

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 97/2024 OF 7TH OCTOBER 2024

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

PRINCIPAL SECRETARY,

MINISTRY OF DEFENCE 1ST RESPONDENT

MINISTRY OF DEFENCE 2ND RESPONDENT

Review against the decision of the Principal Secretary, Ministry of Defence in relation to Tender No. MOD/423(0110151) 2023/2024 for Provision of insurance cover for VVIP Fokker Aircraft Tail No. KAF 308

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. Mr. Joshua Kiptoo | - | Member |
| 3. CPA Alexander Musau | - | Member |
| 4. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

- | | | |
|---------------------|---|------------------------|
| 1. Mr. James Kilaka | - | Acting Board Secretary |
| 2. Ms. Evelyn Weru | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

APA INSURANCE LIMITED

1. Mr. Ayisi - Advocate, AL & C LLP Advocates
2. Amos Mabuka - Head of Corporate Division

RESPONDENTS

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE & MINISTRY OF DEFENCE

1. Mr. Kabi - Ministry of Defence
2. Mr. Willis O Olwalo - D/D Supply Chain Management Services

BACKGROUND OF THE DECISION

The Tendering Process

1. The Ministry of Defence, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. MOD/423(0110151) 2023/2024 for Provision of insurance cover for VVIP Fokker Aircraft Tail No. KAF 308 (hereinafter referred to as the "subject tender"). Tendering was conducted under Restricted Tendering Method and the subject tender's submission deadline was scheduled on 11th July 2024 at 1000 hrs.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 11th July 2024 signed by members of the Tender Opening Committee

(hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of four (4) tenders were submitted in response to the subject tender. The four (4) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	MUA Insurance Kenya Ltd
2.	APA Insurance
3.	Britam General Insurance
4.	Old Mutual General Insurance

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the four (4) tenders as captured in an Evaluation Report for the subject tender dated 29th July 2024 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

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

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Clause 2 of Section III – Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.
5. At the end of evaluation at this stage one (1) tender was determined non-responsive, while three (3) tenders, including the Applicant's tender was determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Aspect/Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document. Following the Technical Evaluation all the three (3) tenders were determined responsive and proceeded for financial evaluation.

Financial Evaluation

7. The Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenders would be ranked following price comparison and the bidder with the lowest evaluated price would be considered for award.

8. Following conclusion of evaluation of bids at this stage, bids were compared and ranked as follows:

<i>Firm</i>	<i>Amount Quoted</i>	<i>Absolute and Final Tender quoted Sum</i>	<i>Tender Cancellation and Alteration</i>
<i>Bidder No. 1: M/S MUA</i>	62,257,078.00	✓	✓
<i>Bidder No. 2: M/S APA</i>	50,830,727.74	✓	✓
<i>Bidder NO. 3: M/S BRITAM</i>	49,959,406.32	✓	✓

Evaluation Committee's Recommendation

9. The Evaluation Committee recommended award of the subject tender to M/s Britam General Insurance Company Kenya Limited at its tender sum of Kenya Shillings Forty-Nine Million, Nine Hundred and Fifty-Nine Thousands, Four Hundred and Six and Thirty two Cents Only (Kshs. 49,959,406.32 being the most responsive bidder.

Professional Opinion

10. In a Professional Opinion dated 19th August 2024 (hereinafter referred to as the "Professional Opinion"), the Head Supply Chain Management Services, Ms. Magdaline Koech, 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 M/s Britam General Insurance Company Kenya Limited at its tender sum of Kenya Shillings Forty-Nine Million, Nine Hundred and Fifty-Nine Thousands, Four Hundred and Six and Thirty two Cents Only (Kshs. 49,959,406.32 being the most responsive bidder.

11. Thereafter the Professional Opinion was approved by the 1st Respondent herein, on 20th August 2024.

Notification to Tenderers

12. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 28th August 2024.

REQUEST FOR REVIEW NO. 97 OF 2024

13. On 7th October 2024, APA Insurance Limited, the Applicant herein filed a Request for Review dated 30th September 2024 together with an Applicant's Statement in Support of the Request for Review dated 30th September 2024 and signed by Ruth Mbalelo, its Legal Manager (hereinafter referred to as the 'instant Request for Review') through

AL & C LLP Partners Advocates seeking the following orders from the Board in verbatim:

- a. Any Notification of Award given or made by the Respondents to any Tenderer who participated in Tender No. MOD/423 (0110151) 2023/2024 for Provision of Insurance Cover – VVIP Fokker Aircraft Tail No. KAF 308, herein be nullified, cancelled and set aside.***

- b. Any procurement contract with respect to Tender No. MOD/423 (0110151) 2023/2024 for Provision of Insurance Cover – VVIP Fokker Aircraft Tail No. KAF 308 that the Respondents may have entered into with any Tenderer in respect to the subject Tender, herein be nullified, cancelled and set aside.***

- c. The 1st Respondent be directed to furnish the Applicant, with a summary of the proceedings of the opening of bids, evaluation and comparison of bids including the evaluation criteria used in evaluating bids in Tender No. MOD/423 (0110151) 2023/2024 for Provision of Insurance Cover – VVIP Fokker Aircraft Tail No. KAF 308, forthwith in accordance with Section 67(4) of the Act as read with Section 68(2)(d)(iii) of the Act.***

- d. The Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings related to Tender No. MOD/423 (0110151) 2023/2024 for Provision of Insurance Cover – VVIP Fokker Aircraft Tail No. KAF 308 and in exercise of its discretion direct the Respondents to redo or correct anything within the entire procurement proceedings found not to have been done in accordance/compliance with the law.***
- e. The Respondents be directed to extend the tender validity period of Tender No. MOD/423 (0110151) 2023/2024 for Provision of Insurance Cover – VVIP Fokker Aircraft Tail No. KAF 308 for a period of thirty (30) days from the date of its expiry in line with Section 88 of the Public Procurement and Asset Disposal Act, 2015 pending;***
- f. The Respondents be compelled to pay the Applicant the Costs arising from and incidental to this Request for Review; and***
- g. The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and***

appropriate in ensuring that the ends of justice are fully met in the circumstances of this request for Review.

14. In a Notification of Appeal and a letter dated 7th October 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 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 7th October 2024.

15. On 16th October 2024, the Respondents filed a Memorandum of Response to the Request for Review dated 15th October 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

16. *Vide* letter dated 18th October 2024, advanced via email, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the

Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

17. *Vide* a Hearing Notice dated 18th October 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 22nd October 2024 at 2.30 p.m., through the link availed in the said Hearing Notice.
18. On 22nd October 2024, the Applicant filed through its advocates an Applicant's Further Statement in Support of the Request for Review dated 17th October 2024 and signed by Ruth Mbalelo, Written Submissions dated 22nd October 2024 and List of Authorities dated 22nd October 2024.
19. At the hearing of the instant Request for Review on 22nd October 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

20. In his submissions, counsel for the Applicant, Mr. Ayisi, relied on the documents filed in the instant Request for Review before the Board. Counsel submitted that the Applicant was the previous provider of the insurance cover for the aircraft in the subject tender and that it opted to participate in the subject tender pursuant to an invitation by the Respondents. However, that upon submission of its bid document, there was no communication forthcoming from the Respondents and the Applicant has never been informed of the outcome of the tendering process as required under the Tender Document, the Act and the Constitution.

21. Counsel further submitted that the Applicant noting that the cover of the subject aircraft was expiring on 23rd September 2024 sought to confirm from the Respondents, *vide* letter dated 19th September 2024, whether the current insurance is to be extended or not and also sought to know the status of the subject tender.

22. Mr. Ayisi submitted that the Respondents have never responded to the Applicant's letter of 19th September 2024 and that it was only until 14th October 2024, that they issued the Applicant with an irregular letter of notification of award which was defective as it lacked the following key details namely: the name and address of the tenderer submitting the successful tender, the contract price of the successful tenderer, and a statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter is addressed was unsuccessful.

23. Counsel indicated that prior to receiving the Respondents' Memorandum of Response to the instant Request for Review, they did not have knowledge of the successful bidder in the subject tender and reasons why it was successful. He further indicated that the notification anticipated from the Respondents ought to have contained (a) the name and address of the tenderer submitting the successful tender, (b) the contract price of the successful tenderer, (c) a statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter is addressed was unsuccessful, unless the price information revealed the reasons, (d) the expiry of the standstill period, and (d) the instructions on how to request a debriefing and/or submit a complaint during the standstill period.

