

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 14/2021 OF 4TH FEBRUARY 2021

BETWEEN

SCIENCESCOPE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

RENAISSANCE HEALTH LIMITED.....1ST INTERESTED PARTY

ABBOTT GmbH.....2ND INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenyatta National Hospital in relation to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Nicholas Mruttu | -Member |
| 5. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta National Hospital (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper on 10th November 2020.

Bid submission deadline and opening of bids

The Procuring Entity received a total of four (4) bids by the bid submission deadline of 3rd December 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

1. M/s Neo Science Africa Ltd;
2. M/s Sciencescope Limited;
3. M/s Meditec Systems Ltd; and
4. M/s Renaissance Health Limited.

Evaluation of bids

An Evaluation Committee appointed by the Procuring Entity’s Chief Executive Officer evaluated bids in the following stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and

iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether or not bidders submitted mandatory documents required under Stage 1. Preliminary Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation, all the four bidders were found responsive, and thus eligible to proceed to the Technical Evaluation Stage.

2. Technical Evaluation

At this stage, the Evaluation Committee determined bidders' compliance to the tender requirements, their technical capacity and availability of adequate resources to implement the subject tender in accordance with the criteria outlined in Stage 2. Technical Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation at this stage, two bidders were found responsive and thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the prices quoted by bidders as follows: -

BIDDER NO.	TOTAL VALUE KSHS
2 M/s Sciencscope Limited	102,879,013.59
4 M/s Renaissance Health Ltd.	25,144,255.00

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Renaissance Health Limited at the price of Kshs. 25,144,255.00 for being the lowest evaluated tenderer.

Professional Opinion

In a professional opinion dated 9th December 2020, the Procuring Entity's Acting Director, Supply Chain Management reviewed the Evaluation Report dated 8th December 2020 and took the view that the subject procurement process satisfied the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He advised the Chief Executive Officer to award the subject tender to M/s Renaissance Health Limited at the price of Kshs. 25,144,255.00. The said professional opinion was approved on 9th December 2020.

Notification to Bidders

In letters dated 10th December 2020, the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 157/2020

M/s Sciencescope Limited lodged Request for Review No. 157 of 2020 on 23rd December 2020 through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. An order annulling and setting aside the award of Tender Number KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment – Fully Automated Immunoassay for Immunochemistry Analyser to M/s Renaissance Health Limited;***
- ii. An order annulling and setting aside the Respondents’ letters of notification of unsuccessful bid in respect to tender number KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment – Fully Automated Immunoassay for Immunochemistry Analyser) dated 10th December 2020 and 11th December 2020 addressed to M/s Sciencoscope Limited;***
- iii. An order substituting the Respondents’ decision awarding Tender Number. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment – Fully Automated Immunoassay for Immunochemistry Analyser) to Renaissance Health Limited with a decision awarding the subject tender to the Applicant, M/s Sciencoscope Limited on account of having attained the award criteria set out in the Tender Document;***
- iv. Any other relief that the Board may deem fit and just to grant and***
- v. An order awarding costs of the Review.***

The Board having considered each of the parties’ pleadings and written submissions, together with the confidential documents pertaining to the subject procurement process rendered a decision dated 12th January 2021 issuing the following specific orders: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment -Fully Automated Immunoassay for Immunochemistry Analyser dated 11th December 2020, addressed to the Applicant and the letters dated 10th December 2020 addressed to all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser dated 10th December 2020, addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in this case.**
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to ensure the procurement**

proceedings in Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

- 5. Given that the subject procurement proceedings is not complete, each party shall bear its own costs in the Request for Review.**

RE-EVALUATION OF TENDERS AT THE FINANCIAL EVALUATION STAGE

In a letter dated 15th January 2021, the Procuring Entity's Chief Executive Officer referred the Chairman of the Procuring Entity's Evaluation Committee to the decision rendered by the Board in **PPARB Application No. 157 of 2020, Sciencescope Limited v. The Accounting Officer, Kenyatta National Hospital & 2 Others** (hereinafter referred to as "the Board's

decision in Review No. 157/2020"). He then requested the Evaluation Committee to re-evaluate bidders who were found eligible to proceed to Financial Evaluation, taking into consideration the findings of the Board's decision in Review No. 157/2020 and to submit an evaluation report on or before 18th January 2021.

According to the Evaluation Report received on 18th January 2021 by the Acting Director, Supply Chain Management (having compared the signature of the recipient on 18th January 2021 and that of the Acting Director, Supply Chain Management in the Professional Opinion dated 19th January 2021), the Evaluation Committee noted the contents of the letter dated 15th January 2021 received from the Chief Executive Officer and conducted a re-evaluation of Financial Evaluation in the following components: -

a) Determination of evaluated price for each bid

- i.** There will be no correction of arithmetic errors as per section 82 of the Act;

Item Number	Item description	Bidder No 2 M/s Sciencscope Ltd	Bidder No 4 M/s Renaissance Health Ltd	Remarks if any
1	There will be no corrections of arithmetic errors as per Public Procurement & Assets Disposal Act 2015 Section 82	No Correction of Arithmetic's done	No Correction of Arithmetic's done	-

- ii.** Conversion of all tenders to same currency using a uniform exchange rate prevailing at the closing date of the tender;

Item Number	Item description	Bidder No 2	Bidder No 4	Remarks if any
1	Conversion of all tender to same currency using a uniform exchange rate prevailing at the Closing date of the Tender.	quoted in Kenya Shillings as per form of tender	quoted in Kenya Shillings as per form of tender	No conversion done since all the bidder quoted on Kenya Shillings as per form of tender

iii. Application of any discount offered on the tender;

Item Number	Item description	Bidder No 2	Bidder No 4	Remarks if any
1	Application of any discount offered on the tender	No Discount offered by the bidder as per form of tender	No Discount offered by the bidder as per form of tender	-

iv. Establish if the items quoted are within the prevailing market rates from known retail outlets and Public Procurement Regulatory Authority price index.

Bidder No	Item description	PPRA INDEX	MARKET RATES	Remarks if any
2	Establish if items quoted for are within prevailing market rates from the known retail outlets & Public Procurement Regulatory Authority price index. A written undertaking that the prices shall remain valid for 12 months from date of contract in line with the Public Procurement and Asset Disposal Act 2015 section 139(3).	The items under consideration are not standard and are specific to the equipment associated hence as per the latest PPRA Index the items prices are not indicated on the website and on the latest market price index (Annexed is PPRA Market index)	The Director supply chain may recommend for award based on the previous prices as indicative of market rates since the subject procurement is specialized and it's accompanied by leasing arrangement which from the market knowledge cannot be assessed through market survey.	Annexed is PPRA Market index. The Director supply chain may recommend for award based on the previous prices as indicative of market rates

b) Ranking of tenders according to their evaluated prices

The Evaluation Committee tabulated the Items offered by each of the bidders and the prices indicated by the bidders. Subsequently thereafter, the Evaluation Committee ranked the two bidders as follows: -

BIDDER NO.	UNIT PRICE QUOTED BY SUPPLIER	RATING PER UNIT PRICE	PRELIMINARY EVALUATION	TEC REPORT	DELIVERY PERIOD	COUNTRY OF ORIGIN	TOTAL VALUE KSH
2	102,879,013.59	2 nd	Pass	pass	8-12 weeks	Germany	102,879,013.59
4	25,144,225.00	1 st	Pass	pass	8-12 weeks	China	25,144,225.00

Recommendation

Upon conclusion of re-evaluation at the Financial Evaluation Stage, the Evaluation Committee recommended award of the subject tender to M/s Renaissance Health Limited at the price of Kshs. 25,144,225.00 for being the lowest evaluated responsive tenderer.

Due Diligence

The Evaluation Committee undertook a due diligence exercise on M/s Renaissance Health Limited to ascertain the following: -

- 1. Documentary evidence as submitted by the bidder;*
 - 2. Capacity: Human Capacity and other Technical Infrastructure;*
 - 3. Seeking Confidential references from Manufacturers;*
 - 4. Services Sustainability and availability of service/technical engineers;*
- and*

5. Statutory Compliance with statutory bodies.

According to the due diligence findings, the Evaluation Committee established the following: -

- *The documents submitted by M/s Renaissance Health Limited were authentic;*
- *The bidder had the relevant human capital and a fully equipped and installed infrastructure such as internet to facilitate service delivery and ease of communication;*
- *Having written to the manufacturer identified by M/s Renaissance Health Limited in its original bid, the said manufacturer confirmed that it authorized M/s Renaissance Health Limited to use the manufacturer's items in the subject tender;*
- *The Evaluation Committee confirmed that the bidder's service sustainability is guaranteed since the bidder had a Serviced/Technical Engineer who is well trained hence reducing the machines downtime in case of any breakdown; and*
- *Having undertaken a Tax Compliance Certificate (TCC) checker on the official website of Kenya Revenue Authority, the Evaluation Committee confirmed that the Tax Compliance Certificate submitted by M/s Renaissance Health Limited was valid.*

The Evaluation Committee was thus satisfied that M/s Renaissance Health Limited is qualified to perform the subject tender satisfactorily in line with Clause 2.26.1 and Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document.

