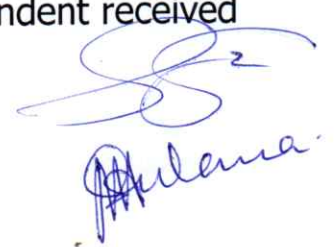
(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.



(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

101. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

102. Turning to the circumstances in the instant Request for Review, the Board notes, from the Board's file and Registry records, that the Respondent was notified vide email on 9th August 2024 at 19:06 hours of the existence of the instant Request for Review which was scanned to it absent of the annexures attached to the Request for Review. Further on the 13th August 2024, the Respondent was served with the physical copies of the Notification of Appeal dated 9th August 2024 together with a full copy of the Request for Review including annexures therein. As such, it was only until the Respondent received



the physical copies of the Request for Review containing the annexures that it was duly served and could respond to the issues raised in the Request for Review.

103. In computing time when the Respondent ought to have filed its response pursuant to Regulation 205(3) of Regulations 2020, the Board is guided by the provisions of Section 57 of the Interpretation and General Provisions Act 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.

104. In computing time when the Respondent ought to have filed its response upon receipt of the filed Request for Review, the 13th August 2024 is excluded pursuant to Section 57(a) of the IGPA being the day that the Respondent was duly served with the Request for Review. As such, 5 days started running from 14th August 2024 and lapsed on 18th August 2024, which was on a Sunday and an excluded day hence the next official working day was on the 19th August 2024. The Respondent having filed its Memorandum of Response on 19th August 2024 was therefore within the stipulated statutory timelines.

105. This Board is cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide 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."

106. In the Board's considered view, Regulation 205 (3) & (4) of Regulations 2020 seeks to cure the mischief where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

107. 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. The Board is cognizant of the need to exercise its discretion with utmost care when faced with an application to strike out pleadings for having been filed out of time as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:



"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward"

108. Further, the Board notes that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and



caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

109. Guided by the holding in the above cases, we find that no prejudice was occasioned on the Applicant as none has been presented in filing of the Respondent's Memorandum of Response on the 19th August 2024 in view of the circumstances involved on service of the Request for Review application upon it. All parties have indeed filed and served their respective pleadings and confidential documents as requested and attended the virtual hearing as scheduled. The Respondents Memorandum of Response as filed together with the annexures and confidential documents filed with the Board have enabled the Board have an informed view of the procurement proceedings in the subject tender and to review the instant Request for Review. Having filed their response and the confidential documents, we find that the Respondent is not subject to the sanctions provided under Regulations 204 (4) of Regulations 2020. We would have held otherwise if the Respondents had not filed any response to the Request for Review or submitted confidential documents to the Board in accordance with Section 67(3)



of the Act and perhaps escalated the matter to PPRA for relevant action to be taken.

110. In the circumstances, we find that the Respondent's Memorandum of Response as filed in the instant Request for Review is properly before the Board and the same is not time barred. Accordingly, Respondent's Memorandum of Response as filed is deemed as properly filed and may be relied upon in these proceedings.

As to whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Preliminary Evaluation stage acted in breach of the provisions of Section 80(2) of the Act.

111. It is the Applicant's case that the reasons for disqualification of its tender at the Preliminary Evaluation stage was unfair and discriminatory since it submitted a materially responsive bid contrary to the allegation by the Respondent that it failed to comply with Mandatory Requirements No. 8 and 19 of the Revised Preliminary/Mandatory Requirements in Addendum 3 dated 2nd May 2024 in the Tender Document. The Applicant contends that if any discrepancies were noted by the Respondent in its bid document, the Respondent was under obligation to seek clarifications on the same from the Applicant instead of resulting to disqualifying its tender.

112. It is the Respondent's case in response that the Applicant's tender failed to comply with the requirements stipulated under Mandatory

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Requirement No. 8 and Mandatory Requirement No. 10 of the Tender Document and, as such, the Applicant's tender was non-responsive pursuant to the provisions of Section 79(1) of the Act and that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Act.

113. The Board is alive to the objective of public procurement which 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)d)"

114. Justice Mativo in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality**



Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."

115. 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)

(2) ***The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,***

(3); and

(4)"

116. Section 80(2) of the Act is clear on the requirement for 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. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity.

117. Section 79(1) of the Act provides for responsiveness of tenders as follows:

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."



118. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."



119. The Board takes cognizance of the provisions of Regulation 74(1) of Regulations 2020 which states as follows:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***



120. Considering the above provisions of the Act, the Regulations 2020 and case law it is clear that evaluation of tenders is only carried out in accordance with the criteria and procedures set out in the Tender Document and that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was under an obligation to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document.

121. Turning to the circumstances of the instant Request for Review, the Board notes that the Tender Document under Mandatory Requirement No. 8 and Mandatory Requirement No. 19 provided as follows:

REVISED PRELIMINARY/MANDATORY REQUIREMENTS

<i>MANDATORY REQUIREMENTS</i>		
	<i>REQUIREMENT</i>	<i>COMPLIED</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>8.</i>	<i>Bidder MUST provide Copy of Certified Audited Accounts for any of the last Three (3) consecutive years (2020, 2021,2022,2023)</i> <ul style="list-style-type: none"> <i>For Purpose of the Evaluation the Accounts are considered to be certified if issued by a registered CPA Firm/member recognized by ICPAK and signed by the Company's Directors.</i> 	<i>Mandatory</i>



	<ul style="list-style-type: none"> • <i>The practicing number of the independent auditor i.e. CPA member signing the accounts must be indicated in the independents audit reports.</i> • <i>Auditor's Practicing License for 2024 should be attached.</i> • <i>The Accounts must be complete (Full Audited Accounts i.e. not sections of it)</i> • <i><u>Any Discrepancies in Accounts must be explained in the notes failure to which the accounts will be rejected.</u></i> • <i>The service provider;</i> <ol style="list-style-type: none"> <i>1. Current ratio must be ≥ 0.1</i> <i>2. Acid Test Ratio must be ≥ 0.5</i> 	
.....
19.	<i>Bidder MUST <u>fill sign</u> and stamp Form Con 2</i>	<i>Mandatory</i>
.....

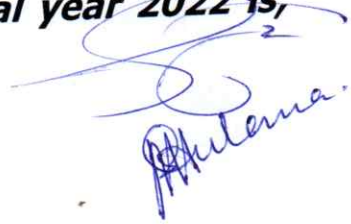
122. In essence, a bidder was required to (a) submit copy of certified audited accounts for any of the last 3 consecutive years 2020, 2021, 2022 or 2023 and these accounts would be considered certified if issued by a registered CPA firm/member recognized by ICPAK and signed by the Company's directors; have an indication of the practicing number of the independent auditor, i.e., CPA member signing the

accounts in the independent Audit Reports; attach year 2024 practicing license of the auditor; completed full audited accounts were required to be submitted; any discrepancies in the accounts ought to have been explained in the notes failure to which the accounts would be rejected; and the service provider's current ratio must be ≥ 0.1 and Acid Test Ratio must be ≥ 0.5 .

123. The Applicant was notified vide email dated 26th July 2024 which transmitted the letter of Notification of Intention to Award the subject tender dated 17th July 2024 that its bid was unsuccessful having been disqualified at the Preliminary Evaluation stage for the following reasons:

"....."

(a) You attached audited accounts for the years 2023, 2022, 2021, 2020, and 2019. These accounts were audited by; 2023 & 2022 audited by CPA Freda Kagwiria Mitambo P/No. 2174 of Deloitte & Touche, 2021 account audited by CPA Fredrick Okwiri George Odhiambo P/No. 1699 of Deloitte & Touche and 2020 & 2019 accounts audited by Kimacia Bernice Wangari P/No. 1457 of Pricewaterhouse Coopers LLP. However, there are discrepancies as there is a variance i.e. the balances brought forward from 2021/2022 are different from the comparatives of the year 2022/2023 i.e. Other receivables and payables in the 2023 statement of financial position for financial year 2022 is,



50,422,000 and 62,388,000, in the restated accounts it's as 329,667,000 and also indicated as 309,157,000.00 in the accounts respectively creating a variance of Kshs. 20,510,000.00 on the comparatives of 2021/2022 and 2022/2023 that is not explained;

(b) Your reinsurance contract assets for 2022 (restated) is Kshs 3, 640,135 as per the 2022/2023. However, in the 2021/2022 report the same is not available.

(c) You did not sign and dully fill the Form Con 2 on the financial historical information as:

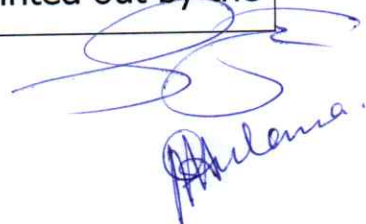
i You did not indicate the cash flow from operating activities and did not leave notes explaining why.

ii You also provided inconsistent figures that were from the reinstated accounts that had variances that were not fully explained in the financial notes i.e. in the Form Fin 3.1 for the year 2022 ,Total Assets is indicated as 17,280,743,000 while in the audited accounts its stated as 19,115,961,000, Total liabilities is stated as 11,855,967,000 in the Form Fin 3.1 while in the audited accounts its stated as 13,977,091,000 ,you also indicted profit before taxes as 706,661,000.00 in the form fin 3.1 while its indicated as 652,119,000.00 in the audited accounts.



124. We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act in respect to the subject tender and note the following with respect to Mandatory Requirement No. 8 and 19 of the Tender Document:

No.	Mandatory Requirement	Board's observation
1.	Mandatory Requirement No. 8	<ul style="list-style-type: none">• Non-compliant to this mandatory requirement.• The Applicant conceded that the discrepancies and the variances in the balances brought forward from 2021/2022 and the comparatives of the year 2022/2023 arose from the fact that the 2021/2022 financial statement was reported under International Financial Reporting Standard (IFRS) 4 while the 2022/2023 statement was reported in IFRS 17 and this explanation was not provided for in its bid document.• No explanations were offered by the Applicant in its bid document as notes on the discrepancies pointed out by the



		<p>Respondent pertaining to its submitted audited accounts in its bid document.</p> <ul style="list-style-type: none"> • The discrepancies and variances noted by the Respondent were pointed out to the Applicant in its notification letter dated 17th July 2024.
	<p>Mandatory Requirement No. 19</p>	<ul style="list-style-type: none"> • Non-compliant to this mandatory requirement. • Submitted at pages 690 to 692 of its bid document FORM Con-2 but did not sign as required under the evaluation criteria.

125. From the foregoing it is clear that there were unexplained discrepancies in the Audited accounts submitted by the Applicant in its bid document and that the Applicant also failed to duly sign Form Con 2 as stipulated in the Tender Document. The Board has on numerous occasions held that mandatory requirements cannot be waived. Section 79 (2) and (3) of the Act provides as follows with regard to minor deviations:


"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from
the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without
affecting the substance of the tender.

***(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and
comparison of tenders."***

126. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

127. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the High Court considered what amounts to a minor deviation and determined as follows:

"The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if



it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."



129. Considering the above, the Board is left with the inevitable conclusion that the Applicant's bid was non-responsive as it failed to comply with the aforementioned mandatory requirements No. 8 and 19 of the Tender Document.


Paulina.

As to whether the Procuring Entity improperly evaluated and awarded the subject tender to the Interested Party against the provisions of the Act.

131. The Applicant contends that the Interested Party's tender price read out at the tender opening was only for one year premium and that it failed to submit a premium for the two year period stipulated under the Schedule of Prices. As such the Interested Party's tender price was abnormally low thus unresponsive and ought to have been disqualified at the Preliminary Evaluation stage.

132. In response, the Respondent averred that the Interested Party's tender price was reasonable, proportionate and within the originally estimated cost of the contract. It further averred that the Interested Party's tender price was Kshs. 179,609,302.00 per annum for one-year duration subject to renewal upon satisfactory performance as provided at ITT 2.2 of Section II Tender Data Sheet of the Tender Document and as such it had been provided in accordance with the requirements of the Tender document.

133. The Board observes that Clause 2.2 of Section I – Instructions to Tenderers at page 7 of 82 of the Tender Document provides as follows:

"2.2 The successful Tenderer will be expected to commence providing the Insurance Services by Date provided in the TDS. The insurance duration for each item will be one year or the period specified in the TDS."

[Handwritten signature]

134. Further ITT 2.2 of Section II- Tender Data Sheet (TDS) at page 26 of 82 of the Tender Document provides at follows:

SECTION II- TENDER DATA SHEET (TDS)

The following specific data for the Insurance services to be procured shall complement, supplement, or amend the provisions in the instructions to Tenderers (ITT). Whenever there is a conflict, the provisions here in shall prevail over those in ITT.

<i>ITT Reference</i>	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS</i>
<i>.....</i>	<i>.....</i>
<i>ITT 2.2</i>	<i>The Intended date commencing providing the Insurance Services is: Upon Contract Signing</i> <i>The contract duration shall be: 1-year renewable for another 1 year based on satisfactory performance.</i>
<i>.....</i>	<i>.....</i>

135. Additionally, the Schedule of Prices Form at page 56 of 82 of the Tender Document provided under the fourth column the Insurance period as Two (2 No.) years hence the total tender price for insurance services to be filled out by a bidder would be for the two years.



136. The Board's interpretation of the aforementioned provisions of the Tender Document is that provision of the insurance service in the subject tender would commence upon signing the contract and the duration of the said contract would be for a period of 1 year which was renewable for another 1-year subject to satisfactory performance of the said contract. It is imperative to note that the provisions under the TDS prevail over those in the ITT whenever there is a conflict and as such, what was provided for in the TDS in terms of the contract duration prevails over any other provisions.

137. It is the Board's considered view that the duration of the contract emanating in the subject tender would be for 1-year subject to another 1-year renewal upon satisfactory performance of the contract. The award of the tender to the Interested Party at its tender sum of Kshs. 179,609,302.00 per annum was therefore in accordance with the provisions of the Tender Document as read with the Act and the Constitution.

138. The Board further notes, from the original bid document of the Interested Party submitted to the Board pursuant to Section 67(3)(e) of the Act, that the Interested Party did address in the form of explanatory notes the discrepancies in its audited accounts as can be seen from pages 84 to 91 of its bid document and as such, it was compliant to Mandatory Requirement No. 8 of the Tender document.

Signature

139. In the circumstances we find that the Procuring Entity properly evaluated and awarded the subject tender to the Interested Party in accordance to the provisions of the Tender Document, the Act and the Constitution. Accordingly, this ground of review fails.

What orders the Board should grant in the circumstances

140. The Board has found that the preliminary objection raised by the Applicant is devoid of merit and the same is dismissed.

141. The Board has also found that the Applicant's bid was non-responsive as it failed to comply with mandatory requirements No. 8 and 19 of the Tender Document and that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Preliminary Examination stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

142. The Board has further found that the Procuring Entity properly evaluated and awarded the subject tender to the Interested Party in accordance to the provisions of the Tender Document, the Act and the Constitution.

143. The upshot of the findings is that the instant Request for Review fails and is disallowed.



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FINAL ORDERS

144. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in this Request for Review:

- A. The Applicant's Preliminary Objection dated 19th August 2024 be and is hereby dismissed.**
- B. The Request for Review dated and filed on 9th August 2024 in respect of Tender No. KR/SCM/100/2024-2025 for Provision of Staff Medical Insurance Services for the Kenya Railways Corporation be and is hereby dismissed.**
- C. The Respondent is hereby directed to proceed with the procurement proceedings of the subject tender to its logical conclusion.**
- D. Considering the outcome of this Request for Review, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 29th Day of August 2024.



PANEL CHAIRPERSON

PPARB

PPARB No.75/2024
29th August 2024



SECRETARY

PPARB