24. Mr. Ayisi submitted that the contract entered into the subject tender by the Respondents is contrary to Section 135 of the Act since it is an illegally created contract having been entered into without proper notification being issued to the Applicant who according to the Respondents was unsuccessful. In support of his argument, he referred the Board to the holding in *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR* and argued that the Board has jurisdiction to investigate and look into the facts leading to the signing of the contract in the subject tender and if the same was in compliance with Section 135 of the Act.

25. It is the Applicant's case that the Respondents deliberately and inexplicably delayed to notify the Applicant of the fate of its bid

contrary to Section 87 of the Act read with Regulation 82 of Regulations 2020 and clause 41 of the Tender Document. The Applicant further contends that the Respondents have employed dilatory tactics to evade the obligation of notifying the Applicant since they *inter alia* (a) refused/neglected to prepare a notification of the (un)successfulness of the Applicant's tender in the subject tender, (b) ignored correspondence from the Applicant on the fast approaching expiry of the existing insurance cover on the subject aircraft, (c) ignored correspondence from the Applicant on the fast approaching expiry of the subject tender's validity period, and (d) engaging in dilatory conduct so that the Respondents can later use the expiry of the existing insurance cover on the subject aircraft as a pretext for its unlawful refusal/omission to notify the Applicant of the outcome of its tender.

26. Counsel submitted that by failing to adhere to the provisions of Section 87 of the Act as read with Regulation 82 of Regulations 2020, the Respondents breached the values and guiding principles under Section 3 of the Act and the primary responsibility of the accounting officer provided under Section 44(1) of the Act. He further submitted that the Applicant is aggrieved by the Respondents failure to comply with their obligations under the Constitution, the Act, Regulations 2020 and the Tender Document.

27. Counsel pointed out that the Respondents failed to show how they served the Applicants with the notification letter and on this basis, the instant Request for Review is merited.

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

Respondents' submissions

29. In his submissions, Mr. Kabi relied on documents filed before the Board by the Respondents in the instant Request for Review. He referred the Board to the Applicant's Further Statement and the impugned notification letter dated 28th August 2024 and pointed out that the Respondents filed their Memorandum of Response to the Request for Review on 16th October 2024 and there is a clear indication that the Applicant had possession of the said copy notification letter.

30. Mr. Kabi submitted that the Respondents released the notification letter dated 28th August 2024 to all bidders in the subject tender. He further clarified that the subject tender was a restricted tender and was never advertised by the Procuring Entity.

31. He further submitted that VVIP FOKKER aircraft tail no. KAF 308 is the official aircraft used by the Commander in Chief of the Kenya Defence Forces for official duties and its insurance was expiring on midnight of 23rd September 2024 when the contract in the subject tender was signed between the Procuring Entity and the successful bidder, Britam General Insurance Company Limited.

32. Mr. Kabi submitted that from page 2 of the notification letter dated 28th August 2024 the successful tenderer was indicated including its contract price against the other unsuccessful tenderers. He further submitted that the standstill period was also clearly defined including when any compliant ought to be made by a bidder.
33. It is the Respondents' case that the 14 days standstill period provided lapsed before any bidder raised a complaint with the Procuring Entity leading to issuance of a notification of award to Britam General Insurance Kenya Limited, the successful bidder, on 11th September 2024 who in turn issued an acceptance letter and 12 days later, parties entered into a contract.
34. He pointed out that the previous insurance contract with the Applicant was expired and the Respondents cannot be blamed for consequences or actions that are beyond their control once they released the notification letter for postage to the Postmaster General.
35. Mr. Kabi submitted that the Respondents sent on the 28th August 2024 the notification letter that was allegedly received by the Applicant on 14th October 2024 and the same was sent at GPO Post Office and it ought to have been received by the Applicant on the same day. He further submitted that the Applicant cannot feign ignorance of the contents of the notification letter and what was required of them having not exhausted the mechanisms provided therein.

36. He argued that the Applicant cannot come before the Board ought of time and without leave to seek the contract to be annulled. He reiterated that the contract signed in the subject tender was valid and the provision of insurance for the FOCA aircraft used by the Commander-in-Chief is a serious matter of national security and there is no way that that Procuring Entity would allow the President to be exposed to the perils that comes with using an aircraft that is not adequately insured.

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

Applicant's Rejoinder

38. In a rejoinder, Mr. Ayisi submitted that the Respondents having indicated that they served the Applicants with the notification letter by way of post ought to have demonstrated the date of dispatch of the said notification letter for the Board to be convinced that indeed there was postage of that letter and that for it to be received on the same day, that must have been registered post. He indicated that the law does recognize postage as a way of service but there ought to be evidence to support this allegation before the Board.

39. On the issue of the standstill period, counsel submitted that due to the failure by the Respondents to prove that they issued the notification letter, the standstill period is a nullity.

40. He further submitted that the Respondents' reference to the notification letter received by the Applicant on 14th October 2024 demonstrates that physical service is recognized by the Respondents yet they failed to respond to the Applicant's letter of 19th September 2024.

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

CLARIFICATIONS

42. On whether reasons for disqualification of the Applicant's bid were indicated in the notification letter issued to the Applicant, Mr. Kabi confirmed that the same were indicated.

43. As to postage of the notification letters, Mr. Kabi submitted that the Procuring Entity has an internal document used for delivery of letters of postage and the same indicate that the letters were received by the delivery person from the procurement department on 28th August 2024 and posted on the same day.

44. When asked to clarify whether the Procuring Entity has a receipt confirming that postage was done, Mr. Kabi submitted that letters to be dispatched are franked at the Procuring Entity's offices before dispatch and this has always been the practice.

45. When asked to clarify whether the Applicant wrote to the Respondents so as to find out why they weren't getting a response on the outcome of evaluation of the subject tender, Mr. Ayisi submitted that they followed up *vide* letter dated 19th September 2024, where they sought to know the outcome of their bid and if the insurance was to be renewed though they did not receive a response.
46. On reasons advanced for disqualification of the Applicant's bid, Mr. Ayisi submitted that from the notification letter, the Applicant's price was not the lowest evaluated price hence its disqualification.
47. When asked by the Board to clarify whether this was an open tender or a restricted tender, Mr. Ayisi while quoting the Applicant's copy of Tender Document submitted that it was an open tender.
48. On his part, Mr. Kabi submitted that the subject tender was a restricted tender and was expressly indicated as such in the Tender Document.
49. The Board informed parties that the instant Request for Review having been filed on 7th October 2024 was due to expire on 28th October 2024 and the Board would communicate its decision on or before 28th October 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

A. Whether the Applicant was notified of the outcome of the procurement process in the subject tender as required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

B. What orders should the Board grant in the circumstances?

Whether the Applicant was notified of the outcome of the procurement process in the subject tender as required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020;

51. It is the Applicant's case that the Respondents breached section 87 of the Act read with Regulation 82(3) of Regulations 2020 and Article 227 (1) of the Constitution by, *inter alia*, (a) failing to disclose particulars of successful tenderer in the subject tender; (b) failing to disclose the successful tenderer tender price; (c) failing to disclose reasons why the tenders were successful in accordance with section 86 (1) of the

Act; (d) inexplicably delaying in issuing their letter of notification of intention to award contract in the subject tender; and (e) failing to disclose that the specific outcome of evaluation of its bid document.

52. The Respondents submit that the Applicant and unsuccessful tenderers were notified of reasons why their tenders were unsuccessful and informed of the successful tenderers and reason why they were successful *vide* the letters of notification of intention to award contract in the subject tender dated 28th August 2024 which met the requirements of section 87(3) of the Act.

53. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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."

54. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

55. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and

shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”

56. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system,

including notification to unsuccessful tenderers must be conducted in a transparent manner.

57. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

58. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

59. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

60. We note that the Respondents annexed in their Memorandum of Response to the Request for Review dated 15th October 2024 Exhibit marked 'WOO 2', 'WOO3', 'WOO4' and 'WOO5' copies of the letters of notification issued to bidders in the subject tender. Upon enquiry by the Board on how the said letters were dispatched to bidders, Mr. Kabi submitted that the letters were posted to the various recipients on the 28th August 2024 at GPO Post Office and the Applicant ought to have received its letter on the same day of 28th August 2024 though it had allegedly received its letter on 14th October 2024.

61. According to the Applicant's letter of Notification of Intention to Award the subject tender dated 28th August 2024, the reason why the Applicant's bid was unsuccessful was not indicated. However, we note from the Evaluation Report submitted by the 1st Respondent as part of the confidential file pursuant to Section 67(3)(e) of the Act that the Applicant's bid progressed to the Financial Evaluation stage where its price was compared with other responsive bids at this stage as follows:

<i>Firm</i>	<i>Amount Quoted</i>	<i>Absolute and Final Tender quoted Sum</i>	<i>Tender Cancellation and Alteration</i>
<i>Bidder No. 1: M/S MUA</i>	62,257,078.00	✓	✓
<i>Bidder No. 2: M/S APA</i>	50,830,727.74	✓	✓
<i>Bidder NO. 3: M/S BRITAM</i>	49,959,406.32	✓	✓

62. From the bids evaluated and in view of the award criteria, the Evaluation Committee recommended award of the subject tender to the lowest evaluated bidder being Britam General Insurance Company Kenya Limited. The Applicant's bid was therefore not the lowest evaluated bid and was disqualified on this basis.

63. We note that the Applicant at paragraphs 14,15, 16,17, 18, 19 and 20 of its Further Statement in Support of the Request for Review dated 17th October 2024 avers that it was served on the 14th October 2024 with a letter of Notification of Intention to Award the subject tender dated 28th August 2024 and that the said notification letter was in breach of Section 87 of the Act read with Regulation 82 of Regulations 2020 and Article 227 of the Constitution. The Applicant further avers that service of this notification 2 days prior to the Respondents filing their response to the instant Request for Review is an afterthought

and was served upon the Applicant in reaction to the instant Request for Review.

64. We further note that the Applicant avers at paragraph 25 of its Further Statement in Support of the Request for Review dated 17th October 2024 that the copies of the letters of notification of intention to award marked 'WOO 2', 'WOO3', 'WOO4' and 'WOO5' in the Respondents' Memorandum of Response to the Request for Review dated 15th October 2024 are strange to the Applicant and that there is no evidence before the Board that they said notification was ever received by the Applicant.

65. Having carefully perused the confidential file submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act, we note that there is no proof of whether the Applicant's letter of Notification of Intention to Award the subject tender dated 28th August 2024 was simultaneously dispatched to the Applicant while the Respondents were also notifying the successful tenderer and other unsuccessful tenderers in the subject tender.

66. Further to this, having also carefully studied the Respondents' pleadings and oral submissions, we note that the Respondents have not adduced evidence in support of their allegation that the Applicant's notification letter was sent via post on 28th August 2024. The rules of evidence require he who alleges must prove as provided for in Section

107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

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

67. The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

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

68. In the instant Request for Review, the evidential burden of proof shifted to the Respondents to prove that indeed the Applicant was simultaneously served with its letter of notification of Intention to Award the subject tender via post on 28th August 2024 as was the successful tenderer and other unsuccessful tenderers in the subject tender.

69. In view of the foregoing, we find that the Respondents Letter of Notification of Intention to Award the subject tender dated 28th August 2024 issued to the Applicant in the subject tender did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

70. We have found that the Applicant's letter of Notification of Intention to Award the subject tender dated 28th August 2024 failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

71. Consequently, the Board deems it fit to nullify the Applicant's Letter of Notification of Intention to Award the subject tender dated 28th August 2024 to enable the 1st Respondent to notify the Applicant of the outcome of evaluation of its bid document and the subject tender in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

72. The upshot of our findings is that the instant Request for Review dated 30th September 2024 and filed on 7th October 2024 succeeds only to the extent that the Letter of Notification of Intention to Award the subject tender dated 28th August 2024 issued to the Applicant did not meet the threshold required un Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

FINAL ORDERS

73. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 30th September 2024 and filed on 7th October 2024:

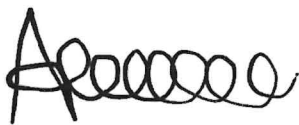
A. The Letter of Notification of Intention to Award dated 28th August 2024 addressed to the Applicant with respect to Tender No. MOD/423(0110151) 2023/2024 for Provision of insurance cover for VVIP Fokker Aircraft Tail No. KAF 308 be and is hereby nullified and set aside.

B. The 1st Respondent is hereby directed to issue the Applicant with a letter of Notification of Intention to Award with respect to Tender No. MOD/423(0110151) 2023/2024 for Provision of insurance cover for VVIP Fokker Aircraft Tail No. KAF 308 disclosing reasons for its disqualification as captured in the Evaluation report

in addition to the name of the successful bidder in the subject tender and reasons why the said bidder was rendered successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within three (3) day from the date hereof taking into consideration the Board’s findings herein.

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

Dated at NAIROBI this 28th Day of October 2024.



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PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB