

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 80/2024 OF 16TH AUGUST 2024

BETWEEN

THE KENYAN ALLIANCE INSURANCE

COMPANY LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

JUBILEE HEALTH INSURANCE LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer Nairobi City County Government in relation to Tender No. NCC/PSM/T/001/2024-2025 for Provision of Comprehensive Medical Insurance, Group Life and Last Expense Cover for State and Public Service Officers for Nairobi City County

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|--------------------------------------|
| 1. Ms. Alice Oeri | - | Vice Chairperson & Panel Chairperson |
| 2. Mr. Joshua Kiptoo | - | Member |
| 3. Eng. Lilian Ogombo | - | Member |

IN ATTENDANCE

- | | |
|-----------------------|--------------------------|
| 1. Mr. James Kilaka | - Acting Board Secretary |
| 2. Philimon Chemoiywo | - Secretariat |
| 3. Ms. Sarah Ayoo | - Secretariat |
| 4. Everlyne Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

THE KENYAN ALLIANCE INSURANCE COMPANY LIMITED

Mr. Edward Ratemo	- Advocate, ROM Law Advocates LLP
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RESPONDENTS

ACCOUNTING OFFICER, NAIROBI CITY COUNTY GOVERNMENT & NAIROBI CITY COUNTY GOVERNMENT

- | | |
|----------------|------------------------------------|
| 1. Mr. Kihara | -Advocate, Kihara & Wyne Advocates |
| 2. Ms. Wanjiku | -Advocate, Kihara & Wyne Advocates |

INTERESTED PARTY

JUBILEE HEALTH INSURANCE LIMITED

Ms. Dorothy Jemator	- Advocate Chepkuto Advocates
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BACKGROUND OF THE DECISION

The Tendering Process

1. The Nairobi City County, the Procuring Entity and 2nd Respondent herein invited sealed bids in response to Tender No.

NCC/PSM/T/001/2024-2025 for Provision of Comprehensive Medical Insurance, Group Life and Last Expense Cover for State and Public Service Officers for Nairobi City County (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 8th July 2024 published on the Procuring Entity's website www.nairobi.go.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. Vide addendum No. 1 dated 16th July bidders were *inter alia* notified that a new amended tender document had been uploaded. Further vide addendum No. 2 dated 22nd July 2024, bidders were notified that a new tender document had been uploaded and that the tender's submission deadline was on Friday 26th July 2024 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the tender opening held on 26th July 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 Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of six (6) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	Name
1.	Kenya Alliance Insurance Company Limited
2.	First Assurance
3.	Trident Insurance Company Limited
4.	AAR Insurance
5.	Jubilee Insurance Health
6.	Madison General Insurance

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the six (6) tenders as captured in the Evaluation Report dated 6th August 2024. The evaluation was done in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness using the criteria set out in Clause A. Preliminary/Mandatory Evaluation Criteria at pages 26 to 27 of the

requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation, stage four (4) tenders were determined non-responsive, including the Applicant's tender while two (2) tenders were determined responsive. The responsive tenders proceeded for Technical Evaluation as can be discerned at pages 17 and 18 of the Evaluation Report as follows:

"OBSERVATION

1. Bidder No 1 M/s Kenya Alliance Insurance Company Limited did not proceed to technical evaluation due to the following reasons;

Provide certified copies of audited accounts for years 2021, 2022, & 2023 signed by auditor(s) approved by Institute of Certified Public Accountant of Kenya (ICPAK)

M/s Kenya Alliance Insurance Company Limited, the audited accounts for the year 2022 and 2023 were not stamped and certified by the auditing firm appointed to audit accounts.

2. Bidder 2 M/s First Assurance did not proceed to technical evaluation due to the following reasons;

Duly completed and signed qualification form as prescribed in the tender document

M/s First Assurance did not provide qualification form in the prescribed format which did not capture the "value of similar nature and volume of contracts as required by the procuring entity.

3. Bidder 4 M/S AAR INSURANCE did not proceed to technical evaluation due to the following reasons:

- Provide certified copy of cr-12 from Registrar of Companies not issued earlier than six (6) months from date of tender opening (Attach certified copies of appointment letters, National Identity cards/ valid passports of listed local Directors). AAR did not attach the appointment letters for Directors

4. Bidder 6 M/S MADISON GENERAL INSURANCE did not proceed to technical criteria due to the following reasons:

- provide certified copy of cr-12 from Registrar of Companies not issued earlier than six (6) months from date of tender opening (Attach certified copies of appointment letters, National Identity cards/ valid passports of listed local Directors)

M/s Madison General Insurance did not attach all directors Appointment letters, out of the eight and one nominee representing the Madison group only four appointment letters were provided

Duly completed and signed qualification form. M/s Madison General Insurance qualification form in the prescribed format which did not capture some county of origin where the services were provided.

Bidder no 3 M/S TRIDENT INSURANCE COMPANY LIMITED and Bidder 5 M/S JUBILEE HEALTH INSURANCE LIMITED proceeded for technical evaluation having met all the mandatory requirements.”

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Clause 2 a) Technical Evaluation Criteria at pages 28 to 30 of the Tender Document. The pass mark for the technical qualification was set as 80% and above.
7. At the end of evaluation at this stage, one (1) tender was determined non-responsive having scored 76% while one (1) tender by the Interested Party was determined responsive at this stage having scored 96% and recommended to proceed to financial evaluation as can be discerned from pages 12 to 27 of the Evaluation Report as follows:

S/NO	CRITERIA	MAX SCORES	BIDDER 3 M/S TRIDENT INSURANCE COMPANY LIMITED							
			E1	E2	E3	E4	E5	E6	E7	E8
										AV
1	Provide evidence of the net paid medical claims for the last three years 2021,2022& 2023 (state 3 years average supported by IRA extracts) Above 1 Billion 10 marks Between 500M- 1B-7 marks Below 500M-3 marks	10	3	3	3	3	3	3	3	3
2	Provide evidence of provision of medical insurance services to the magnitude of the tender under consideration	10	3	3	3	3	3	3	3	3
3	Provide proof of financial capacity to handle provision of comprehensive medical insurance group life and last expense cover for state and public services officers for Nairobi City County Attach balance sheet extract	10	10	10	10	10	10	10	10	10
4	The firm's capital adequate ratio for each of the previous 3 years 2021,2022&2023) Attach IRA extracts 100% -1 marks for each year	3	2	2	2	2	2	2	2	2
5	bidder must have at least four (4) different contact persons who are able to make instant decision 24 hour call on both emergency and non-emergency cases .attach proof of duties and responsibilities allocation from the management	2	1	1	1	1	1	1	1	1
6	Must provide a certified list of medical specialists and hospitals in their panel country wide (NHIF accredited) provide valid telephone /mobile contact persons to	10	10	10	10	10	10	10	10	10

	the above medical service providers above 40 counties-10 marks Between 25-39 counties -5 marks Below 25 counties -1mark																	
7.	The service provider to issue a commitment to empanel at least four (4) providers from Nairobi city county level 4 and above hospitals upon award of the tender	5		5	5	5	5	5	5	5	5	5	5	5	5	5	5	5
8	Provide a list of three (3) medical clients with average premiums of 100 million ,where similar services have been offered or ongoing for the last (2) years 2022 and 2023 (3marks for each	9		6	6	6	6	6	6	6	6	6	6	6	6	6	6	6
9	Provide actual turnaround time for settling medical reimbursement claims (provide for copy of approved service charter) With 10day -6marks Ten to twenty days -4 marks over 20days -marks	6		6	6	6	6	6	6	6	6	6	6	6	6	6	6	6

10	The bidder must comply with the schedule of benefits as listed, exclusion of any of the list under listed shall result to a loss of marks	3	2	2	2	2	2	2	2	2	2	2
11	a) Outpatient services b) Inpatient services c) Maternity benefits d) Dental benefits e) Optical benefits f) Group life benefits g) Last expense benefit h) Mental disorders	5	5	5	5	5	5	5	5	5	5	5
12	The bidder must provide a certified sample of their insurance policy which is clearly responsive to the terms of reference (tors) The service provider must issue medical identification smart card /biometric card smart virtual card or an equivalent (provide sample) and digital platform to be accessible by all county staff irrespective of the job category Provide modalities of engagements before biometric cards are processes for new entrants to the scheme On boarding and issuance of medical biometric card is to achieved within 30 days after commencement of the cover Within 7 days 4marks	2	2	2	2	2	2	2	2	2	2	2
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S/NO	CRITERIA	MA X SC OR ES	BIDDER 5 M/S JUBILEE HEALTH INSURANCE LIMITED							
			E1	E2	E3	E4	E5	E6	E7	E8
										AV
1	Provide evidence of the net paid medical claims for the last three years 2021,2022& 2023 (state 3 years average supported by IRA extracts) Above 1 billion 10 marks Between 500m- 1b-7 marks below 500m-3 marks	10	10	10	10	10	10	10	10	10
2	Provide evidence of provision of medical insurance services to the magnitude of the tender under consideration	10	10	10	10	10	10	10	10	10
3	Provide proof of financial capacity to handle provision of comprehensive medical insurance group life and last expense cover for state and public services officers for Nairobi City County Attach balance sheet extract	10	10	10	10	10	10	10	10	10
4	The firm's capital adequate ratio for each of the previous 3 years 2021,2022&2023) Attach IRA extracts 100% -1 marks for each year	3	3	3	3	3	3	3	3	3
5	bidder must have at least four (4) different contact persons who are able to make instant decision 24 hour call on both emergency and non-emergency cases ,attach proof of duties and responsibilities allocation from the management	2	2	2	2	2	2	2	2	2
6	Must provide a certified list of medical specialists and hospitals in their panel country wide (NHIF accredited) provide valid telephone /mobile contact persons	10	10	10	10	10	10	10	10	10

	to the above medical service providers above 40 counties-10 marks Between 25-39 counties -5 marks Below 25 counties -1mark																		
7.	The service provider to issue a commitment to empanel at least four (4) providers from Nairobi city county level 4 and above hospitals upon award of the tender	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5	5
8	Provide a list of three (3) medical clients with average premiums of 100 million ,where similar services have been offered or ongoing for the last (2) years 2022 and 2023 (3marks for each	9	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6
9	Provide actual turnaround time for settling medical reimbursement claims (provide for copy of approved service charter) With 10day -6marks Ten to twenty days -4 marks over 20days -marks	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2 b) Financial Evaluation at page 30 of the Tender Document. The Procuring Entity would award the subject tender to the bidder with the lowest evaluated price.

9. The Evaluation Committee noted as follows at pages 28 of the Evaluation Report with regard to the Interested Party:

SCHEDULE OF PRICES FORM

<i>1</i>	<i>2</i>	<i>3</i>		<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>
<i>No of item to be insured</i>	<i>Description of item to be insured</i>	<i>Value of item to be insured</i>	<i>Major contingencies requiring insurance</i>	<i>Insurance period</i>	<i>Insurance Premium per specified period (Tender Price)</i>	<i>Price discount (if any)</i>	<i>Total Tender Price for Insurance Service (Col. 5-6)</i>
<i>17,920</i>	<i>Medical Cover for NCCG staff</i>	<i>As per the TORs attached</i>	<i>Medical Insurance Cover</i>	<i>Per year</i>	<i>Ksh. 1,495,474,577</i>	<i>N/A</i>	<i>Ksh. 1,495,474,577</i>

10. At the end of evaluation at this stage, the Evaluation Committee recommend award of the subject tender to the Interested party at a bid sum of Kenya Shillings One Billion Four Hundred and Ninety-Five Million Four Hundred and Seventy-Four Thousand Five Hundred and

Seventy-Seven only (Kshs. 1,495,474,577/=) only for a period of one (1) year from the date of the contract signing.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the tender to the Interested Party at a bid sum of Kenya Shillings One Billion Four Hundred and Ninety-Five Million Four Hundred and Seventy-Four Thousand Five Hundred and Seventy-Seven only (Kshs. 1,495,474,577/=) only for a period of one (1) year from the date of the contract signing.

Professional Opinion

12. In a Professional Opinion dated 6th August 2024, the Director- Supply Chain Management Services, Mr. R.M.Omanwa, 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 the Interested Party at a bid sum of Kenya Shillings One Billion Four Hundred and Ninety-Five Million Four Hundred and Seventy-Four Thousand Five Hundred and Seventy-Seven only (Kshs. 1,495,474,577/=) only for a period of one (1) year from the date of the contract signing.

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SCHEDULE OF PRICES FORM

1	2	3		4	5	6	7
<i>No of item to be insured</i>	<i>Description of item to be insured</i>	<i>Value of item to be insured</i>	<i>Major contingencies requiring insurance</i>	<i>Insurance period</i>	<i>Insurance Premium per specified period (Tender Price)</i>	<i>Price discount (if any)</i>	<i>Total Tender Price for Insurance Service (Col. 5-6)</i>
17,920	Medical Cover for NCCG staff	As per the TORs attached	Medical Insurance Cover	Per year	Ksh. 1,495,474,577	N/A	Ksh. 1,495,474,577

10. At the end of evaluation at this stage, the Evaluation Committee recommend award of the subject tender to the Interested party at a bid sum of Kenya Shillings One Billion Four Hundred and Ninety-Five Million Four Hundred and Seventy-Four Thousand Five Hundred and

Seventy-Seven only (Kshs. 1,495,474,577/=) only for a period of one (1) year from the date of the contract signing.

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13. The Professional Opinion was approved by the County Chief Officer – Public Service Management of the Procuring Entity, Ms. Janet Opiata on 6th August 2024.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation process *vide* letters dated 6th August 2024.

REQUEST FOR REVIEW NO. 80 OF 2024

15. On 16th August 2024, The Kenyan Alliance Insurance Company Limited hereinafter referred to as ("the Applicant"), filed a Request for Review dated 16th August 2024 together with an undated Authority to Swear Affidavit, undated Verifying Affidavit sworn by Mercy Ndegwa and Supporting Affidavit sworn by Mercy Ndegwa, its Principal Officer (hereinafter referred to as "the instant Request for Review") through ROM Law Advocates LLP seeking the following orders from the Board:

A. The 1st and 2nd Respondent's decision contained in the letter of notification dated 6th August, 2024 disqualifying the Applicant's bid with respect to Tender No. NCC/PSM/T/001/2024-2025 for Provision Of Comprehensive Medical Insurance, Group Life And Last Expense Cover For State And Public Service Officers Cover For Nairobi City County be and is hereby nullified and/or set aside.

B. The 1st and 2nd Respondent's decision contained in the Letter of Notification dated 6th August, 2024 awarding Tender No. NCC/PSM/T/001/2024-2025 for Provision Of Comprehensive Medical Insurance, Group Life And Last Expense Cover For State And Public Service Officers Cover For Nairobi City County to the Interested Party be and is hereby nullified and/or set aside.

C. An Order be and is hereby issued directing the 1st and 2nd Respondents to readmit the Applicant into the Tender proceedings in Tender No. NCC/PSM/T/001/2024-2025 for Provision Of Comprehensive Medical Insurance, Group Life And Last Expense Cover For State And Public Service Officers Cover For Nairobi City County and to re-evaluate the Applicant's Tender in accordance with the provisions of the Tender document, Constitution, the PPADA, 2015 and the PPADA Regulations, 2020.

D. An order be and is hereby issued directing the Director General, Public Procurement Regulatory Authority to supervise and oversee the tender re-evaluation in line with its oversight role.

E. An Order be and is hereby issued extending the tender validity period for a further Thirty (30) Days.

F. The Respondents be and is hereby ordered to pay the costs of and incidental to these proceedings; and

G. Such other or further reliefs as this Board shall deem just and expedient.

16. In a Notification of Appeal and a letter dated 16th August 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 16th August 2024.

17. The Respondents filed, through Kihara & Wyne Advocates a Notice of Appointment of Advocates dated 19th August 2024, Preliminary

Objection dated 21st August 2024, and a 1st and 2nd Respondents' Memorandum of Response sworn on 21st August 2024 by Milka Thuku.

18. *Vide* email dated 23rd 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.
19. On 27th August 2024, the Interested Party filed through Chepkuto Advocates a Notice of Appointment of Advocates dated 26th August 2024, a Notice of Preliminary Objection dated 26th August 2024, and a Replying Affidavit sworn on 26th August 2024 by Njer Njomo.
20. *Vide* a Hearing Notice dated 27th August 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 29th August 2024 at 2.30 p.m. through the link availed in the said Hearing Notice.
21. On 27th August 2024, the Applicant filed through its advocates an Applicant's List of Documents dated 26th August 2024.
22. On 28th August 2024, the Applicant filed through its advocates an Applicant's Further Affidavit sworn on 28th August 2024 by Mercy Ndegwa.

23. On 29th August 2024, the Applicant filed through its advocates Written Submissions dated 28th August 2024 and a List of Authorities dated 28th August 2024.
24. On 29th August 2024, the Respondents filed through their advocates Written Submissions dated 28th August 2024 and a List of Authorities dated 28th August 2024.
25. On 29th August 2024, the Interested Party filed Written Submissions dated 28th August 2024 and a List of Authorities dated 29th August 2024.
26. When the matter came up for hearing on 29th August 2024 at 2:30 hrs, the Board read out pleadings filed by parties and directed that the preliminary objections raised by both the Respondents and Interested Party 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

27. The Applicant, led by Mr. Ratemo, relied on its documents filed before the Board and went on to submit that the issues raised by the Applicant are properly laid out in the prayers sought in the instant Request for Review.

28. Mr. Ratemo submitted that Section 167 of the Act as read with Regulation 203 of Regulations 2020 identify the benchmark events for the running of time to be the date of notification of award or occurrence of breach. He further submitted that the instant Request for Review is hinged on the award of the subject tender to the Interested Party and this notification came to the attention of the Applicant on 7th August 2024. He pressed on that the Applicant's contention before the Board was its disqualification of its bid document submitted in the subject tender as notified vide letter dated 6th August 2024 received on 7th August 2024 and the instant Request for Review was filed on 16th August 2024 which was just 9 days after notification and that the breach complained of occurred upon notification on 7th August 2024 which forms the benchmark date from when the 14 days' statutory period starts running.

29. Counsel submitted that the question of knowledge is central in identifying the benchmark date and that the instant Request for Review as filed is within the 14 days stipulated statutory period. In support of his argument, counsel referred to the holding in *Nairobi Judicial Review No. 102 of 2023* and the provisions under *Section 57*

of the Interpretation and General Provisions Act on computation of time.

30. He urged the Board to dismiss the Respondents' Preliminary Objection.
31. With regard to substantive issues raised in the instant Request for Review, Mr. Ratemo submitted that the Applicant seeks a review of the whole of the Respondents' decision as contained in the notification letter dated 6th August 2024 in relation to the subject tender.
32. He submitted that the subject tender was issued by way of an advertisement in the National Suppliers Portal and that the Applicant submitted a responsive bid document at a tender price of Kshs. 1,484,891,476/= for consideration and evaluation by the Respondents in accordance with the tender Provisions and the Act. Counsel further submitted that following evaluation of the subject tender, the Applicant was notified vide letter dated 6th August 2024 of the decision of the 1st Respondent to award the subject tender to the Interested Party at a tender price of Kshs. 1,495,474,577/= and that the notification letter disclosed that the Applicant's bid was unsuccessful for the reason that the audited accounts for the years 2022 and 2023 were not stamped and certified by the auditing firm appointed to audit accounts yet the requirement laid out in the Tender Document was that tenderers provide certified copies of audited accounts for years 2021, 2022 and 2023 signed by auditor(s) approved by Institute of

Certified Public Accountants of Kenya (ICPAK) leading the Applicant to file the instant Request for Review.

33. On the issue of whether the Applicant supplied certified copies of the Audited Accounts as stipulated in the Tender Document, Mr. Ratemo pointed to Mandatory Requirement No. 11 of Part A of Section III at page 27 of the Tender Document requiring a bidder to provide certified copies of audited accounts for the years 2021, 2022, & 2023 signed by auditor(s) who are approved by Institute of certified public accountants of Kenya (ICPAK). He further pointed out that a cursory reading of this provision required bidders to provide certified copies of audited accounts, and that the audited accounts be signed by an auditor approved by ICPAK. He argued that the only obligation placed on the auditor was to sign the audited accounts and not to either stamp or certify the audited accounts.
34. Mr. Ratemo submitted that the Applicant submitted audited accounts that were certified by an advocate of the High Court of Kenya as a true copy of the original and that the Tender document never specified or stipulated anything more in relation to the audited accounts other than tenderers were to submit certified copies of the audited accounts.
35. He argued that if the provision was to submit copies of audited accounts that have been certified and signed by the auditors, the Applicant would consider that it failed to meet the requirement but in this instance, the wording of the Tender Document required bidders

to provided certified copies of audited accounts that have been signed by the auditing firm registered by ICPAK. He further argued that the notification letter issued to the Applicant indicated that the Applicant was unsuccessful because its certified copies had not been stamped and signed by the auditing firm approved by ICPAK.

36. Counsel submitted that the mere introduction of the aspect of the audited accounts being stamped in the letter of notification of regret issued by the Respondents is a new criterion that was not provided for in the Tender Document and as such, the Respondent failed to correctly apply the evaluation criteria set out under Section III of the Tender Document.
37. Counsel further submitted that the Applicant's tender was substantially responsive and ought to have been considered for further evaluation at the Technical Evaluation stage.
38. Mr. Ratemo pointed to submissions by the Interested Party on an allegation that the audited accounts can only be certified by an auditor and indicated that this was not the question before the Board and neither was it a contention that the Applicant had raised.
39. The Applicant conceded that verification and certification of audited accounts was within the ambit of the auditor and that the requirement in the Tender Document was touching on a copy of the audited accounts hence the provision was for a bidder to provide certified

copies and as such, Mr. Eddie Owiti, an advocate of the High Court of Kenya certified its documents and was not purporting to confirm the financial status of the Applicant as this had already been actioned by the auditing firm. Mr. Ratemo submitted that the advocate was confirming that what was presented before him as a copy was a true reflection of what was contained in the original document.

40. Counsel pointed the Board to Mandatory Requirements No. 3 to 8 of the Tender Document requiring a bidder to submit certified copies of various documents and argued that these bore the same language and the manner in which they were coined and drafted only required that the various documents be certified and if at all the intention was to have the documents certified by the various organizations or persons who issued or prepared the said documents, then the same ought to have been certified by the Registrar of Companies, the Insurance Regulatory Authority and the 2nd Respondents amongst others being the entities who issued the said documents.

41. Mr. Ratemo argued that in view of the above, on a balance of probabilities, the interpretation of Mandatory Requirement No. 11 of the Tender Document meant that the advocate was certifying that these are true copies of the original and was not purporting to verify the financial status of the company.

42. Counsel submitted that for contrast purposes, the Applicant had submitted the 1st tender that had been previously advertised before

an addendum was issued by the floating the subject tender wherein under requirement no. 11 the Procuring Entity required bidders to submit certified copies of audited accounts for the year 2021, 2022, and 2023 signed by auditors approved by ICPAK where all pages must be certified by a practicing auditor.

43. Counsel further submitted that under the impugned tender, this requirement was missing as it would alter the requirement in question as it would place the burden on an auditor to be the one tasked with certification of the audited accounts.

44. Counsel reiterated that the Applicant's tender was responsive noting that its submitted audited accounts had been verified pursuant to Section 19 of the Act and the proper financial position established. He drew attention to the specifications provided in the Instructions to Tenderers at Clause 29 to 31 in the Tender Document and the previous actions by the Procuring Entity as set out at page 6 of the Request for Review indicting a clear bias towards the Interested Party.

45. Mr. Ratemo urged the Board to allow the Request for Review as prayed.

Respondents' case

46. The Respondents, led by Mr. Kihara and Ms. Wanjiku, relied on the documents that they filed before the Board, together with confidential documents concerning the tender.

47. With regard to the Respondents' Preliminary Objection, Mr. Kihara indicated that he would be abandoning ground 1 of his objection since the issue contested had been rectified by the Applicant.
48. On ground 2 of the Respondents' objection, Mr. Kihara submitted that the Board lacks the requisite jurisdiction to entertain the instant Request for Review and made reference to provisions under Section 167(1) of the Act. He indicated that the issue in contest was when time started running and submitted that the breach complained of by the Applicant pertains to the drafting of the Tender Document.
49. Counsel pointed out that from how the instant Request for Review had been structured, the Applicant was clearly complaining about drafting of the Tender Document and were therefore required to approach the Board for review within 14 days of uploading of the Tender Document by the Respondent.
50. In support of his argument, counsel referred the Board to paragraph 13 of the Request for Review where the Applicant was alleging that the Tender Document was crafted in an open manner that could not guide or provide for a specific manner of the person to certify the audited accounts and since the Applicant viewed the Tender Document as ambiguous, it chose to have the audited accounts certified by an advocate. He further referred the Board to paragraph 16 to the Request for Review where the Applicant averred that if at all the

Respondents required the audited accounts to be certified by the auditing firm, they were obligated to explicitly state the requirement in the Tender Document. He pressed on that the Applicant's case was pegged on the claim that the Tender Document was missing some information and further referred the Board to paragraph 21(b) of the Request for Review.

51. Counsel argued that this was not the opportune time for the Applicant to raise these complaints as they ought to have been raised 14 days from the date when the Tender Document was uploaded by the Respondents and not upon receipt of the notification letter informing them of their disqualification in the subject tender.

52. In support of his case, counsel referred to the holding in *Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR*, *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kemotrade Investment Limited (2018) eKLR*, and *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Marsep Petroleum Dealers (2023) eKLR*.

53. With regard to the substantive issues raised in the instant Request for Review, Ms. Wanjiku proceeded to refer the Board to Section 79 of the Act and the holding in *Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Medical Supplies Authority & 2 others (Interested Parties); First Assurance Company Limited (Ex parte) (Application E189 of 2022) [2023] KEHC 734 (KLR)* and

submitted that mandatory requirements serve a specific purpose and no entity can direct a procuring entity to dispense with any mandatory requirement as long as it is not inconsistent with the law since doing so would be in breach of Section 60, 70 and 79 of the Act.

54. Ms. Wanjiku further submitted that the Applicant was disqualified for failure to comply with Mandatory Requirement No. 11 of the Tender Document which rendered its bid non-responsive and that this reason was issued by the Respondent being failure to have its audited accounts for the year 2022-2023 certified by the auditing firm appointed to audit the said accounts.

55. Counsel referred the Board to paragraph 15 and 18 of the Applicant's Supporting Affidavit and submitted that the Applicant ought to have sought clarification on mandatory requirement No. 11 with regard to the specific manner in which the audited accounts were to be certified and in support of this argument referred the Board to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (interested parties)(2020) eKLR* wherein the High Court emphasized the purpose of seeking clarification. She pointed to clause 7 and 8 of the Tender Document arguing that the said clauses mandated a bidder to seek clarification from a procuring entity in writing before the deadline of submissions of its bid and where there is lack of a specification, then a clarification ought to be sought.

56. Ms. Wanjiku submitted that the Applicant herein failed to seek clarification on Mandatory Requirement No. 11 of the Tender Document and is estopped from making a claim that it understood the said requirement to be crafted in an open manner. Counsel referred the Board to the holding in *Republic v Public Procurement Administrative Review Board Accounting Officer Kenya Medical Supplies Authority & 2 others (interested parties); First Assurance Company Limited (ex parte) (Application No. E189 of 2022) KEHC 734 (KLR)* whereby the court held that responsiveness of a tender is not dependent on what a bidder understands but rather on what the Tender Document provides.

57. Counsel reiterated that pursuant to Mandatory Requirement No. 11 of the Tender Document, the audited accounts were required to be certified by an auditor. She maintained that the Evaluation Committee evaluated the subject tender in accordance with the provisions of the Act.

58. The Respondents referred the Board to the holdings in *Republic v Public Procurement Administrative Review Board Ex parte Fahimyasini Company Ltd; Kenya Urban Roads Authority & another (interested parties) (2021) eKLR* and *Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR* and urged the Board to dismiss the Request for Review with costs.

Interested Party's case

59. The Interested Party led by Ms. Jemator submitted that the Interested Party was greatly prejudiced by the failure by the Applicant to serve it with the attachments relied upon in the Instant Request for Review which led it to seek the same from the Respondent.
60. Counsel argued that the Applicant was shifting goal posts since on one hand its position was that the breach complained of in the instant Request for Review occurred on 5th August 2024 yet from its pleadings, it alleged that the Tender Document as drafted was ambiguous.
61. In support of Mr. Kihara's submissions, counsel maintained that a party can only rely on filed pleadings and that time started running when the Applicant had sight of the Tender Document and that all it needed to do was seek a clarification from the Procuring Entity on whether certification was to be done by the auditors or advocates and if they contested the certification being done by the auditor, their next cause of action would be approaching the Board before the tender submission deadline in contest of the same. Counsel referred the Board to Section 167(1) of the Act in this regard.
62. On admissibility of documents, counsel referred to Section 67 of the Act and pointed out that confidential documents refer to any document used during or after procurement proceedings and any information relating to evaluation and comparison or clarification of tenders, proposals and quotations whose disclosure would inhibit fair competition.

63. Ms. Jemator referred the Board to paragraph 23 of the Applicant's affidavit where two letters from PPRA were annexed dated 28th June 2024 and 12th July 2024 and marked as M6A and M6B respectively. Counsel pointed out that the Applicant while relying on the said letters alleged that the Procuring Entity illegally and unlawfully sought to extend the contract between itself and the Interested Party yet the Director General, PPRA had directed the Procuring Entity to review its Tender Document and this correspondence had been heavily relied upon by the Applicant in the instant Request for Review while arguing on the question of certification of the audited accounts.
64. Counsel further pointed out that the Applicant was neither a party in the aforementioned correspondences and neither were the said letters addressed to it nor copied to it which begs the question on how it came to access the same. She referred to the Applicant's Further Affidavit whereby the Applicant confirmed that it did not have custody of the said documents and only exercised their constitutional rights to access these documents as seen in their letter addressed to PPRA dated 14th August 2024.
65. Ms. Jemator submitted that the right to access to information as stipulated under Article 35 of the Constitution is limited and the Access to Information Act provides for the procedure on how a party accesses information and documents of a confidential nature failure to which reliance on the same is considered inadmissible and illegal. To buttress

her argument, she referred to the holding in *Okiya Omtatah v Central Bank of Kenya, Public Procurement Review Authority & 6 others*.

66. Counsel submitted that failure by the Applicant to provide communication from PPRA releasing the confidential information relied on confirms that the same was illegally obtained thus inadmissible in the instant Request for Review and greatly prejudiced the Interested Party since it exposed its contract details with the Procuring Entity to the public and also confirms that the Applicant had sight of that communication prior to submission of its bid document.

67. She pointed out that one of the recommendations made by PPRA touched on the issue of certification of audited accounts and the author therein was on the opinion that certification could be done by an Advocate being the reason why the Applicant proceeded to have its documents certified by an Advocate and this was a clear indication that the integrity of the procurement process in the subject tender was under question. In support of her argument, she referred the Board to its holding in *PPARB No. 21 of 2015, the Thwama Building Services Ltd. Vs Tharaka Nithi County Government* and *PPARB No. 11 of 2016 Amro Insurance Brokers Limited vs. Kenya Wildlife Services* and urged the Board to order for investigations to be carried out on how the Applicant came about the confidential information and strike out the Request for Review.

68. On the issue of whether the Applicant met mandatory requirement No. 11 of the Tender Document, counsel pointed to submissions by Mr. Ratemo on the definition of the terms verification and certification and submitted that only an accountant under Section 19 of the Accountants Act who has power to certify financial statements and accounts. She further pointed out that any audited accounts certified by a person other than an accountant fails to meet the criteria provided under the Tender Document and this was similar to the legal profession whereby only a person qualified as a Commissioner for Oaths can commission documents and only a Notary Public can notarize documents.
69. With regard to the issue of whether stamping was a requirement in the Tender Document, counsel urged the Board to study the Applicant's bid document and note that the same did not bear a stamp yet certification and stamping go hand in hand.
70. On the argument made that there were other mandatory documents that provided for certified copies, counsel submitted that there was no provision for any of these documents to be signed by the author and made reference to Mandatory Requirement No. 8 as an example in distinguishing it from Mandatory Requirement No. 11 of the Tender Document.

71. Counsel submitted that there was no ambiguity in the subject tender on the requirement under Mandatory Requirement No. 11 and urged the Board to strike out the instant Request for Review.

Applicant's Rejoinder

72. In a rejoinder, Mr. Ratemo submitted that the Interested Party had been served with the complete set of documents in the matter which were sent via email.

73. Counsel pointed to the Applicant's Further Affidavit and submitted that the alleged confidential documents were public documents and the Applicant was exercising its constitutional right to access to justice and recommended PPRA for expeditiously supplying it with the requested documents and information.

74. He submitted that there was no prejudice occasioned upon the Interested Party since the Applicant got hold of the aforementioned letters after receipt of its letter of notification of regret in the subject tender. Counsel reiterated that the Procuring Entity is mandated to ensure that the evaluation process adheres to the provisions of the Tender Document, the Act and Regulations 2020.

75. Mr. Ratemo pointed out that the question before the Board was on the requirement and format of the copies of audited accounts that were required to be supplied and the Tender Document did not provide

for verification and certification to be undertaken at that particular point. He further pointed out that the first tender was only introduced by the Applicant so as to contrast the two requirements under Mandatory Requirement No. 11 and it was imperative to note that at the bottom of the said tender, there was a requirement for certification of copies by a commissioner for oaths.

76. He indicated that the copies of the audited accounts were to be certified and the only obligation placed upon the auditor was to have signed the original audited accounts. He further indicated that there was no clarification needed nor ambiguity in crafting of the Tender Document with regard to Mandatory Requirement No. 11 of the Tender Document and that the notification letter spoke to a new criteria requiring stamping of the documents submitted.

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

CLARIFICATIONS

78. When asked by the Board to clarify on the difference in Mandatory Requirement No. 11 in the first tender document and the second tender document which is the basis of the subject procurement, and what necessitated the amendment, Mr. Kihara submitted that there were two addendums and a suggestion from PPRA on amendments to the first tender document and any change thereon was to comply with the opinion of the regulator.

79. On whether certification by a commissioner for oaths was on certain documents under the mandatory requirements or all documents that had a requirement for certified copies, counsel submitted that the entire bid document ought to have been certified by a commissioner for oaths and on mandatory requirement no.11 this was to be over and above the certification by the auditor. He indicated that this was required since ordinarily a commissioner may not verify the contents of the financial statements. On whether the Procuring Entity's aim was to verify if the contents of the financial statements submitted in the bid document were factual, counsel answered in the affirmative.

80. On why mandatory requirement no. 11 in the Tender Document did not specifically indicate that certification ought to be by the auditor and was not framed as advised by PPRA, counsel pointed out that the subject tender's quantum was quite high and requirements in various tenders are not always similar hence the higher the quantum the more clarifications required to be given by a procuring entity and in this instance, the Procuring Entity needed to be very certain that the audited accounts submitted had been certified by the person who drew them to ensure that the bidder would deliver if awarded the contract. He further pointed out that all the bidders in the subject tender understood this requirement and it was only the Applicant who seemed to have a different interpretation.

81. On her part, Ms. Jemator submitted that a bidder could only submit certified copies of its audited accounts and this is provided for under Section 19 of the Accountants Act which provides that certification can only be done by an accountant and the process of certification is similar to verification. She reiterated that audited accounts can only be certified or verified by their author hence the reason why advocates do not have capacity to certify audited accounts.
82. As to whether the footnote under the Mandatory Requirements left room for various interpretations by bidders hence the reason no clarification was sought, Mr. Kihara submitted that Mandatory Requirement No. 11 of the Tender Document was clear that the audited accounts were to be certified by a practising auditor and the footnote notified bidders that those copies ought to be certified by a commissioner for oaths hence two certifications were required.
83. On whether the Applicant was able to differentiate between certification and verification, Mr. Ratemo submitted that the first tender required certification be done by a practising auditor but the subject tender only provided for the audited accounts to be signed. He indicated that in the audited accounts, an entry was made by the Auditor as to consistency of the financial statements addressing the issue of verification that information therein is a true reflection of the financial statements and status of the bidder. He reiterated that there was no ambiguity on the requirement for certification in the subject tender and there was no need to seek clarification on the same.

84. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 16th August 2024 was due to expire on 6th September 2024 and the Board would communicate its decision on or before 6th September 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

In determining the first issue, the Board will make a determination on whether the instant Request for Review was filed within the stipulated statutory period of 14 days of notification of award or occurrence of breach pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

B. Whether Applicant's exhibits marked as 'MN-5' and 'MN-6b' being letters dated 12th July 2024 and 28th June 2024 are

confidential and inadmissible in the instant Request for Review.

C. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

D. What orders the Board should grant in the circumstances

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

86. The Respondents filed a Preliminary Objection dated 21st August 2024 seeking for the instant Request for Review to be struck out on the ground that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days of occurrence of breach complained of.

87. It is the Respondents case that from how the Request for Review is structured, the breach complained of by the Applicant pertains to the drafting of the Tender Document and ought to have been raised pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Simply put, the Respondents

contends that the Applicant ought to have approached the Board for review within 14 days of uploading of the Tender Document by the Respondents.

88. In response, the Applicant submitted that the instant Request for Review is hinged on the award of the subject tender to the Interested Party which it only came to learn of upon receipt of a notification of intention to award the subject tender on 7th August 2024. It is the Applicant's case that its contention in the instant Request for Review pertains to its disqualification and the breach complained of occurred upon notification on 7th August 2024 which forms the benchmark date from when the 14 days' statutory period starts running.

89. It is necessary for the Board to determine whether it has jurisdiction to hear and determine the issues raised by the Applicant in this Request for Review noting that it is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

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

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court

with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

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

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

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

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

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

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a

solid foundation because jurisdiction is the bedrock on which court proceedings are based."

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

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

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

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

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

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

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

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

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

99. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

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

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

167. Request for a review

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

(2)

(3)

.....

173. Powers of Review Board

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

101. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

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

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

203. Request for a review

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

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

(a);

(b);

(c) be made within fourteen days of —

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

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

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

(d)

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

(4)

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

87. Notification of intention to enter into a contract

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

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

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

successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

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

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

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

106. Having considered parties' pleadings and submissions on the Preliminary Objection, the issue that calls for determination by this Board is what were the circumstances in the instant case that determine the period when the Applicant ought to have approached the Board?

107. We have studied the Request for Review application and understand the Applicant's contention to be that the Respondents breached Section 80(2) of the Act by failing to evaluate the Applicant's tender in accordance with the procedures and criteria set out in the Tender Document and particularly Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria. The Applicant has stated that it only came to learn of this breach when it was notified in accordance with Section 87 of the Act of its unsuccessfulness in the subject tender vide a notification letter dated 6th August 2024 received on 7th August 2024 which set out the reason as to why its tender was unsuccessful.

108. According to the Applicant, the 2nd Respondent's Evaluation Committee used extraneous criteria to evaluate the Applicant's tender with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria. It is the Board's considered view that at the point of submitting its tender, the Applicant was

cognizant of the mandatory requirements stipulated in the Tender Document did not have an issue with the provisions and requirements of the Tender Document prior to submitting its tender and was of the belief that in submitting its tender, it had adhered to all the stipulated requirements in Tender Document.

109. It therefore follows, the Applicant could not have filed a Request for Review within 14 days of the time it obtained the Tender Document since it had a legitimate expectation that the 2nd Respondent would evaluate its tender using the evaluation criteria stipulated in the Tender Document as understood and interpreted by the Applicant.

110. It is only after it received the letter of Notification, that the Applicant found out that the interpretation by the 2nd Respondent's Evaluation Committee of the provisions of Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria in applying the same when evaluating the Applicant's tender differed from what the Applicant's interpretation of the same was. This is the reason why the Applicant believes the 2nd Respondent's Evaluation Committee used extraneous criteria not provided for in the Tender Document to evaluate its tender at the Preliminary Evaluation stage. With this, we are of the considered view that the allegations of breach of the provisions of Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria became known to the Applicant when it received the letter of Notification dated 6th August 2024 and could not have been known to

the Applicant when the Applicant obtained the Tender Document or during the tender submission deadline.

111. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA") which provides as follows:

57. Computation of time

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

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

done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

112. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of its tender, fourteen days started running on 8th August 2024 and lapsed on 21st August 2024. The 7th August 2024 is excluded pursuant to Section 57(a) IGPA being the day when the letter of notification was received by the Applicant. In essence, the Applicant had between 8th August 2024 and 21st August 2024 to seek administrative review before the Board.

113. The Applicant filed the Request for Review on 16th August 2024 which was within the statutory period of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Accordingly, we have jurisdiction to hear and determine the instant Request for Review. Consequently, the Preliminary Objection contained in the Respondents' Preliminary Objection dated 21st August 2024 fails.

Whether Applicant's exhibits marked as 'MN-5' and 'MN-6b' being letters dated 12th July 2024 and 28th June 2024 are confidential and inadmissible in the instant Request for Review.

114. The Interested Party contends at grounds 2 to 4 of its Notice of Preliminary Objection that (a) the Applicant is in breach of Section 67 of the Act, (b) the Applicant is in breach of the Evidence Act as read with Article 50(4) of the Constitution by illegally obtaining and relying on evidence that is confidential under the Act, (c) the illegally obtained evidence ought to be expunged from record failure to which it will render the proceedings unfair and detrimental to the administration of justice.

115. On its part, the Applicant deponed at paragraph 5 and 6 of its Further Affidavit that through its advocates on record and in exercise of its constitutional right to access to information, it wrote to PPRA and sought for clarification on the opinion of PPRA as regards the actions of the Respondent in the subject tender and in response, PPRA responded by availing the alleged confidential documents.

116. The Board is cognizant of the provisions of Section 67 of the Act which provides for confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law and reads as follows:

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."

117. From the above, it is clear that the Act upholds the confidentiality of public procurement proceedings and information. Specifically, a procuring entity, its officers, agents and indeed any person are

prohibited from disclosing any procurement information that would (i) be against the public interest; (ii) prejudice the legitimate commercial interest of tenderers; (iii) disclose the evaluation and comparison of tenders, and (iv) the contents of tenders. Any such disclosure of procurement information is an offence attracting criminal sanctions in addition to debarment and prohibition from working for a government entity or where the government is a shareholder for a period of 10 years.

118. However, Section 67(3) of the Act provides instances when disclosure of confidential information is permitted such as when such disclosure is for purposes of a review under the Act. In essence, a person submitting a tender is entitled to be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. However, this entitlement only crystalizes when such a person submitting a tender makes a request to the Procuring Entity to be furnished with the same.

119. **Notably, all communication and enquires between parties in procurement proceedings must be in writing as provided under Section in 64(1) of the Act.** It then follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records which can only be disclosed by the accounting officer of a procuring entity.

120. Turning to the circumstances in the instant Request for Review, we note that the alleged confidential documents pertains to the Applicant's exhibits marked as 'MN-5' and 'MN-6b' being letters dated 12th July 2024 and 28th June 2024 both addressed to Patrick Analo Akivaga, Regd. Physical Planner and Ag. County Secretary and Head of County Public Service, Nairobi City County and were both from the Director General PPRA. The letter dated 12th July 2024 was copied to CEC Member Finance and Economic Planning Nairobi City County while the letter dated 28th June 2024 was copied to the H.E The Governor, Nairobi City County.

121. While the Applicant in its Further Affidavit contends that in exercise of its right to access to information it sought in writing through its advocates for clarification of PPRA as regard the actions of the Respondent in the subject tender as evidenced by its letter dated 14th August 2024 received by PPRA on 15th August 2024, **it has not adduced any evidence nor written communication to show that PPRA responded by availing the alleged confidential documents.** In view of the foregoing, it is evident that the Board cannot ascertain how the Applicant obtained the alleged information and documents produced as exhibits MN-5 and MN-6b in the instant Request for Review.

122. The Board observes that a bidder bears a duty to follow the prescribed procedure whenever it requires access to any information pertaining to procurement proceedings and confidential information

and especially if the said information is to be adduced in evidence in a request for review noting that the right to access information has to be balanced with the obligation to follow due process.

123. Having perused the confidential file submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that the letters dated 12th July 2024 and 28th June 2024 are not part of the documents submitted to the Board. Neither the Procuring Entity nor the Interested Party availed the letters for the Board to confirm their authenticity and verify confidentiality of these documents as relates to the procurement proceedings in the subject tender. Notably, the letter dated 28th June 2024 has no correlation and adds no value to the issues raised in the instant Request for Review. Additionally, the letter dated 12th July 2024 was an opinion rendered by PPRA that the Applicant relies on in propelling its case but fails to adequately explain how it obtained the said letter.

124. In view of the foregoing, the Board must then balance the right to access information with the obligation to follow due process, in considering the documents produced as exhibits MN-5 and MN-6b in the instant Request for Review. In saying so, we are guided by the holding by the Supreme Court in **Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated))[2023] KESC 38 (KLR) (Civ) (16 June 2023) (Judgment)** (hereinafter referred to as "the Kenya Railways

Corporation case”) where the Supreme Court was called upon to determine, *inter alia*, whether irregularly obtained public documents/information were admissible as evidence in court. This was an issue that had been previously decided at the High Court where the learned judges had expunged documents in support of the petition filed by the 1st, 2nd and 3rd respondents having found the same to be inadmissible and the decision by the High Court was upheld by the Court of Appeal leading to the appeal at the Supreme Court which held as follows:

“.....

77. The 1st and 2nd respondents, in their cross-appeal, fault the superior courts’ decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions. The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister’s office; the Embassy of the People’s Republic of China and Ministry of Transport; the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People’s Republic of China; the Attorney General’s Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General’s office; and between the Office of

the Deputy President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and installation of facilities, locomotives and rolling stock; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

78. In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under article 33 of the United Nations Convention Against Corruption. This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the Public Officer Ethics Act, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the Evidence Act and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under

article 31 of the Constitution. The High Court was of the position that the 1st, 2nd and 3^d respondents ought to have properly compelled the Government to provide the documents under article 35 of the Constitution. This position was affirmed by the Court of Appeal which added that admitting such documents would be detrimental to the administration of justice and against the principle underlying article 50(4) of the Constitution.

79. The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3^d respondents in support of their petitions filed at the High Court.....

80. The Evidence Act cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that:

Application.

1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

81. The Evidence Act provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states:

Certified copies of public documents.

1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allows the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.

83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby out rightly rendered inadmissible.

84. Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to

access the information by first, requesting for the information from the relevant State agency.....

85. The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been denied or not provided. The 1st, 2nd and 3^d Respondents herein did not make a request to be provided with the information relied on.

.....

87. This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in Njonjo Mue case (supra). In that case, we recognized that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

88. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or



violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process. Applying that test to the obtaining facts, we summed up the position as follows:

"(24) The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information."

.....

91. We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of the Constitution. Allowing such documents is akin to sanitizing illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the Constitution on the right to privacy including privacy of communication.

Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the Evidence Act or requested for information under article 35 of the Constitution, the documents are inadmissible, we so declare.

.....”[Emphasis ours]

125. The import of the above holding is that (a) the Evidence Act provides for admissibility of evidence in judicial proceedings save for proceedings before an arbitrator with Section 80 setting out the manner in which public documents may be produced in court, (b) for public documents adduced in evidence to be rendered admissible, they ought to either be produced as an original document or a duly certified copy, (c) for the right to access to information to be justiciable, the person seeking the information must establish that he or she has followed the set out procedure when requesting the information, and (d) admitting illegally obtained information is detrimental to the

administration of justice since allowing such documents is akin to sanitizing an illicit action.

126. In view of the above well-reasoned decision, the Board observes that the Supreme Court in the the Kenya Railways Corporation case has rendered itself and explained the provisions of the Constitution and the law as far as public records are concerned. Turning to the matter at hand, the Applicant has failed to demonstrate that it followed the due procedure provided under the Constitution and in the Kenya Railways Corporation case in accessing the two letters marked as exhibits 'MN-5' and 'MN-6b' and this violation automatically renders the said letters inadmissible in these proceedings.

127. In the circumstances, we deem it fit and just to direct that the Applicant's exhibits marked as 'MN-5' and 'MN-6b' being letters dated 12th July 2024 and 28th June 2024 be expunged from these proceedings.

Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

128. The Applicant avers that its tender satisfied all the requirements of the Tender Document and that the Respondents in disqualifying its tender breached Article 227 of the Constitution, Section 80(2) of the Act and Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria (hereinafter referred to as "Mandatory Requirement No. 11"). It is the Applicant's case that the reasons for disqualification of its tender at the Preliminary Evaluation stage was unfair, tantamount to changing goal posts, malicious and discriminatory and that the Respondents introduced a new and extrinsic criterion when evaluating its tender.

129. It is the Respondents case that the Applicant's tender failed to comply with Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria stipulated in the Tender Document and, as such, the Applicant's tender was non-responsive pursuant to the provisions of Section 79(1) of the Act. The Respondents argued that if the provision under Mandatory Requirement No. 11 was not clear, the Applicant ought to have sought a clarification and that the Evaluation Committee adhered to the set out evaluation criteria in the Tender Document and complied with the provisions of the Act.

130. On its part, the Interested Party aligned itself with the Respondents submissions and invited the Board to note that the evaluation criteria under Mandatory Requirement No. 11 as laid out in the Tender Document was clear and known by all bidders in the subject tender

and the Applicant was disqualified for failure to comply with the said requirement.

131. 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)"

132. 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..."

133. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a 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."

134. Further Section 60(1) of the Act provides:

"(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."

135. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(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."

136. 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)"

137. 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.

138. 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."

139. 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."

140. 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.***

141. 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.

142. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a notification letter dated 6th August 2024 that its tender was unsuccessful in the subject tender as follows:

".....

We regret to inform you that your bid for the above tender was unsuccessful due to the reasons indicated below:

Provide certified copies of audited accounts for years 2021,2022, & 2023 signed by auditor(s) approved by Institute of Certified Public Accountant of Kenya (ICPAK): The audited accounts for the year 2022 and

2023 were not stamped and certified by the auditing firm appointed to audit accounts.

.....”

143. The Board notes that the impugned Tender Document under Mandatory Requirement No. 11 provided as follows:

A. PRELIMINARY/MANDATORY EVALUATION CRITERIA

<i>MR</i>	<i>MANDATORY REQUIREMENT</i>	<i>YES/NO</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>11.</i>	<i>Provide certified copies of audited accounts for years 2021,2022, & 2023 signed by auditor(s) who are approved by Institute of Certified Public Accountant of Kenya (ICPAK)</i>	
<i>.....</i>	<i>.....</i>	
<i>.....</i>	<i>.....</i>	
<i>NB: All copies attached must be certified by Commissioner of Oath</i>		

144. In essence, a bidder was required to submit certified copies of audited accounts for years 2021,2022&2023 signed by auditor(s) approved by ICPAK. It was a mandatory requirement for all copies attached in the bid document to be certified by a Commissioner of Oaths and if a tenderer did not satisfy even one of the mandatory requirements at the Preliminary Evaluation stage, its tender would be

found non-responsive and would be disqualified from proceeding for any further evaluation.

145. According to the Evaluation Report, we note that the Applicant was disqualified at the Preliminary Evaluation stage as follows:

"OBSERVATION

1. Bidder No. 1 M/s Kenya Alliance Insurance Company Limited did not proceed to technical evaluation due to the following reasons:

Provide certified copies of audited accounts for years 2021,2022, & 2023 signed by auditor(s) approved by Institute of Certified Public Accountant of Kenya (ICPAK) M/s Kenya Alliance Insurance Company Limited The audited accounts for the year 2022 and 2023 were not stamped and certified by the auditing firm appointed to audit accounts."

146. The bone of contention in the instant Request for Review is on who was to certify these audited accounts. Was it a Commissioner of Oaths or the issuing Auditor?

147. The Applicant invited the Board to note that there was no requirement in the Tender Document requiring the audited accounts to be certified by the issuing auditor and that a bidder was only required to provided audited accounts which were certified by a commissioner of oaths and if the Procuring Entity required the audited

accounts to be certified by both the issuing auditor and the commissioner of oaths, this ought to have been explicitly stated under Mandatory Requirement No. 11. In support of this argument, the Applicant pointed the Board to what it terms as the First Tender Document scheduled to close on 22nd July 2024 marked as MN-6(a) which had explicitly provided that audited accounts were to be certified by both the auditor and commissioner for oaths and this is what should have been explicitly provided for in the impugned Tender Document.

148. In response, the Respondents submitted that the audited accounts were to be certified by the auditing firm and that bidders had been advised to have the attached copies under the Preliminary/Mandatory Evaluation Criteria further certified by a commissioner of oaths. The Respondents contend that if Mandatory Requirement No. 11 was not clear, the Applicant ought to have sought a clarification before the tender submission deadline.

149. On its part, the Interested Party aligned itself with the submissions made by the Respondents and argued that pursuant to Section 19 of the Accountant Act, it is the responsibility of the accountant to certify financial accounts and related statements. The Interested Party submitted that financial statements are prepared by a certified public accountant recognized by ICPAK and an advocate cannot perform this role since the responsibility falls squarely under the mandate of the accountant and the duty to certify financial statements and accounts

is a duty under the Accountants Act, reserved for registered certified public accountants.

150. We note that all parties in the instant Request for Review agree on one aspect being that there was no ambiguity in the interpretation of Mandatory Requirement No. 11 of the Tender Document.

151. To begin with the term 'certified copy' is defined in the Cambridge English Dictionary as:

"a copy of a document that can be used instead of the original one because an official has checked it and formally approved it as a true and accurate copy by signing it."

152. Moreover, the Black's Law Dictionary defines the term 'certified copy' as:

"A copy of a document signed and certified as a true copy by the officer to whose custody the original is entrusted."

153. In view of the foregoing definitions, a certified copy of a document refers to a copy of document which is authoritatively and formally confirmed and approved by an official to be a true and accurate copy of the original document.

154. It is our considered view that Mandatory Requirement No. 11 of the Tender Document required a bidder:

- i to submit copies of audited accounts for years 2021,2022&2023;
- ii to ensure that the said audited accounts were signed by auditor(s) approved by ICPAK; and
- iii for the said audited accounts to be certified.

155. As to certification, we note that bidders were cautioned at the footnote of the Preliminary/Mandatory Evaluation Criteria to note that all copies attached in their bid document were to be certified by a commissioner of oath.

156. The Black's Law Dictionary defines a 'Commissioner of Oaths' as:

"A person that can administer oaths and take affidavits. They may only do this for other clients not their own."

157. Section 4 of the Oaths and Statutory Declarations Act sets out the powers of a commissioner for oaths as follows in subsection (1) thereof:

"(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognize in or for the purpose of any civil proceedings in the High Court or any subordinate court."

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested."

158. The basis of laying out the above provisions is to demonstrate that a commissioner for oaths is not only a practicing advocate but a practicing advocate who has been duly appointed by the Chief Justice as a commissioner of oaths and may administer oaths and take affidavits in addition to certification of documents where needed to do so as not only an advocate but a commissioner for oaths. We are therefore not persuaded by the argument that copies of submitted audited accounts could only be certified by a certified public accountant recognized by ICPAK.

159. With this in mind, and having established that certification entails an official checking a copy of document as against the original one and formally approving it to be a true and accurate copy of the original by signing the copy, we find that the Applicant's audited accounts as submitted in its bid document were not only signed by its Auditors approved by ICPAK but were also properly certified by a Commissioner of Oaths going by the name Eddy Owiti. We also find that Mandatory Requirement No. 1 as laid out in the Tender Document did not explicitly provide that certification ought to have been done by both

the Auditor and Commissioner for Oaths and as such, the 2nd Respondent's Evaluation Committee introduced a new and extrinsic criterion when evaluating the Applicant's bid document.

160. Considering the above, the Board is left with the inevitable conclusion that the Applicant's bid met on all fours the requirement stipulated under Mandatory Requirement No. 11 of the Tender Document and ought to have been rendered responsive and progressed for Technical Evaluation.

161. In the circumstances, the Board finds that the 2nd Respondent's Evaluation Committee failed to evaluate the Applicant's tender with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution. Accordingly, this ground of review succeeds.

What orders the Board should grant in the circumstances

162. The Board has found that the preliminary objections raised by the Respondent and ground 1 of the preliminary objection raised by the Interested Party is devoid of merit and the same is dismissed. We have also found merit with grounds 2 to 4 of the Interested Party's preliminary objection and expunged copies of the letters dated 12th

July 2024 and 28th June 2024 marked as Applicant's exhibits 'MN-5' and 'MN-6b'.

163. The Board has also found that the 2nd Respondent's Evaluation Committee failed to evaluate the Applicant's tender with respect to Mandatory Requirement No. 11 of the Preliminary/Mandatory Evaluation Criteria in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution. We deem it just and fair to direct for the Applicant and all other bidders who were responsive at the Technical Evaluation stage be admitted to the Technical Evaluation stage for re-evaluation of their bid documents.

164. The upshot of the findings is that the instant Request for Review succeeds in the following terms:

FINAL ORDERS

165. 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 Respondents Notice of Preliminary Objection dated 21st August 2024 be and is hereby dismissed.

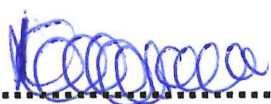
- B. The Applicant's exhibits marked as 'MN-5' and 'MN-6b' being letters dated 12th July 2024 and 28th June 2024 be and are hereby expunged.**
- C. The letter of Notification of Intention to Enter into a Contract with respect to Tender No. NCC/PSM/T/001/2024-2025 for Provision of Comprehensive Medical Insurance, Group Life and Last Expense Cover for State and Public Service Officers for Nairobi City County issued addressed to the Interested Party be and is hereby nullified and set aside.**
- D. The letters of Notification of Regret with respect to Tender No. NCC/PSM/T/001/2024-2025 for Provision of Comprehensive Medical Insurance, Group Life and Last Expense Cover for State and Public Service Officers for Nairobi City County addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.**
- E. The 1st Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender and that of the Interested party to the Technical evaluation stage and proceed with re-evaluation of the Applicant's tender and that of the Interested party at the**

Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.

F. Further to Order No. E, the 1st Respondent is hereby ordered to proceed with the procurement process of Tender No. NCC/PSM/T/001/2024-2025 for Provision of Comprehensive Medical Insurance, Group Life and Last Expense Cover for State and Public Service Officers for Nairobi City County to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.

G. Considering the outcome of this Request for Review, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 6th Day of September 2024.

.....  6/9/24

PANEL CHAIRPERSON

PPARB

..... 

SECRETARY

PPARB