Professional Opinion

In a professional opinion dated 19th January 2021, the Acting Director, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including re-evaluation at the Financial Evaluation Stage pursuant to the orders issued on 12th January 2021 in the Board's decision in Review No. 157/2020 and together with the findings of the due diligence exercise undertaken on M/s Renaissance Health Limited. He further urged the Procuring Entity's Chief Executive Officer to note the recommendation for award of the subject tender to the said bidder was made based on previous prices as indicative of market rates since the subject procurement process is specialised and the Procuring Entity has an existing contract on the items being procured under the subject tender. The Chief Executive Officer approved the said professional opinion on 19th January 2021.

Notification to Bidders

In letters dated 21st January 2021, the Procuring Entity notified the successful tenderer and all other unsuccessful tenderers of the outcome of their bids.

REQUEST FOR REVIEW NO. 14/2021

M/s Sciencescope Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 22nd December 2020 and filed on 4th February 2021 together with a Supporting Affidavit sworn on 22nd December 2020 and

filed on 4th February 2021 through the firm of Sigano & Omollo LLP Advocates seeking the following orders: -

- a) An order quashing and setting aside the Procuring Entity's decision in the letter dated 21st January 2021 awarding Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment – Fully Automated Immunoassay for Immunochemistry Analyser) to M/s RENAISSANCE HEALTH LIMITED;***
- b) An order annulling and setting aside the Procuring Entity's letters of notification of unsuccessful bid in respect to tender number KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment – Fully Automated Immunoassay for Immunochemistry Analyser) dated 21st January 2021 addressed to SCIENCESCOPE LIMITED and all other unsuccessful bidders;***
- c) An order directing the Procuring Entity to disqualify M/S RENAISSANCE HEALTH LIMITED from the tender process pursuant to section 66 (3) (a) of the Act and clause 2.29.2 of Section II. Instructions to Tenderers of the Tender Document and/or section 79 of the Public Procurement and Asset Disposal Act read together with rule 75 (1) of the Public Procurement and Asset Disposal Regulations 2020.***
- d) Based on the findings of the Review herein, an order directing the Director General of Public Procurement Regulatory Authority to initiate debarment proceedings against the 1st***

- Interested Party and 2nd Interested Party pursuant to Regulation 22 (1) (b) of the Public Procurement and Asset Disposal Regulations 2020 on the grounds of having committed fraudulent practice in the subject tender;***
- e) An order directing award the subject tender number KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment- Fully Automated Immunoassay for Immunochemistry Analyser) to M/s SCIENCESCOPE LIMITED;***
- f) Any other relief that the Board may deem fit and just to grant;***
and
- g) An order awarding costs of the Review to the Applicant.***

In response, the Respondents lodged a Memorandum of Response dated 11th February 2021 and filed on 12th February 2021 together with a Supporting Affidavit sworn on 11th February 2021 and filed on 12th February 2021 through the Procuring Entity's Board while the 1st Interested Party lodged a Notice of Preliminary Objection dated and filed on 16th February 2021 together with a Statement of Response sworn and filed on 16th February 2021 through Mwaniki Gachoka & Co. Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that

pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated and filed on 22nd February 2021 while the Respondents lodged Written Submissions dated 22nd February 2021 and filed on 23rd February 2021. The 1st Interested Party lodged Written Submissions dated 23rd February 2021 and filed on even date.

BOARD'S DECISION

After careful consideration of the parties' pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act, the Board finds that the following issues crystallize for determination: -

- I. Whether the 2nd Interested Party is properly joined as a party to the Request for Review.**

- II. Whether the doctrine of res judicata applies in respect to the following allegations raised by the Applicant: -**
 - a) Whether the 1st Interested Party satisfied the criteria for Performance Report of Similar Analyser/Platform for Level 6 hospital under Clause X. Reference of Section VII. Schedule of Requirements of the Tender Document;*

- b) Whether the 1st Interested Party satisfied the criteria on Maintenance under Clause XII. Maintenance of Section VII. Schedule of Requirements of the Tender Document;*
- c) Whether the 1st Interested Party provided false information in its product brochure so as to meet the technical specifications specified in the Tender Document;*
- d) Whether the 1st Interested Party was non-responsive to mandatory and technical requirements and thus the Respondents contravened section 79 and 80 (2) of the Act read together with Regulation 75 (1) of Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") by admitting the 1st Interested Party's tender at the Financial Evaluation Stage; and*
- e) Whether the 1st Interested Party failed to quote for all items in the subject tender thus quoting a price that is manifestly low in its Form of Tender.*

III. Whether the 1st Respondent complied with the orders of the Board issued on 12th January 2021 in PPARB Application No. 157 of 2020, Sciencescope Limited v. The Accounting Officer, Kenyatta National Hospital & 2 Others.

IV. Whether the 1st Interested Party and M/s Abbott GmbH committed fraudulent practice to ensure the 1st Interested Party is awarded the subject tender.

The Board now proceeds to address the above issues as follows: -

On the first issue for determination, the 1st Interested Party raised a Preliminary Objection in its Notice of Preliminary Objection and Written Submissions, urging the Board to strike out the 2nd Interested Party because the 2nd Interested Party is neither a tenderer, a procuring entity and/or participant in the subject procurement process and thus not a party to the instant Request for Review. The 1st Interested Party further contended that the Applicant did not seek leave of the Board to join the 2nd Interested Party as contemplated by section 170 (d) of the Act and that the Applicant's joinder of the 2nd Interested Party as a party to the Request for Review is aimed at straining the supplier-distributor relationship between the 1st Interested Party and the 2nd Interested Party. At paragraphs 10 of its Written Submissions, the Applicant states that the 2nd Interested Party has been joined to the Request for Review on the basis of having issued a manufacturer's authorization to the 1st Interested Party and because the 2nd Interested Party is a principal of the 1st Interested Party in the subject procurement proceedings.

The Board notes that section 170 of the Act provides as follows: -

"The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine

The party referred to in section 170 (a) of the Act is known as an Applicant and is the party that files a request for review in accordance with section 167 (1) of the Act. The provision of section 167 (1) of the Act only identifies candidates and tenderers as the persons who file a Request for Review challenging the decision by a procuring entity. The Board studied the 1st Interested Party's original bid and notes that the 1st Interested Party and M/s Abbott GmbH are in a manufacturer-distributor relationship evidenced by the letter of manufacturer's authorization issued by M/s Abbott GmbH on 3rd December 2020 found at page 00064 of the 1st Interested Party's original bid. The 1st Interested Party did not submit its bid in Joint Venture or in consortium with M/s Abbott GmbH and thus M/s Abbott GmbH is not a tenderer in the subject procurement proceedings.

Further, the Court of Appeal in **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors, John Kivunzi t/a Jona Pestcon & 9 Others** addressed the import of section 170 (b) of the Act and held as follows: -

"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings the current statute which replaced it, the PPADA, requires that the

Accounting officer of the procuring entity, be the party under section 170 (b) of the Act. We are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered...

When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply."

It is therefore evident from the decision of the Court of Appeal in the foregoing case that an accounting officer of a procuring entity is a necessary party to a request for review pursuant to section 170 (b) of the Act. In the instant request for review the accounting officer of the procuring entity is the 1st Respondent.

On the other hand, pursuant to section 170 (c) of the Act, a successful bidder such as the 1st Interested Party is a party to a request for review.

It is worth noting that the Applicant alleged that it joined M/s Abbott GmbH as a 2nd Interested Party because M/s Abbott GmbH issued a manufacturer's authorization to the 1st Interested Party and that M/s Abbott GmbH engaged in fraudulent practice with the 1st Interested Party. According to the

Applicant, a party that is likely to be adversely affected by the findings of the Board on allegations of fraud is a necessary party to these proceedings and the Board can exercise its mandate under section 170 (d) of the Act to determine the 2nd Interested Party is a necessary party to the Request for Review.

The Board observes that section 170 (d) of the Act gives the Board discretion to determine such other persons to be joined as parties to a request for review as opposed to section 170 (a), (b) and (c) of the Act in which an applicant, an accounting officer of a procuring entity and a successful bidder are automatic parties who need no determination of the Board to be parties to a request for review. It therefore means, joinder of parties by dint of section 170 (d) of the Act is done at the Board's discretion and as such, a party seeking to join any other person that does not fall under section 170 (a), (b) and (c) of the Act ought to seek leave of the Board, for the Board to determine whether or not such leave ought to be granted. A determination by the Board can be made where issues are placed before the Board through a formal application and other parties are given an opportunity to respond to the said application. Upon filing a Request for Review, the Board Secretary directs the Accounting Officer of a Procuring Entity to provide all confidential documents applicable to a procurement process pursuant to section 168 of the Act including a list of tenderers. Thereafter, the Board notifies other tenderers of the existence of the Request for Review to enable them to file their response either in support of or in opposition to the request for review. M/s Abbott GmbH was not notified of the instant Request for Review because it was not in the list of tenderers submitted by the Procuring Entity since M/s

Abbott GmbH was not a tenderer in the subject procurement process. The Applicant never made a formal application for leave to join M/s Abbott GmbH as a party to the instant Request for Review for the Board's determination on the same.

The Applicant's failure to seek leave of the Board through a formal application, interfered with other parties' right to be heard on the issue of joinder of a party and further interfered with the right of M/s Abbott GmbH to support or oppose an application to be joined as a party. In lieu of a determination of the Board allowing joinder of M/s Abbott GmbH as a party to the instant request for review, M/s Abbott GmbH is not properly joined as a party to the instant Request for Review.

Accordingly, the Board upholds the Notice of Preliminary Objection filed by the 1st Interested Party on 16th February 2021 and hereby strikes out the 2nd Interested Party from the instant Request for Review.

On the first limb of the second issue for determination, the Applicant alleged at paragraph 18 (viii) of its Request for Review, that the 1st Interested Party failed to meet the criteria for reference which required bidders to submit Performance report of similar analyser/platform from level 6 hospital and/or a private hospital with minimum number test 50000-100000 per annum. At paragraph 6 (f) of its Written Submissions, the 1st Interested Party states that the question of responsiveness of the 1st Interested Party's tender both at preliminary and technical evaluation stages was upheld by the Board and thus not open to the Applicant to re-litigate the same.

The Board studied the Tender Document and notes that the criteria for providing Performance Report of Similar Analyser/Platform for Level 6 hospital forms part of the Technical Specifications under Clause X. Reference of Section VII. Schedule of Requirements as follows: -

"Reference: Performance report of similar analyser/platform from level 6 hospital and/or a private hospital with minimum number test 50000-100000 per annum"

The Board observes that the Applicant is challenging a criterion on technical specifications which is evaluated at the Technical Evaluation Stage. This criterion was raised by the Applicant at paragraph 10 (viii) of its Supplementary Affidavit sworn on 8th January 2021 and filed on 11th January 2021 (a day before the decision of the Board) with respect to Review No. 157/2020 where the Board never concluded that the 1st Interested Party's evaluation at the Technical Evaluation Stage was flawed but only found evaluation at the Financial Evaluation Stage was flawed and thus ordered a re-evaluation at the Financial Evaluation Stage.

The doctrine of res judicata frowns upon party's use of courts, tribunals and other decision making bodies as a means of abusing the process of litigation.

The Board observes that the parties to Review No. 157/2020 are the same parties in the instant Request for Review litigating under the same title and the Applicant is raising a criterion at the Technical Evaluation Stage. In its decision dated 12th January 2021 in Review No. 157/2020, the Board found no fault with the manner in which the Procuring Entity conducted Technical

Evaluation and which decision has not been challenged by way of Judicial Review at the High Court thus binding to all parties in the instant Request for Review. However, the Board in Review No. 157/2020 faulted the manner in which the Procuring Entity conducted and directed for a re-evaluation at the Financial Evaluation Stage. The Applicant is now litigating a second time on the criteria of Clause X. Reference under Technical Specifications of Section VII. Schedule of Requirements regarding responsiveness of the 1st Interested Party at the Technical Evaluation Stage and we find that the question whether the 1st Interested Party satisfied the criteria for Performance Report of Similar Analyser/Platform for Level 6 hospital under Clause X. Reference of Section VII. Schedule of Requirements is res judicata.

On the second limb of the second issue for determination, the Applicant alleged at paragraph 18 (ix) of its Request for Review that the Procuring Entity failed to evaluate the 1st Interested Party's bid in accordance with the criteria for submission of proof of compliance with requirements for maintenance of the equipment including proof of local capacity to provide comprehensive maintenance and repair services. At paragraph 6 (f) of its Written Submissions, the 1st Interested Party states that the question of responsiveness of the 1st Interested Party's tender both at preliminary and technical evaluation stages was upheld by the Board and thus not open to the Applicant to litigate the same a second time.

The Board observes that the criteria on Maintenance forms part of the Technical Specifications under Clause XII. Maintenance of Section VII. Schedule of Requirements provided as follows: -

"Maintenance: 1. Periodic monitoring and evaluation of analysers every 6 months by the manufacturer
2. Provide PPM, equipment maintenance and monitoring schedules.
3. Uptime of at least 98%.
4. Should give proof of local capacity to provide comprehensive maintenance and repair services"

It is evident that, the Applicant is challenging a criterion on technical specifications which is evaluated at the Technical Evaluation Stage. At paragraph 13 (vi) of its Supplementary Affidavit sworn on 8th January 2021 and filed on 11th January 2021 with respect to Review No. 157/2020, the Applicant challenged this criterion and as already noted, the Board in Review No. 157/2020 was not convinced that the manner in which preliminary and technical evaluation was done by the Respondents was flawed but instead found the Financial Evaluation was flawed and directed for a re-evaluation at the Financial Evaluation Stage. The Applicant is now litigating a second time on the criteria of Clause XII. Maintenance under Technical Specifications of Section VII. Schedule of Requirements regarding responsiveness of the 1st Interested Party at the Technical Evaluation Stage and we find that the question whether the 1st Interested Party satisfied the criteria on Maintenance under Clause XII. Maintenance of Section VII. Schedule of Requirements of the Tender Document is res judicata.

On the third limb of the second issue for determination, the Applicant stated at paragraph 18 (iii) of the Applicant's Request for Review, that the 1st Interested Party provided false information by submitting a manipulated product brochure in order to induce the Procuring Entity into awarding the tender to the 1st Interested Party. In response, the Respondents aver at paragraph 4 and 5 of their Response that the scope of re-evaluation by the Evaluation Committee was limited to re-instating tenders that made it to Financial Evaluation, at the Financial Evaluation stage and to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. According to the Respondents, the Applicant introduced new unsubstantiated claims which do not even fall under financial evaluation in the hope of a second bite at the cherry. At paragraph 12 of its Statement of Response, the 1st Interested Party avers that it was evaluated on its technical qualifications in line with Clause 2.24 of Section II. Instructions to Tenderers and Stage 2. Product Evaluation found at page 32 and 35 of the Tender Document.

In addressing this issue, the Board observes that the issue of Product Brochure submitted by the 1st Interested Party formed part of Product Evaluation under Stage 2 (i). Product Evaluation at the Technical Evaluation Stage found at page 32 of the Tender Document. At paragraph 20 of its Supplementary Affidavit sworn on 8th January 2021 and filed on 11th January 2021, the Applicant alleged that the 1st Interested Party provided false

information in its product brochure so as to meet the technical specifications specified in the Tender Document.

Having perused the confidential documents filed before it, the Board in Review No. 157/2020 was not convinced that the manner in which preliminary and technical evaluation was undertaken by the Respondent was flawed. On the contrary, the Board found that the Financial Evaluation was flawed and thus directed a re-evaluation at the Financial Evaluation Stage. The Applicant is now litigating a second time on a criterion considered during Technical Evaluation and the Board finds that the question whether the 1st Interested Party provided false information in its product brochure so as to meet the technical specifications specified in the Tender Document is res judicata.

On the fourth limb of the second issue, the Applicant alleged at paragraph 19 of its Request for Review that the Respondents contravened section 79 and 80 (2) of the Act read together with Regulation 75 (1) of Regulations 2020 by admitting the 1st Interested Party at the Financial Evaluation despite having been non-responsive to mandatory and technical requirements and in making this allegation, the Applicant referred to the criteria on technical evaluation already addressed by the Board in the first, second and third limb of the second issue for determination. As such, the Board would simply reiterate that section 79 of the Act deals with responsiveness of bidders to eligibility and mandatory requirements (including technical specifications) while section 80 (2) of the Act requires an evaluation committee to stick to the criteria specified in the Tender Document. At paragraph 31 of the Board's decision in Review No. 157/2020, the Board held that: -

"The Board takes cognizance that an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender."

Regulation 75 (1) of Regulations 2020 referred to by the Applicant provides that: -

"A procuring entity shall reject all tenders which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations"

Further, Regulation 74 of Regulations 2020 referred to above deals with preliminary evaluation of tenders. The Board already observed in Review No. 157/2020 that an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage. In doing so, the Board was not convinced that the manner in which evaluation of bids was undertaken at the Preliminary and Technical Evaluation stage was flawed but faulted the Financial Evaluation and ordered for a re-evaluation at the Financial Evaluation Stage.

The Applicant is estopped from litigating upon issues of responsiveness of the 1st Interested Party at the preliminary and technical evaluation stages because the Board in Review No. 157/2020 was not convinced that there was any flawed/irregularity by the Respondents regarding preliminary and

technical evaluation but found the 1st Respondents had not conducted the Financial Evaluation of bids in accordance with the criteria set out in the Tender Document and thus ordered the 1st Respondent to reinstate the Applicant's tender and all other tenders (in this case the 1st Interested Party's tender).

Accordingly, the Board finds that the question whether the 1st Interested Party was non-responsive to mandatory and technical requirements is res judicata because the Board having perused the evaluation report forming part of confidential documents in Review No. 157/2020, the Board was not convinced that there was any irregularity by the Respondents regarding preliminary and technical evaluation but found the 1st Respondents had not conducted the Financial Evaluation of bids in accordance with the criteria set out in the Tender Document and thus ordered the 1st Respondent to reinstate the Applicant's tender and all other tenders (in this case the 1st Interested Party's tender).

On the fifth limb of the second issue, the Applicant alleged that the 1st Interested Party failed to quote a tender price in respect of all items in the subject tender and thus alleged the 1st Interested Party's tender price was an underbid at paragraph 33 of the Applicant's Written Submissions. The Board in Review No. 157/2020 noted at page 16 thereof that a reading of paragraphs 14 (c), (d) (e) and 15 of the Applicant's Request for Review No. 158/2020 alleged that the Interested Party's tender sum of Kshs. 25,144,225.00 was an "underbid" because it did not reflect reasonable costs

for provision of the entire scope of services being procured and that the Interested Party's bid ought to be declared non-responsive. The Board proceeded to examine the Schedule of Requirements of the 1st Interested Party and the Applicant and settled the issue that the Applicant's Schedule of Requirements found at pages 00041 to 00044 of its original bid comprised of 60 items inclusive of the 51 items specified at pages 38 to 39 of the Tender Document and additional items referred to by the Applicant as "Other Consumables, Controls, Calibrators and Auxiliary Reagents" with a sum total of Kshs. 102,879,013.59 for the said 60 items and which amount was carried forward to the Applicant's Form of Tender dated 2nd December 2020, found at page 00045 of its original bid. Further, the Board observed in Review No. 157/2020 that the 1st Interested Party's Schedule of Requirements contained 51 items specified at pages 38 to 39 of the Tender Document and ran through pages 00042 to 00043 of the 1st Interested Party's original bid. The 1st Interested Party indicated the total amount of the said 51 items as Kshs. 25,144,225.00, which amount was carried forward to the 1st Interested Party's Form of Tender dated 2nd December 2020, found at page 0009 of its original bid.

In essence, the Board addressed the question of how the two bidders quoted for items in the subject tender and thus the Applicant's allegation that the 1st Interested Party failed to quote for all items in the subject tender is *res judicata*.

This Board must always be vigilant to guard against litigants such as the Applicant herein in their attempts to evade the doctrine of *res judicata* by

litigating on the same causes of action so as to seek the same remedy before the Board. If this Board allows the Applicant to go on litigating forever over the same issue with the same parties over the same subject tender merely because the Applicant has given its case some cosmetic face lift on every occasion the Applicant files a Request for Review, then the doctrine of res judicata whose primary aim is to prevent the abuse of the processes before this Board, would lose its significance in our jurisdiction.

The Board is alive to the fact that any new issues raised regarding re-evaluation at the Financial Evaluation stage, due diligence, award and notification to bidders undertaken pursuant to orders of the Board in Review No. 157/2020 would not be res judicata. At paragraph 68 of the decision in Judicial Review Miscellaneous Application No. 283 of 2019, **Republic v Public Procurement Administrative Review Board & 3 others Ex parte Techno Relief Services Limited [2019] eKLR**, the Honourable Justice Nyamweya held as follows: -

"In the second Request for Review, the ex parte Applicant alleges that there was non-compliance by the 2nd Respondent with the 1st Respondent's directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of the 1st Respondent's own orders."

Having considered the Board's finding in the above case, the Board observes that in Review No. 157/2020, it directed the 1st Respondent to undertake a

re-evaluation at the Financial Evaluation Stage and a due diligence exercise and the Applicant herein is now alleging at paragraph 18 (v) and 21 of its Request for Review that the 1st Respondent failed to undertake due diligence to verify the documents submitted by the 1st Interested Party. At paragraph 15 to 17 of their Response, the Respondents explain the manner in which due diligence exercise was conducted on the 1st Interested Party to verify the documentary evidence provided by the bidder.

The question whether the 1st Respondent re-instated the Applicant's tender and the 1st Interested Party's tender at the Financial Evaluation Stage so as to re-evaluate the Applicant's tender and all other tenders (that is, the 1st Interested Party's tender) at the Financial Evaluation Stage is a question of compliance with the orders of the Board in Review No. 157/2020 and thus, are not res judicata. In addition to this, the manner in which due diligence, award of the subject tender and notification to bidders was conducted are also questions of compliance with the orders of the Board in Review No. 157/2020 and are therefore not res judicata.

Accordingly, the Board shall address the foregoing while making a determination on the third issue for determination.

In addressing the third issue for determination, the Board deems it necessary to give a brief background of the instant Request for Review.

The Applicant participated in the subject procurement proceedings by submitting a tender in response to the Procuring Entity's Advertisement of 10th November 2020. Upon conclusion of evaluation by the Procuring Entity,

the Applicant was notified that its bid was found non-responsive through a letter of notification of unsuccessful bid dated 10th December 2020. Being aggrieved by the Procuring Entity's decision on its bid, the Applicant lodged Review No. 157/2020 before this Board. The Board having considered each of the parties' pleadings including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act, rendered a decision dated 12th January 2021 in Review No. 157/2020 directing as follows: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment -Fully Automated Immunoassay for Immunochemistry Analyser dated 11th December 2020, addressed to the Applicant and the letters dated 10th December 2020 addressed to all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser dated 10th December 2020, addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial**

Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in this case.

- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to ensure the procurement proceedings in Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.**
- 5. Given that the subject procurement proceedings is not complete, each party shall bear its own costs in the Request for Review.**

It is worth noting that the Board; nullified the letter of notification of intention to award the subject tender dated 11th December 2020 addressed to the Applicant, nullified the letters of notification dated 10th December 2020 addressed to all other unsuccessful bidders and nullified the letter of notification of intention to award the subject tender dated 10th December 2020 addressed to the 1st Interested Party. Further, the Board ordered the 1st Respondent to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in Review No. 157/2020 and to ensure the subject procurement proceedings proceeds to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

The salient findings of the Board in respect to Order No. 3 and 4 of the decision in Review No. 157/2020 were as follows: -

- *At page 18, the Board considered the criteria outlined in Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and noted the same comprised of two limbs, that is, **(a) Determination of evaluated price for each bid based on four components** [that is, (i) no corrections of arithmetic errors as per the Act, (ii) converting of all tenders to same currency using a uniform exchange rate prevailing at the closing date of the tender, (iii) application of any discount offered on the tender, (iv) establishing if items quoted are within prevailing market rates from the known retail outlets and Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") price index] and **(b) Ranking of tenders according to their evaluated prices;***
- *At page 18, the Board found that the Evaluation Committee ranked tenders by merely recording tenderers' respective tender sums without first applying the procedures and criteria for Financial Evaluation outlined in clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document;*
- *At page 21, the Board found that the Evaluation Committee undermined the principle of fairness by ignoring the set out procedures and criteria in Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document when such procedures and criteria was well known to bidders who had a legitimate expectation that evaluation would be conducted in accordance with the Tender Document.*

- *At page 25, the Board found that even though bidders were required to provide a duly completed Price Schedule, the Procuring Entity did not provide a sample of the same in its Tender Document, but instead, provided a Schedule of Requirements comprising of 51 items found at pages 38 to 39 of the Tender Document whose costs were to be specified by bidders. These 51 items comprised of the scope of what was being procured by the Respondents;*
- *At page 25, the Board observed that the Applicant's Schedule of Requirements found at pages 00041 to 00044 of its original bid comprised of 60 items inclusive of the 51 items specified at pages 38 to 39 of the Tender Document and additional items referred to by the Applicant as "Other Consumables, Controls, Calibrators and Auxiliary Reagents" with a sum total of Kshs. 102,879,013.59 for the said 60 items and which amount was carried forward to the Applicant's Form of Tender dated 2nd December 2020, found at page 00045 of its original bid;*
- *At page 26, the Board observed that the 1st Interested Party's Schedule of Requirements contained 51 items specified at pages 38 to 39 of the Tender Document and ran through pages 00042 to 00043 of the 1st Interested Party's original bid. The 1st Interested Party indicated the total amount of the said 51 items as Kshs. 25,144,225.00, which amount was carried forward to the 1st Interested Party's Form of Tender dated 2nd December 2020, found at page 0009 of its original bid;*

- *At page 26, the Board observed that the Evaluation Committee ought to have established whether the prices quoted for the 51 items in the Schedule of Requirements on page 38 to 39 of the Tender Document by all tenderers who made it to the Financial Evaluation Stage were within prevailing market rates from known retail outlets and the Public Procurement Regulatory Authority's price index;*
- *At page 27, the Board observed that whereas the Applicant failed to furnish the Board with any evidence of prevailing market rates to prove that the 1st Interested Party's tender sum was below the prevailing market rates for the subject tender, the responsibility of determining prevailing market rates lies with the Respondents and not bidders;*
- *At page 27, the Board observed that the Procuring Entity's Head of Procurement, in his or her professional opinion, is under an obligation to include information whether the recommended price for standard goods, services and works are within the indicative market prices as stipulated in Regulation 78 (4) read together with Regulation 78 (3) of Regulations 2020;*
- *At page 28, the Board found that the Respondents did not discharge their burden of proving that the procedures and criteria under Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document were applied before proceeding to Clause (b) ranking of tenders according to their evaluated prices and more so, did not demonstrate that the Evaluation Committee satisfied itself that the prices quoted for the 51 items are within prevailing market rates from known retail outlets and the Authority's price index, thus failed to*

evaluate bids at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act;

- *At page 31 to 32, the Board observed that an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender. Upon recommendation of award on the lowest evaluated tenderer, an Evaluation Committee conducts due diligence depending on the question whether a due diligence exercise was a procedure specified in the Tender Document;*
- *At page 32, the Board noted that pursuant to Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document, the Procuring Entity had an obligation of conducting a post-qualification exercise in the absence of pre-qualification. Through a post-qualification exercise (otherwise known as due diligence), the Procuring Entity would determine whether the lowest evaluated responsive tenderer is qualified to perform the contract (that is, the subject tender) satisfactorily before award of the tender is made;*
- *At pages 33 to 35, the Board outlined the manner in which a due diligence exercise ought to be conducted and further examined that the Respondents had an obligation to determine; (i) the tenderer that is responsive to eligibility and mandatory requirements including technical specifications, (ii) the lowest evaluated tenderer at the Financial Evaluation Stage in accordance with Stage 3. Financial*

Evaluation of Section VI. Evaluation Criteria of the Tender Document and (iii) whether the lowest evaluated tenderer qualifies to perform the contract satisfactorily through a due diligence exercise on such tenderer undertaken in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Thereafter, to award the subject tender in accordance with the award criteria specified in Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act;

- *At page 36, the Board held that the Procuring Entity failed to award the subject tender to the 1st Interested Party in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act;*
- *At page 42, the Board addressed the requirements for notification to bidders pursuant to section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 and found that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) it includes the name of the successful tenderer, the tender price and the reason why the successful bidder's bid was successful in accordance with section 86 (1) of the Act and in Review No. 157/2020, such reason would be that the successful tenderer submitted the lowest evaluated tender price;*

- *At page 44, the Board found the Applicant's letter of notification of unsuccessful bid dated 11th December 2020 was not issued in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.*

The Applicant avers at paragraph 13 of the Request for Review that none of the parties to Review No. 157/2020 challenged the Board's decision through Judicial Review proceedings filed at the High Court within fourteen (14) days of the decision rendered on 21st January 2021 in Review No. 157/2020. The Respondents and the 1st Interested Party did not controvert the Applicant's allegation. According to paragraph 6 of the Respondents' Memorandum of Response, the Respondents aver that steps were taken by them in compliance with the orders of the Board in Review No. 157/2020.

It is worth noting that having failed to challenge the Board's decision in Review No. 157/2020, the same is final and binding to all parties to Review No. 157/2020 pursuant to section 175 (1) of the Act and thus, any action by a party to Review No. 157/2020 contrary to the decision of the Board in Review No. 157/2020 will be in disobedience of the Board's decision, in breach of the Act and such action shall be null and void in accordance with section 175 (6) of the Act.

It now behooves upon this Board to determine whether the 1st Respondent complied with the orders of the Board, specifically in relation to the findings

in Review No. 157/2020 that the 1st Respondent was required to take into consideration in concluding the subject procurement process.

The first limb of the directions given by the Board to the 1st Respondent required him to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. The Board studied the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that after receiving the written decision of the Board, the 1st Respondent addressed a letter dated 15th January 2021 to the Chairman of the Evaluation Committee stating as follows: -

***"RE: RE-EVALUATION OF TENDER NO. KNH/T/82/2021-2026
FOR OPERATIONAL LEASING OF LABORATORY
EQUIPMENT-FULLY AUTOMATED IMMUNOASSAY FOR
IMMUNOCHEMISTRY ANALYSER***

Reference is made to the above tender

You are hereby required to urgently re-evaluate the tender. The Board ordered to re-instate the Applicant's tender and all other tenders that made it to the Financial Evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document taking into consideration the Board's findings in this case.

You are expected to complete this report by Monday 18th January 2020 and submit to the Director, Supply Chain Management”

The Board believes that the 1st Respondent erroneously stated an evaluation report should be submitted by the Evaluation Committee on Monday 18th January **2020** instead of 18th January 2021 because the above letter is dated 15th January 2021 and the Report on Re-evaluation at the Financial Evaluation Stage forming part of the Procuring Entity’s confidential file contains a signature with a date of 18th January 2021 affixed on the face of the said report. According to page 13 of the said report, the Evaluation Committee noted as follows: -

“In compliance with the above orders, we received a letter referenced KNH/SCM/ADM.43 dated 15th January 2020 that we reconstitute as an evaluation committee to consider the findings of the Board and make an award as appropriate”

The Board believes the Evaluation Committee erroneously stated they received a letter dated 15th January **2020** instead of 15th January 2021 having noted that the letter addressed to the Chairman of the Evaluation Committee was dated 15th January 2021 by the 1st Respondent. According to the report on Re-evaluation at the Financial Evaluation Stage, the Evaluation Committee reinstated the Applicant’s tender and the 1st Interested Party’s tender at the Financial Evaluation Stage so as to conduct a re-evaluation at the Financial Evaluation Stage.

When addressing the second issue for determination, the Board already held that in Review No. 157/2020, it found no fault in the manner in which the Respondents evaluated the 1st Interested Party at the preliminary and technical evaluation stages, but faulted the Financial Evaluation and ordered for a re-evaluation at the Financial Evaluation Stage. To that end, the 1st Respondent acted in compliance with Order No. 3 of the Board's decision in Review No. 157/2020 by re-instating the 1st Interested Party's tender at the Financial Evaluation Stage to enable the Evaluation Committee to determine the evaluated price for each bid through a re-evaluation at the Financial Evaluation Stage.

The first limb of determining the evaluated price as observed by the Board in Review No. 157/2020 was that no correction of errors would be undertaken as per section 82 of the Act. According to page 13 of the report of Re-evaluation of Financial Evaluation, the Evaluation Committee noted that there was no correction of errors done on the Applicant's and the 1st Interested Party's respective bids.

Secondly, there was need for the Evaluation Committee to convert all tenders to the same currency using a uniform exchange rate prevailing at the closing date of the tender. At page 14 of its report, the Evaluation Committee noted that the Applicant and the 1st Interested Party quoted their respective tender prices in Kenya Shillings and thus there was no need for any conversion. Thirdly, the Board noted that the Tender Document required application of any discount offered on the tender. At page 14 of its report, the Evaluation Committee noted that no discount was offered by the Applicant and the 1st Interested Party as per their respective Forms of Tender. On the fourth limb

of determining the evaluated price, the Board noted that the Tender Document required the Evaluation Committee to establish if items quoted are within prevailing market rates from known retail outlets and the Public Procurement Regulatory Authority's (hereinafter referred to as "the Authority") price index. At page 14 of its report, the Evaluation Committee observed that: -

"The items under consideration are not standard and are specific to the equipment associated hence as per the latest PPRA Index the items' prices are not indicated on the website and on the latest market price index (Annexed is PPRA Market Index)"

In its Response to the Request for Review, the Respondents attached the Authority's Market Price Index Survey Results issued on February 2020 containing items running from pages 4 to 58 thereof. However, none of the items being procured by the Respondents are listed on the said Market Price Index issued by the Authority. Regarding confirmation whether the items quoted are within prevailing market rates from known retail outlets, the Evaluation Committee states at page 14 of the report that: -

"The Director, Supply Chain may recommend for award based on the previous prices as indicative of market rates since the subject procurement is specialized and it's accompanied by leasing arrangement which from the market knowledge cannot be assessed through market survey."

At paragraph 11 of their Response, the Respondents aver that in a similar tender for the fiscal year 2014/2015, the Procuring Entity awarded the tender at Kshs. 13,272,628.00 per annum for a five-year period ending in 2021 and that if this amount is compared with the award made in the subject tender, the lowest evaluated bidder quoted Kshs. 25,144,225.00 for the five-year period. According to the Respondents, the amount at which award was made in the subject tender compared to the annual contract amount for the five-year period ending in 2021 is reasonable and within the prevailing market rates. This comparison was used as a basis for determining prevailing market rates from a known retailer. To support their position, the Respondents referred the Board to a Contract dated 20th September 2016 for Operational Leasing of Laboratory Equipment (Equipment Placement of Immunochemistry Analyzer) between the Procuring Entity and the Applicant for a contract sum of Kshs. 13,272,628/- per annum.

Having studied the said contract, the Board observes that the contract of the Procuring Entity's previous supplier can be used as indicative of prevailing market rates because the Applicant (being the Procuring Entity's previous supplier) is a known retailer/distributor of items required in the subject tender. A procuring entity may establish prevailing market prices by requesting known retailers to provide the amount of money they would charge for specific goods, works or services a procuring entity wants to procure. Therefore, information given by a known retailer who in this case is the Procuring Entity's previous supplier (who the Board notes is the Applicant in the instant Request for Review) is useful to the Procuring Entity in establishing the market rates of the goods, works or services it is procuring

whilst taking into account the inflation rates of prices caused by various factors in an economy. The Board notes that in relying on its previous supplier as a known retailer, the Procuring Entity determined the market rates of its previous contract on the same goods, works or services being procured in the subject tender. In its pleadings and written Submissions, the Applicant did not challenge the use of the previous contract of the Procuring Entity (where the Applicant was the supplier) as a basis of determining prevailing market rates. In **PPARB Application No. 99 & 100/2019 (Consolidated, CMC Motors Group Limited & Another v. The Principal Secretary, State Department of Interior, Ministry of Interior and Co-Ordination of National Government**, the Board had occasion to address this question when it held as follows: -

"The Board notes, the National Treasury previously procured for "Leasing of Motor Vehicles" on behalf of the Procuring Entity herein, being the user of such procured services. The National Treasury, issued Addenda extending the contracts of its current service providers which were lapsing in April 2019, for a further 6 months ending on 15th October 2019. The Applicants in this case, confirmed that they agreed to extension of their respective contracts with the National Treasury to from April 2019 to 15th October 2019.

The Procuring Entity used the prevailing market prices of 2019 indicated in the contracts that were extended by the National Treasury from April 2019 to 15th October 2019 including the Applicants' extended contracts.

The Board studied the manner in which the second limb of the market survey was conducted and notes, the Procuring Entity was benchmarking with the National Treasury that extended its own contracts, in respect of the same items that the Procuring Entity is procuring under Phase V. Further to this, the Quantity of vehicles are the same in both phases as captured at page 3 of the Market Survey Report.

Regulation 10 (2) (e) of the 2006 Regulations states that the functions of a Tender Committee is to ensure: - "the procuring entity does not pay in excess of prevailing market prices". Similarly, Regulation 22 (2) of the 2006 Regulations [that is repealed Public Procurement and Disposal Regulations, 2006] provides that: -

"When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions."

The Board wonders what else would be an up to date economic and market conditions, if not, prices quoted in the extended contracts that are due to lapse in 15th October 2019.

The Board observes, at pages 109 to 112 of the Procuring Entity's confidential file, Secretariat Comments of the Procuring Entity's Head of Procurement Unit are attached as part of the Professional Opinion signed on 9th August 2019.

The Head of Procurement function, at Item 8 (g) thereof states that a cumulative amount of Kenya Shillings One Billion, Eighty-Nine Million, One Hundred and Thirty-Eighty Thousand, Two Hundred and Ninety-Four and Thirty-Six Cents (Kshs. 1,089,138,294.36), will be a loss to the Kenyan tax payer, if the Procuring Entity procures the items at the amounts quoted by bidders recommended for award in Lots 1, 2, 3, 6, 7 and 8 in this procurement process. This amount is not little amount, and most importantly, the same is taxpayer's money.

Article 227 (1) of the Constitution states that: -

"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"

In addition to this, Article 201 (d) of the Constitution cites one of the principles of public finance as "public money should be used in a prudent and responsible way"

The Board finds, the Procuring Entity has the responsibility to comply with the provisions of Regulation 8 (3) (z), 10 (2) (e) and 22 (2) of the 2006 Regulations, read together with Articles 201 (d) and 227 (1) of the Constitution. Hence, the Procuring Entity cannot be faulted for establishing the

prevailing market prices under which to procure items for the benefit of saving taxpayer’s money” [Emphasis by the Board]

It is evident that a procuring entity may consider the prices of goods, works or services previously procured in a similar contract to determine the prevailing market rates and thus the Procuring Entity herein was well within the provisions of Article 201 (d) of the Constitution in relying on the contract of its previous supplier to determine prevailing market rates for the benefit of saving tax payer’s money and to ensure public money is used in a prudent and responsible way.

Clause (b) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document required the Evaluation Committee to rank tenders according to the evaluated prices. According to page 15 of its report on re-evaluation of Financial Evaluation, the Evaluation Committee tabulated the 60 items found in the Applicant’s Schedule of Requirements at pages 00041 to 00044 of its original bid which were inclusive of the 51 items specified at pages 38 to 39 of the Tender Document with a sum total of Kshs. 102,879,013.59 for the 60 items. The Evaluation Committee also tabulated the 51 items specified at pages 00042 to 00043 of the 1st Interested Party’s original bid with a sum total of Kshs. 25,144,225.00. Subsequently thereafter, the Evaluation Committee ranked the two bidders according to their evaluated prices as follows: -

BIDDER NO.	UNIT PRICE QUOTED BY SUPPLIER	RATING PER UNIT PRICE	PRELIMINARY EVALUATION	TEC REPORT	DELIVERY PERIOD	COUNTRY OF ORIGIN	TOTAL VALUE KSH
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2 Sciences cope Limited	102,879,013.5 9	2 nd	Pass	pass	8-12 weeks	German y	102,879,013 .59
4 Rennais ance Health Limited	25,144,225.00	1 st	Pass	pass	8-12 weeks	China	25,144,225. 00

The Evaluation Committee then determined that the 1st Interested Party submitted the lowest evaluated tender at Kshs. 25,144,225.00.

The Applicant further alleged at paragraph 23 of its Supporting Affidavit that the 1st Interested Party submitted two sets of tender prices. The Board has already noted hereinbefore that the Applicant's allegation that the 1st Interested Party did not quote some items and thus submitted an underbid was addressed in Review No. 157/2020 as outlined hereinbefore and is thus res judicata.

From the foregoing, the Board finds that the 1st Respondent ensured the Applicant's tender and the 1st Interested Party's tender were re-instated at the Financial Evaluation Stage and subsequently, the Evaluation Committee conducted a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document in compliance with Order No. 3 of the Board's decision in Review No. 157/2020.

Having recommended the lowest evaluated tenderer, the next step to be undertaken by the Evaluation Committee was a due diligence exercise in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

The Board in Review No. 157/2020 did not outline the specific parameters for due diligence that the Procuring Entity would apply when conducting a due diligence pursuant to Order No. 4 of the said decision. However, the Board held that such an exercise ought to be undertaken in accordance with Clause 2.26.2 of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Secondly, Clause 2.26.2 of Section II. Instructions to Tenderers of the Tender Document states that due diligence will take into account the: -

"tenderer's financial, technical and production capabilities. It will be based upon an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer, pursuant to paragraph 2.12.3 as well as such other information as the Hospital deems necessary and appropriate"

Clause 2.12.3 of Section II. Instructions to Tenderers of the Tender Document referenced in the above excerpt states that: -

"the documentary evidence of the tenderer's qualifications to perform the contract if its tender is accepted shall be established to the Hospital's satisfaction;"

a) That, in the case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the tenderer has been duly authorized by the goods' manufacturer or producer to supply the goods.

b) that the tenderer has the financial, technical and production capability necessary to perform the contract”

From the due diligence report, the Evaluation Committee verified the documentary evidence provided by the 1st Interested Party and found such documents to be true. Furthermore, the due diligence exercise also involved confirming the 1st Interested Party's Human Capacity and other Technical Infrastructure. Therefore, the Applicant's allegation at paragraph 36 (c) of its written submissions that the Respondents conducted a sham due diligence and thus failed to verify whether the 1st Interested Party is able to conduct all tests as per its schedule of requirements, has not been substantiated to the satisfaction of the Board because the Respondents received positive responses after due diligence confirming that the 1st Interested Party's has the necessary Human Capacity and other Technical Infrastructure which the Board observed would assist conducting all tests as per the 1st Interested Party's schedule of requirements.

Accordingly, the Applicant's allegation at paragraph 18 (v) and 21 of its Request for Review and paragraph 36 (c) of its written submissions has not been substantiated because the Procuring Entity conducted a due diligence exercise on the 1st Interested Party to verify the documentary evidence submitted by the said bidder and further verified whether the 1st Interested

Party has the technical infrastructure required to conduct all tests as per the 1st Interested Party's schedule of requirements, thereby received positive responses on the areas raised by the Applicant.

It is evident that, the Evaluation Committee confirmed and verified the qualifications of the 1st Interested Party from the due diligence criteria and findings outlined hereinbefore. Furthermore, 4 Evaluation Committee members appended their full names and initialed each page of the due diligence report as required by section 83 (3) of the Act.

Consequently, the Board finds that the Evaluation Committee conducted a due diligence exercise on the 1st Interested Party in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

Having concluded due diligence on the 1st Interested Party, the 1st Respondent had an obligation of awarding the subject tender to the lowest evaluated responsive tenderer in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act. In Review No. 157/2020, the Board observed at page 35 and 36 on the manner in which award ought to have been made as already outlined hereinbefore.

The Procuring Entity determined the lowest evaluated tenderer at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation

of Section VI. Evaluation Criteria of the Tender Document and further determined whether the lowest evaluated tenderer qualifies to perform the contract (that is, the subject tender) satisfactorily through a due diligence exercise on the 1st Interested Party undertaken in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Thereafter, the Procuring Entity's Acting Director, Supply Chain Management in his professional opinion dated 19th January 2021 observed that a re-evaluation at the Financial Evaluation Stage was undertaken by the Evaluation Committee in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and that recommendation for award of the subject tender to the 1st Interested Party was based on previous prices as indicative of market prices since the subject procurement process is specialized and the Procuring Entity had existing contracts. Having noted the positive responses obtained from the due diligence exercise, he advised the 1st Respondent to award the subject tender to the 1st Interested Party for being the lowest evaluated responsive tenderer. Thereafter, the 1st Respondent awarded the subject tender to the 1st Interested Party.

Accordingly, the Board finds that the 1st Respondent awarded the subject tender to the 1st Interested Party in accordance with the award criteria specified in Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

Upon conclusion of re-evaluation at the Financial Evaluation Stage, a due diligence exercise and approval of award of the subject tender, the action remaining was for the 1st Respondent to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020.

The Applicant received a letter of notification of unsuccessful bid dated 21st January 2021 with the following details: -

"Pursuant to the provision of section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, and in view of the Public Procurement Administrative Review Board (PPARB) decision on the above mentioned tenders and its orders to the Hospital, this is to inform you that your bid was unsuccessful at financial evaluation stage due to the reason (s) stated below;

- ***Your bid was ranked 2nd Lowest in price***

The tender was awarded to M/s Renaissance Health Limited at the Tender Sum of Kshs. 25,144,225.00 (Kenya Shillings Twenty-Five Million, One Hundred and Forty-Four Thousand, Two Hundred and Twenty-Five Only) having satisfied the conditions for responsiveness, post-qualification and financial evaluation. The bid was the lowest evaluated in price.

Notwithstanding the above, we take this early opportunity to sincerely thank you for your participation and we look forward to working with you in future when other opportunities arise.

Yours Faithfully,

[signature affixed]

Joyce Kiiti

FOR: CHIEF EXECUTIVE OFFICER”

The Applicant’s letter of notification (i) was issued in writing and there is no allegation that the same was not made at the same time the 1st Interested Party was notified, (ii) it informed the Applicant that its bid was ranked the 2nd lowest in price as can be seen in the report on re-evaluation at the Financial Evaluation stage as the reason relating to non-responsiveness of the Applicant’s tender, (iii) it included the name of the successful tenderer as the 1st Interested Party herein, the tender price of the 1st Interested Party as Kshs. 25,144,225.00 and that the 1st Interested Party satisfied the conditions for responsiveness, post-qualification and financial evaluation and thus had the lowest evaluated price in accordance with section 86 (1) (a) of the Act.

The Applicant alleged at paragraph 39 of its Request for Review that the letter of notification dated 21st January 2021 is defective because it was signed by Joyce Kiiti who is not the Accounting Officer as required under section 87 of the Act.

In addressing this issue, the Board observes that it is not in dispute that the Accounting Officer of the Procuring Entity is the Chief Executive Officer of the Procuring Entity joined as the 1st Respondent herein.

According to section 87 of the Act, an accounting officer of a procuring entity is the person designated to issue notification letters to the successful and unsuccessful bidders. In exercising his duties as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislations. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including "good governance, integrity, transparency and accountability". Article 232 (1) (e) of the Constitution puts it more strictly, that "*the values and principles of public service include accountability for administrative acts*".

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 further requires public officers to maintain high standards of professional ethics in that: -

"Section 5 (1) Every public officer shall maintain high standard of professional ethics

(2) For the purposes of sub-section (1), a public officer maintains high standards of professional ethics if that officer

(a)

(b)

(c) is transparent when executing that officer's functions;

(d) can account for that officer's actions;

(e)

(f)

(g)

(h) observes the rule of law.

From the above provisions, the Board notes that the Accounting Officer of the Procuring Entity has an obligation of observing high standards of public service because he is accountable for administrative acts. Section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and

may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct.”

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. This therefore means that an accounting officer has power to delegate his or her authority, but he or she remains accountable for his or her actions and other actions undertaken by a person to whom he or she has granted express authority to act on his or her behalf. To meet the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avert any abuse that may occur without his or her knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated may use such delegated authority to undermine the accounting officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the 1st Respondent to take necessary steps to ensure that his authority, when delegated, is specific and not open to any form of abuse. It is the Board’s finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert abuse by the person to whom authority has been delegated, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that an accounting officer has the power to delegate his authority to issue letters of notification to unsuccessful bidders.

The Procuring Entity furnished the Board with an Internal Memo reference KNH/CEO/63 dated 18th January 2021 from the Office of the Chief Executive Officer of the Procuring Entity addressed to Joyce Nthenya Kiiti, the Procuring Entity's Acting Director, Supply Chain Management with the following details: -

***"RE: DELEGATION OF AUTHORITY TO SIGN DOCUMENTS
UNDER THE PUBLIC PROCUREMENT AND ASSET
DISPOSAL ACT, 2015***

TENDER NO. KNH/T/82/2021-2026

***OPERATIONAL LEASING OF LABORATORY EQUIPMENT-
FULLY AUTOMATED IMMUNOASSAY FOR
IMMUNOCHEMISTRY ANALYSER***

The Public Procurement and Asset Disposal Act, 2015 vests the responsibility with the Accounting Officer in the performance of various roles in the supply chain function. Section 69 (4) provides that no procurement approval shall be made by a person exercising delegated authority as an accounting officer or head the procuring function unless such delegation has been approved in writing by the accounting officer or the Head of Procurement Unit, respectively

In the absence of the appointed Ag. Director, Supply Chain Management, Mr. John Miring’u, I hereby delegate to you the responsibility of issuing notification letters to all persons/bidders who submitted tenders including termination of procurement proceedings.

This delegation applies only to the subject tender

[signature affixed]

Dr. Evanson Kamuri

Chief Executive Officer”

The above excerpt demonstrates that the 1st Respondent delegated specific authority to Joyce Nthenya Kiiti to issue notification letters to bidders in the subject tender, since the appointed Acting Director, Supply Chain Management, Mr. John Miring’u was absent and the 1st Respondent deemed it necessary for Joyce Nthenya Kiiti to act on his (1st Respondent’s) behalf. To that end, the Board finds that the letters of notification dated 21st January 2021 issued to all bidders including the Applicant herein were issued by a person authorized in law.

In totality of the foregoing, the Board finds that the 1st Respondent 1st Respondent complied with the orders of the Board issued on 12th January 2021 in PPARB Application No. 157 of 2020, Sciencescope Limited v. The Accounting Officer, Kenyatta National Hospital & 2 Others.

The last issue for determination revolves around the Applicant's allegation at paragraph 26 of its Request for Review that the 1st Interested Party and M/s Abbott GmbH jointly and severally committed fraudulent practice to ensure the 1st Interested Party is awarded the subject tender. The Applicant further cited Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document which provides as follows: -

"2.29 Corrupt or Fraudulent Practices

2.29.1. The Hospital requires that tenderers observe the highest standard of ethics during the procurement process and execution of contracts in pursuance of this policy, the Hospital defines, for the purpose of this provision following terms as follows;

(i) "corrupt practice" means the offering, giving, receiving, or soliciting of anything of value to influence the action of the Hospital official in the procurement process or in contract execution; and

(ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Hospital, and includes collusive practice among tenderer (prior to or after tender submission) designed to establish tender

prices at artificial non-competitive levels and to deprive the Hospital of the benefits of free and open competition;

2.29.2 The Hospital will reject a proposal for award if it determines that the tenderer recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question.

2.29.3 Further a tenderer who is found to have indulged in corrupt or fraudulent practices risks being debarred from participating in public procurement in Kenya.”

In the Applicant’s view, the 1st Respondent ought to have been disqualified pursuant to Clause 2.29 of Section II. Instructions to Tenderers of the Tender Document and section 66 (3) (a) of the Act which states that: -

"(1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

(2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.

(3) Without limiting the generality of the subsection (1) and (2), the person shall be—

(a) disqualified from entering into a contract for a procurement or asset disposal proceeding

Consequently, the Applicant urged the Board to direct the Director General of the Authority to initiate debarment proceedings against the 1st Interested Party and M/s Abbott GmbH pursuant to section 22 (1) (b) of Regulations 2020 on grounds of having committed fraudulent practice in the subject tender. In response to this allegation, the 1st Interested Party avers at paragraph 17 (g) of its Statement in Response that it denies the Applicant's allegations of fraud in respect of the brochures submitted by the 1st Interested Party and that the said documents were obtained from the manufacturer. The 1st Interested Party states that it believes the Respondents confirmed the said documentation during a due diligence exercise on the 1st Interested Party.

The Board observes that the Applicant merely raised an allegation of fraud in its pleadings without particularizing the fraud and did not lay a basis by way of credible evidence upon which this Board would make a finding whether or not the 1st Interested Party committed fraud with M/s Abbott GmbH to submit a brochure that is manipulated and to ensure the subject tender is awarded to the 1st Interested Party. In **Civil Appeal No. 411 of 2018, Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** the Court cited with approval the decision of Tunoi JA (as he then was) in **Vijay Morjaria**

v Nansingh Madhusingh Darbar & another [2000] eKLR, where it was held as follows: -

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not permissible to leave fraud to be inferred from the facts.

Having considered the finding in the above case, the Board observes that the Applicant herein has made vague and very general allegations of fraud against the 1st Interested Party and M/s Abbott GmbH without any real and tangible evidence by stating the product brochure submitted by the 1st Interested Party was manipulated to ensure award of the subject tender is awarded to the 1st Interested Party. The Applicant also alleged that the 1st Interested Party submitted a brochure containing tests for the same equipment (Alinity i) in the subject tender and a related Tender No. KNH/T/83/2021-2026 for Operational Leasing of Laboratory Equipment: Automated Immunology Analyser for the period 2021/2021. The Applicant merely made allegations of fraud without furnishing the Board with real and tangible evidence from an expert who can form an opinion on tests undertaken on the items listed in the 1st Interested Party's product brochure submitted in the subject tender and the one submitted in Tender No. KNH/T/83/2021-2026 for Operational Leasing of Laboratory Equipment:

Automated Immunology Analyser for the period 2021/2021, so as to verify the truthfulness or lack thereof, of the alleged similarities of the tests results thus failing to substantiate its claim.

The Board observes that at page 00064 of its original bid, the 1st Interested Party attached a Manufacturer's Authorization dated 3rd December 2020 issued by M/s Abbott GmbH addressed to the Procuring Entity stating as follows: -

"We Abbott, GMBH who are official manufacturers of the Abbott Alinity Analyzer and Abbott Architect Analyser, Reagents, Calibrators, Controls, Accessories, Consumables and Spare Parts having factories in Canon medical systems do hereby authorize Renaissance Health Ltd to submit a bid to the purpose of which is to provide the following goods manufactured by us: for Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser and to subsequently negotiate and sign a contract"

The Product Brochures referred to by the Applicant were issued on the letterhead of M/s Abbott GmbH who gave the 1st Interested Party a manufacturer's authorization and can be found at pages 217 to 224 of the 1st Interested Party's original bid. The Board already established that one of the components of due diligence on the 1st Interested Party was confirmation of the documentary evidence provided by bidders. Through an email dated 15th January 2021, the Respondents requested M/s Abbott GmbH to confirm

whether it authorized the 1st Interested Party to submit a bid, negotiate and sign a contract on behalf of the manufacturer under the subject tender. On the same date of 15th January 2021, M/s Abbott GmbH confirmed that it authorized the 1st Interested Party to submit a bid, negotiate and sign the subject tender on behalf of M/s Abbott GmbH.

The Applicant has failed to substantiate its allegations of fraud because it never provided any real and tangible evidence of the alleged manipulation of the product brochures submitted in the 1st Interested Party's original bid and thus there is no documentation furnished by the Applicant to support its allegation that the 1st Interested Party and M/s Abbott GmbH committed fraudulent practice to ensure the 1st Interested Party is awarded the subject tender.

As regards, the Applicant's prayer for the Board to direct the Director-General of the Authority to initiate debarment proceedings against the 1st Interested Party, the Board notes that Regulation 22 of Regulations 2020 state as follows: -

"A request for debarment may be initiated—

- (a) by the accounting officer of a procuring entity or any other person with knowledge of facts that may support one or more grounds for debarment***
- (b) by the Director General on his or her own motion based on findings from investigations inspections or reviews or***
- (c) on the recommendation"***

The Act and Regulations 2020 do not expressly donate powers to the Board to direct the Director General of the Authority to initiate debarment proceedings against tenderers. Pursuant to section 9 (h) of the Act, one of the functions of the Authority is to: -

"investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review"

Pursuant to section 9 (h) of the Act, the Applicant may lodge a complaint with the Director General of the Authority regarding issues that are not subject to administrative review. Upon conducting investigations pursuant to section 35 of the Act, the Authority may determine whether the findings of the investigations would require the Public Procurement Regulatory Board to debar a person from participating in procurement or asset disposal proceedings pursuant to section 41 of the Act.

In totality of the last issue, the Board finds that the Applicant's allegation that the 1st Interested Party and M/s Abbott GmbH committed fraudulent practice to ensure the 1st Interested Party is awarded the subject tender, has not been substantiated.

In totality of the foregoing, the Applicant's Request for Review is dismissed and the Board grants the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board grants the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 4th February 2021 with respect to Tender No. KNH/T/82/2021-2026 for Operational Leasing of Laboratory Equipment-Fully Automated Immunoassay for Immunochemistry Analyser, be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 24th day of February 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB