

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 21/2025 FILED ON 28TH FEBRUARY 2025

BETWEEN
PRECISION EXPERTS LIMITED APPLICANT
AND
THE ACCOUNTING OFFICER,
KENYA BUREAU OF STANDARDS 1ST RESPONDENT
KENYA BUREAU OF STANDARDS 2ND RESPONDENT

Review of the International Pre-Qualification documents in respect to Tender No. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVOC) to Standards, The Year 2025-2028.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|--------------------|
| 1. Ms. Alice Oeri | -Panel Chairperson |
| 2. Mr. Daniel Langat | -Member |
| 3. Mr. Stanslaus Kimani | -Member |

IN ATTENDANCE

- | | |
|----------------------|---|
| 1. Ms. Sarah Ayoo | -Holding brief for Acting Board Secretary |
| 2. Mr. Erickson Nani | -Secretariat |

PRESENT BY INVITATION

APPLICANT**PRECISION EXPERTS LIMITED**

1. Mr. Sisule Musungu - Advocate, Sisule & Associates LLP
2. Mr. Andrew Mwango- Advocate, Sisule & Associates LLP

RESPONDENTS**THE ACCOUNTING OFFICER, KENYA
BUREAU OF STANDARDS
KENYA BUREAU OF STANDARDS**

- Ms. Teresa Gachagua - Advocate, Kenya Bureau of Standards

INTERESTED PARTY**QUALITY INSPECTION SERVICES INC.
JAPAN**

- Mr. Justus Omollo - Advocate, Sigano & Omollo LLP

BACKGROUND OF THE DECISION**The Tendering Process**

1. The Kenya Bureau of Standards (herein referred to as "the Procuring Entity"), invited interested tenderers and eligible bidders to submit bids in response to an International Tender for pre-qualification under Tender No. KEBS/PRE-Q/T006/2025/2028 for the Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for the period 2025–2028 (hereinafter referred to as "the Subject tender") via an advertisement dated 21st January 2025.

Bid Submission Deadline

2. The initial submission deadline was 11th February 2025 at 10:00 AM.

However, upon issuance of Addenda, the Submission deadline was extended to 3rd March 2025.

Submission of Bids and Tender Opening

3. As per the Tender Opening Minutes dated 3rd March 2025, nineteen (19) bidders were recorded as having submitted their bids by the tender submission deadline.

#	Bidder
1.	Sunchine Quality Control Technology Service Co.
2.	Polucon Services (K) Ltd
3.	Tic Quality Control
4.	World Standardization, Certification and Testing Group (Shenzhen Co. Ltd)
5.	Quality Inspection Services Japan
6.	China Hansom Inspection and Certificate Co. Ltd
7.	Applus
8.	Alberk QA
9.	ASTC As Test Certification Tech. (Hangzhou) Co. Ltd
10.	Helsman Quality and Technology Services Limited (HQTS)
11.	China Certification and Inspection Group Inspection CompanyLimited
12.	China Certification ICT Co. Ltd
13.	Intertek International Limited
14.	TUV Austria
15.	Bay Area Compliance Labs. Corp. (BACC)
16.	Cotecna Inspection SA

17.	TUV Rheinland
18.	Bureau Veritas
19.	SGS

Evaluation of Bids

4. The 1st Respondent was notified that the 2nd Respondent had received a Notification of Appeal on 3rd March 2025, effectively suspending the procurement proceedings. Consequently, the evaluation process did not commence.

REQUEST FOR REVIEW NO.21 OF 2025

5. On 28th February 2025, the Applicant, through the firm of Sisule & Associates LLP, filed a Request for Review dated the same day, accompanied by a Supporting Affidavit sworn by Peter Maina, the Applicant's Director seeking the following orders from the Board:
Applicant

a) An order terminating the present procurement process undertaken by the Procuring Entity under TENDER NO. KEBS/PRE-Q/T006/2025/2028 – PRE-QUALIFICATIONS FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES, THE YEAR 2025-2028;

b) An order directing and mandating the Procuring Entity, the Kenya Bureau of Standards, to develop procurement terms and requirements in respect of PRE-

QUALIFICATIONS FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES, THE YEAR 2025-2028, in a manner that complies with the provisions of the Constitution of Kenya, 2010, and the Public Procurement and Asset Disposal Act, 2015, and more particularly in a manner that is fair, equitable, non-discriminatory, transparent, cost-effective, and that promotes local industry;

c) An order directing the Procuring Entity, the Kenya Bureau of Standards, to develop fresh and lawful procurement terms and requirements in respect of PRE-QUALIFICATIONS FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDSSERVICES, THE YEAR 2025 – 2028, in a reasonable period and not exceeding 60 days from the decision of the Board;

d) An order directing the Procuring Entity, the Kenya Bureau of Standards, to submit the revised procurement terms and requirements in respect of PRE-QUALIFICATIONS FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDSSERVICES, THE YEAR 2025 – 2028, to Public Procurement Regulatory Authority for guidance and concurrence in line with the provisions of the Public Procurement and Asset Disposal Act, 2015; and

e) The costs of the proceedings be awarded to the Applicant.

6. In a Notification of Appeal and letter dated 28th February 2025, Mr. James Kilaka, the Acting Board Secretary, informed the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, concurrently forwarded to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No.2/2020 dated 24th March, 2020 where the Board dispensed with the Physical hearing and directed that all request for review Applications be canvassed by way of Virtual means. The Respondents were also requested to submit their response and confidential tender documents within five (5) days.
7. On 6th March 2025, the Respondents filed a joint Memorandum of Response dated 5th March 2025 together with the Confidential Documents to the Board pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (the Act).
8. On 7th March 2025, the Acting Board Secretary notified all bidders in the subject tender via email of the pending Request for Review. A copy of the Request for Review and the Board's Circular No. 02/2020 dated 24th March 2020 was forwarded to all tenderers. Bidders were invited to submit any relevant information or arguments concerning the tender within three (3) days.
9. On 7th March 2025, the Acting Board Secretary issued a Hearing

Notice to the parties, notifying them that the hearing of the Request for Review would be held virtually on 13th March 2025 at 2:00 PM via the provided link.

10. On 10th March 2025, the Respondents filed their Written Submissions dated the same day.
11. On 13th March 2025, the Applicant filed its Written Submissions and a List and Bundle of Authorities, all dated the same day.
12. On 13th March 2025, despite the Acting Board Secretary's clear and timely notification to all bidders on 7th March 2025—generously giving them three (3) days to submit any information or arguments—the Interested Party, through the firm of Sigano & Omollo LLP, made a grand entrance at the eleventh hour. They filed a Notice of Appointment of Advocates and Grounds of Opposition, both dated the same day.
13. Due to unavoidable circumstances, the hearing scheduled for 13th March 2025 could not proceed and was adjourned to 14th March 2025 at 2:00 PM. All parties were duly notified of the rescheduling.
14. On 14th March 2025, the Applicant filed an undated Further Affidavit along with Supplementary Written Submissions dated the same day.
15. When the Board convened for the hearing on 14th March 2025 at 2:00 PM, all parties were represented by their respective Advocates.

16. Given the Interested Party's line of argument in its Grounds of Opposition concerning jurisdiction, the Board inquired from Counsel for the Interested Party whether a Notice of Preliminary Objection had been filed. Counsel confirmed that no such notice had been filed. However, it was agreed that the jurisdictional issues raised would be treated as a Preliminary Objection.
17. The Board proceeded to allocate time to the parties for their respective submissions.

PARTIES' SUBMISSIONS

Interested Party's Submissions

18. Counsel for the Interested Party, Mr. Omollo, argued that the Applicant lacked the requisite locus standi under Section 167(1) of the Act to institute and continue the administrative review proceedings. He contended that the Applicant had failed to plead or disclose any suffered or potential loss or damage resulting from an alleged breach of duty by the Procuring Entity. In support of this argument, Counsel relied on the case of ***James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 others* [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)**.
19. Counsel further submitted that the Request for Review sought to challenge the contents of the tender document published on 21st January 2025. He argued that the request was filed outside the mandatory timelines prescribed under Section 167(1) of the Act and

Rule 203(2)(c)(i) of the Public Procurement and Asset Disposal Regulations (Regulations).

20. Counsel concluded that, given the issues of *locus standi* and the late filing of the Request for Review, the Board lacked jurisdiction to hear the matter.

Applicant's Submissions

21. Counsel for the Applicant, Mr. Mwango, clarified that the undated Further Affidavit sworn by Peter Maina should have been dated 14th March 2025 and that the omission was a clerical error. He further stated that the Applicant would rely on the said Further Affidavit, along with the Supplementary Submissions dated 14th March 2025, in opposing the Interested Party's Grounds of Opposition.
22. In opposing the Grounds on Board's Jurisdiction, Counsel argued that the Interested Party was a stranger to the proceedings, as its Grounds of Opposition did not specify the capacity in which it was participating.
23. Counsel further argued that the Interested Party was introducing issues not raised by the main parties. In support of this argument, he relied on ***Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR**, which held that an interested party is limited to the issues raised by the principal parties and cannot introduce new matters.

24. On whether the Applicant had pleaded the risk of suffering loss, Counsel submitted that multiple instances within the Request for Review demonstrate such pleadings. He specifically referred the Board to paragraphs 30, 31, 32, 33, 78, 81, 184, and 185 of the Request for Review. In urging the Board to dismiss the ground challenging the pleading of losses, Counsel relied on the High Court decision in ***Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency & Another (Interested Parties); Toddy Civil Engineering Company Limited (Ex Parte Applicant)* [2023] KEHC 3699 (KLR)**.
25. On the issue of the Request for Review being time-barred, Counsel argued that this assertion was erroneous as it presumed that time began to run from 21st January 2025, when the Pre-Qualification documents were published on the 2nd Respondent's website. He contended that it could not be assumed that all candidates accessed the documents on the exact date of publication.
26. Counsel submitted that the terms of the tender crystallize only after the period for clarifications and addenda has lapsed. He highlighted that, under ITA 8.3 of the Pre-Qualification document, questions and requests for clarifications could be made up to seven (7) days before the submission deadline. He emphasized that, before this period elapsed, the terms of the Pre-Qualification document remained subject to potential amendments by the 2nd Respondent.

27. Counsel argued that, given the submission deadline of 3rd March 2025, the deadline for clarifications under ITA 8.3 was 24th February 2025. Consequently, he maintained that the Applicant's Request for Review was filed within the timeline prescribed under section 167(1) of the Act.
28. In support of allowing the Request for Review, Counsel argued that the pre-qualification terms imposed on candidates and tenderers were discriminatory against citizen contractors. He further contended that the terms were unnecessarily and unreasonably restrictive, contrary to section 89(5) of the Act.
29. Counsel argued that Mandatory Requirement No. 7, which compels candidates to submit certified copies of licenses to operate in each preferred country for conformity assessment, was inconsistent with Section V – Scope of Works Performance Specifications, paragraph 2.6. He noted that the latter applies exclusively to international candidates, requiring them to establish an operational office in Kenya only after contract award and within six (6) months of its commencement.
30. Counsel addressed Mandatory Requirement No. 8, which mandates candidates to hold current accreditation to ISO/IEC 17020:2012 (Type A accreditation) with a scope extending to all countries where they intend to provide services. He argued that requiring candidates to extend their accreditation scope to these territories before prequalification was not only onerous for citizen contractors but also

unreasonable.

31. Counsel argued that the technical requirements contravened section 89 of the Act, as they were arbitrary, inconsistent with Kenyan legal standards, and not aligned with international norms or widely accepted trade standards. He further contended that the margin of preference applied was ineffective and failed to fulfill the objectives of section 89(f) of the Act.
32. Counsel argued that Mandatory Requirement No. 1, which demands evidence of the tenderer's physical presence and location to provide PVOC services, imposes a substantial burden on citizen candidates. He contended that this requirement is not grounded in international standards or widely recognized trade norms, such as ISO/IEC 17020:2012 Conformity Assessment – Requirements for the operation of various types of bodies performing inspection.
33. Counsel argued that Criteria No. 3 for technical evaluation, which mandates that suitable candidates must have at least five (5) years of cumulative experience in a similar Conformity Assessment Program, is unreasonable and imposes an unjustifiably excessive burden on prospective applicants.
34. Counsel contended that Criteria No. 4 for technical evaluation, which mandates personnel certification of employees by an ISO/IEC 17024:2012 accredited certification body, is unreasonable. He argued that no such certification scheme exists for personnel conducting

inspections under Conformity Assessment (ISO/IEC 17020:2012), making the requirement impractical and unjustified.

35. Counsel argued that Criteria No. 7 of the technical evaluation, which requires candidates to submit a schedule of their own or affiliated laboratories, contradicts internationally accepted trade standards. He contended that this requirement undermines the principle of global accreditation recognition and restricts the potential synergies that arise from strategic partnerships.

36. Counsel submitted that when technical evaluation criteria surpass the statutory threshold by imposing terms beyond international trade standards or those widely accepted in global commerce, it creates an undue bias against citizen contractors. He argued that, in such instances, even where citizen contractors are assessed against these criteria, the intended margin of preference becomes ineffective in aiding their qualification for financial evaluation.

Respondent's Submissions

37. Counsel for the Respondents, Ms. Gachagua, submitted that she concurred with the Interested Party's arguments regarding the Grounds of Opposition. Addressing the issue of how the Interested Party became aware of the proceedings before the Board, she clarified that the Request for Review had been served upon the Respondents on 3rd March 2025, after the bids had already been opened.

38. Counsel submitted that the mandate to conduct or arrange for the

inspection of imports destined for Kenya is derived from Section 4 of the Standards Act. She further contended that this provision upholds the spirit of Article 46 of the Constitution, which safeguards consumers' rights to goods of reasonable quality and ensures the protection of their health, safety, and economic interests.

39. Counsel submitted that in setting the requirements for inspection bodies seeking engagement, the 2nd Respondent must align with its mandate under both the Standards Act and the Constitution. She emphasized that such requirements should guarantee that only a competent body with the necessary infrastructure is awarded the tender.

40. Counsel directed the Board's attention to section 60 of the Act, read together with section 90(3), which provides that an accounting officer of a procuring entity may, where applicable, conduct a pre-qualification procedure. This procedure serves as a foundational step before adopting an alternative procurement method other than open tender, with the objective of identifying the most qualified firms for the subject procurement.

41. Counsel submitted that section 93(2) of the Act empowers the Respondents to conduct pre-qualification for complex and specialized services. She further contended that section 93(4) of the Act mandates that an invitation for such goods, works, and services must include a statement outlining the key requirements and criteria for pre-qualification, a declaration that the process is open to bidders who

meet the eligibility criteria, and a stipulation that only bidders with the capacity to perform may apply.

42. Counsel referred the Board to the decision in ***Sicpa vs Public Procurement Administrative Review Board & 2 others (Civil Appeal E474 of 2024) [2024] KECA 939 (KLR)***, where the Court affirmed that a Procuring Entity is permitted to tailor its bid document to meet its specific needs.
43. Counsel also relied on the decision in ***Sinopec International Petroleum Service Corporation vs Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR)***, which held that tender requirements are not mere internal prescripts that can be disregarded at will by the Procuring Entity, the Review Board, or even the Court. To do so would amount to a violation of Article 227 of the Constitution.
44. On the issue of the reasonableness of some of the tender requirements, Counsel pointed out that the Respondents had already addressed this matter in paragraph 12 of their Written Submissions.
45. On the requirement of having an operational office both in the country of supply and in Kenya, Counsel submitted that there is no discrimination as alleged by the Applicant. She emphasized that the Applicant had largely misapprehended or misunderstood the tender requirements regarding operational offices. Counsel clarified that the tender document specifies the countries where a tenderer must have

an operational office, which is necessary for facilitating Conformity Assessment Activities. This office would serve as the point for receiving inspection applications, reviewing documents, and coordinating physical inspections and laboratory testing.

46. Further, Counsel submitted that such an operational office is central to the inspection body's operations and must be in place at the time of bidding. She argued that this requirement should not be conflated with the operational office to be established in Kenya, which applies only to inspection bodies not already registered in Kenya. The latter office is intended to serve as an administrative and liaison office for communication and coordination with the 2nd Respondent and other regulatory agencies, given that imports must be examined by various regulatory bodies depending on the nature of the goods being imported.

47. Counsel emphasized that the liaison office is not central to the actual conduct of inspections, as inspections would have already taken place abroad. She argued that this distinction is critical in demonstrating that there is no discrimination in this regard.

48. As to whether the tender requirements are skewed against Kenyan citizens, Counsel submitted that the Applicant has not demonstrated any specific requirement that a Kenyan citizen is incapable of meeting.

49. Counsel submitted that the Applicant was essentially inviting the 2nd Respondent to commit an illegality. She referred to Article 227 of

the Constitution, which upholds the principle of competitiveness in public procurement, and section 79 of the Act, which sets out the criteria for responsiveness of tenders. Counsel emphasized that these provisions anticipate that only qualified and ready service providers should be awarded tenders. She stressed that the subject tender involved highly specialized services, and eligible tenderers must demonstrate their capability to provide Conformity Assessment Services from the outset.

50. Counsel contended that if the 2nd Respondent were to engage persons who are not competent, it would create gaps in the conduct of inspection services, thereby exposing the Kenyan people to the risk of having non-compliant goods enter the country.

Interested Party's Rejoinder

51. Counsel for the Interested Party submitted that the Interested Party did not raise a parallel claim; therefore, its issues fall well within the purview of what an Interested Party can submit on. Counsel argued that the Interested Party was merely making substantive arguments in opposition to the case already filed by the Applicant.
52. On the paragraphs submitted by the Applicant's Counsel that allegedly plead loss and damages in the Request for Review, the Interested Party's Counsel contended that the said paragraphs do not, in fact, plead any specific loss that is likely to be suffered.
53. On the decision in ***Republic v Public Procurement***

Administrative Review Board; Lake Victoria North Water Works Development Agency (supra) as relied upon by the Applicant's Counsel, the Interested Party's Counsel submitted that the case is not good law. He argued that the judgment was set aside by the Court of Appeal in ***Consolidated Civil Appeal 295 of 2023 and 296 of 2023***, where the Court found that the High Court's decision was rendered outside the statutory timelines. Furthermore, the Court of Appeal held that the judgment breached the doctrine of *stare decisis*, as the High Court failed to give effect to binding precedent from the Court of Appeal.

54. On the issue of the statutory timelines for filing the Request for Review, Counsel reiterated that the Request was filed outside the prescribed timelines, making it time-barred.

Applicant's Rejoinder

55. Counsel for the Applicant, Mr. Musungu, submitted that the qualification to perform conformity assessment is determined solely by accreditation and not by any other means. He emphasized that, upon review of the pre-qualification document, accreditation stands as the primary requirement for qualification.
56. On the question of an operational office, Counsel submitted that such an office is not central to the performance of inspection. He argued that anyone with knowledge or understanding of conformity assessment would clearly recognize that no actual conformity assessment takes place in an office. Instead, these assessments occur

either in the field or in laboratories.

CLARIFICATIONS

57. The Board sought clarification from the Applicant's Counsel regarding the specific eligibility criteria that had been structured in a way that would disadvantage their client.
58. The Applicant's Counsel responded by identifying Mandatory Requirement No. 7 as a key concern, referring to their explanation from paragraphs 22 through 32 of the Written Submissions. He also highlighted Mandatory Requirement No. 8, explaining its discriminatory nature from paragraph 33 onwards.
59. Counsel clarified that the discriminatory issues fell into two categories: those under the Mandatory Requirements and those within the technical evaluation criteria. Specifically, he pointed out that Requirement No. 1 of the technical evaluation was detailed from pages 46 to 52 of the Written Submissions, Criteria No. 3 was explained from pages 53 to 55, and Criteria No. 4 was discussed from paragraph 56 onwards. Additionally, he addressed Criteria No. 7, analyzing its impact from paragraphs 63 to 68.
60. The Board posed a series of questions to the Applicant's Counsel. Firstly, they sought to clarify whether the Applicant was a tenderer in this particular tender. They also inquired at what point the Applicant approached the Board—specifically, whether this was after realizing that the terms of the tender were discriminatory. Additionally, the

Board questioned whether it was true that the Applicant had not pleaded any loss or damages in their pleadings.

61. In response, Counsel for the Applicant clarified that the Applicant was a candidate but not a tenderer in the procurement process. He explained that the Applicant chose not to submit a tender, as they believed doing so would have been an exercise in futility. Counsel further stated that the last addendum to the tender was issued on 24th February 2025. It was at this point that they analyzed the amended tender document and decided to move the Board.

62. On the issue of pleading loss and damages, Counsel for the Applicant argued that it is not mandatory to explicitly use the word "damage" for a party to have pleaded loss and damages. He contended that what matters is demonstrating that the party risks suffering loss or prejudice. Counsel maintained that the Applicant had sufficiently shown prejudice by illustrating that they would lose business if they were unable to participate in the tender process.

63. The Board sought clarification on whether interfering with the tender documents would infringe upon the procuring entity's right to customize them according to its requirements and needs. This inquiry raised the broader question of the extent to which a procuring entity has discretion in structuring its tender documents and whether external intervention could unjustifiably limit that discretion.

64. Counsel for the Applicant clarified that the Applicant does not

dispute the Procuring Entity's right to establish criteria for tenders. However, he emphasized that this right is not absolute but is constrained by constitutional principles. He argued that while the Procuring Entity has discretion, it must exercise that discretion within the bounds of fairness, and non-discrimination as prescribed by the Constitution.

BOARD'S DECISION

65. The Board has considered all documents, submissions, and pleadings together with confidential documents submitted to it pursuant to section 67 (3)(e) of the Act and finds the following issues call for determination:

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

In determining the first issue, the Board will make a determination on the following sub-issues:

- i. Whether the Applicant has *locus standi* before the Board.

Depending on the finding of the first sub-issue:

- ii. Whether the Request for Review was filed outside the timeline under section 167 (1) of the Act.

Depending on the second sub-issue and the first issue as a whole:

B. Whether the procurement terms and requirements for the subject tender comply with the principles of non-discrimination, and promotion of local industry as required by the Constitution and the Act.

C. What orders the Board should issue in the circumstance.

Whether the Board has jurisdiction to determine the instant Request for Review.

66. The Interested Party, in response to the Request for Review, filed Grounds of Opposition, effectively raising a preliminary objection on two principal grounds. First, they asserted that the Applicant lacked locus standi to institute the proceedings. Second, they contended that the Request for Review was filed beyond the mandatory timeline prescribed under Section 167(1) of the Act, read together with Regulation 203(2)(c)(i) of the Regulations.

67. The effect of either of the two grounds raised in the Grounds of Opposition, if proven, would divest this Board of jurisdiction to entertain the instant Request for Review. Consequently, given their preliminary nature, these objections must be addressed as a priority.

68. This Board is cognizant of the well-established legal principle that courts and decision-making bodies can only adjudicate matters within their jurisdiction. When a question of jurisdiction arises, it is imperative that the Court or tribunal seized of the matter addresses it as a

threshold issue before taking any further action.

69. As a fundamental principle, when the issue of jurisdiction is raised before a court or decision-making body, it must be determined as a priority before any other matters are addressed. Jurisdiction is the cornerstone of adjudication, and without it, a court or tribunal lacks the legal authority to proceed further.

70. The Supreme Court, in ***Kenya Hotel Properties Limited v Attorney General & 5 others* (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment)**, affirmed the principle that jurisdiction is the foundation of any judicial or quasi-judicial proceeding and must be determined at the outset whenever it is challenged.

On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In [R v Karisa Chengo](#) [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted

by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

71. This Board is a creature of statute, established under Section 27(1) of the Act, which provides:

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

72. Section 28 of the Act outlines the functions of the Board as follows:

The functions of the Review Board shall be – reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

73. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings. Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline the Board's powers in handling such proceedings.
74. Therefore, in light of the foregoing, the Board has no alternative but to examine its jurisdiction by determining whether the Applicant has locus standi and whether the Request for Review was filed outside the mandatory statutory timeline.

Whether the Applicant has *locus standi* before the Board.

75. The Interested Party contended that the Applicant lacked the requisite locus standi under Section 167(1) of the Act to institute and sustain the administrative proceedings. This argument was based on the Applicant's failure to plead or disclose having suffered or risked suffering loss or damage as a result of any alleged breach of a duty imposed on the procuring entity by the Act or its Regulations.
76. In response to the above allegation, Counsel urged the Board to carefully examine the Request for Review Application along with the Supporting Affidavit. During the hearing, Counsel emphasized that paragraphs 30, 31, 32, 33, 78, 81, 84, and 85 of the Request for Review explicitly pleaded the risk of loss and damage that the Applicant stood to suffer.

77. Section 167(1) of the Act provides:

167. Request for a review

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

78. In essence, for one to invoke the jurisdiction of the Board, they must approach it in accordance with Section 167(1) of the Act and satisfy the following conditions: (a) be either a candidate or a tenderer as defined under Section 2 of the Act; (b) claim to have suffered or be at risk of suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or its Regulations; and (c) seek administrative review by the Board within fourteen (14) days from the date of notification of the award or the occurrence of the alleged breach, as prescribed under Regulation 203 of the Regulations.

79. Superior courts have repeatedly addressed the issue of pleading loss and damage under Section 167(1) of the Act. This Board takes cognizance of the holding in Mombasa Civil Appeal No. 131 of 2018, *James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another* (2019) eKLR (hereinafter referred to as "the James

Ayodi case"). In this case, the Court of Appeal was tasked with determining an appeal challenging the High Court's decision, which held that the Board ought to have ruled that the appellants lacked locus standi as they had not demonstrated that they had suffered or were likely to suffer loss. The Court of Appeal, in its determination, provided guidance on the requirement to plead and demonstrate loss or the risk thereof.

" It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;....

...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review.

.....The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]

80. In essence, the Court of Appeal held that for a candidate or tenderer to seek an administrative review before the Board, they must, at the very least, claim to have suffered or to be at risk of suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations.

81. Turning to the instant Request for Review, the central issue for determination by this Board is whether the Applicant, through its pleadings, has at the very least asserted that it has suffered or is at risk of suffering loss or damage due to a breach of duty imposed on the Procuring Entity by the Act or Regulations. This determination is crucial in establishing whether the Applicant has the requisite *locus standi* before the Board.

82. In the case of ***Otolo Margaret Kanini & 16 others v Attorney General & 4 others* [2022] eKLR**, the Court defined *locus standi* in the following terms:

By definition in general, *locus-standi* is the right to bring an action before a Court of law or any other adjudicatory forum. Such right is an entitlement created by the law.

83. The High Court in ***Alfred Njau and Others v City Council of Nairobi* (1982) KAR 229** described *locus standi* as:

...a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to

appear or be heard in such and such proceedings.

84. The import of the above holdings is that *locus standi* refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack *locus standi*, it cannot be heard, regardless of whether its case has merit. This issue alone may lead to the preliminary dismissal of the Request for Review without delving into its substantive aspects.
85. The Board carefully examined the specific paragraphs of the Request for Review that the Applicant relied on to demonstrate that loss and damage were indeed pleaded.
86. A plain reading of the quoted paragraphs does not reveal the words "loss" or "damage." Even with meticulous scrutiny, the voluminous Request for Review does not explicitly contain these terms. However, the absence of specific wording does not automatically negate the substance of the claim. The key question remains whether, when read holistically, the pleadings sufficiently demonstrate the risk of suffering loss or damage as contemplated under the law.
87. The Applicant clearly demonstrated prejudice by illustrating that its inability to participate in the tender would result in lost business opportunities. A holistic reading of the Request for Review reveals that the challenge is based on allegations of restrictive and discriminatory criteria in the tender document, which are said to have created an undue barrier, effectively excluding the Applicant from the

procurement process. This exclusion, in itself, constitutes a tangible risk of loss, reinforcing the Applicant's claim of prejudice.

88. The Board observes that the Applicant effectively pleaded the risk of loss and damage in various sections of its Request for Review, even without explicitly using the terms "damage" or "loss." The Court of Appeal in the James Oyondi case did not mandate the use of these specific terms. Rather, what is essential is the demonstration of a risk of suffering loss or prejudice, which the Applicant has adequately established.

89. The Board is therefore satisfied that the Applicant sufficiently pleaded the risk of loss and damage in its Request for Review. This satisfies the requirement for locus standi before the Board in accordance with Section 167(1) of the Act.

90. In an effort to anchor its Request for Review against the waves of the preliminary objections raised in the Grounds of Opposition, Counsel for the Applicant argued that the Interested Party had failed to define its capacity in the present proceedings—whether as a candidate or a tenderer. On this basis, Counsel contended that the Interested Party lacked *locus standi*.

91. The Board notes that the Interested Party was among the bidders invited by the Acting Board Secretary, via email on 7th March 2025, to submit their arguments and any relevant information. This invitation was issued pursuant to Regulation 205(5) of the Regulations, read

together with Section 170(d) of the Act.

92. The Board also notes that the Applicant in the subject tender is a candidate and not a tenderer, as it is challenging the content of the tender document pursuant to Section 167 of the Act. As a result, the Applicant had not been notified of the outcome of the tender and was therefore unable to determine who the interested parties are in the subject tender, on this account the Applicant cannot be faulted for failing to enjoin Interested Party(s).

93. Further, upon reviewing the Tender Opening Minutes dated 3rd March 2025, as provided by the Procuring Entity in the Confidential File, the Board is satisfied that the Interested Party was indeed one of the bidders in the subject tender. This confirms that the Interested Party has the requisite locus standi in the instant proceedings.

94. The sum and substance of the foregoing analysis is that both the Applicant and the Interested Party have locus standi in the instant proceedings.

ii. Whether the Request for Review was filed outside the timeline under section 167 (1) of the Act.

95. In opposing the Request for Review, Counsel for the Interested Party contended that the Request for Review was challenging the contents of the tender document published on 21st January 2025. Consequently, Counsel argued that the Request for Review was filed

outside the mandatory statutory timelines prescribed under Section 167(1) of the Act and Regulation 203(2)(c)(i) of the Regulations.

96. In response, Counsel for the Applicant contended that the position advanced by the Interested Party was erroneous, as it was based on the incorrect assumption that the statutory timeline began running on 21st January 2025, when the Pre-Qualification documents were published on the 2nd Respondent's website.

97. Applicant's Counsel argued that the tender terms crystallized only after the period for clarifications and addenda had lapsed. Counsel highlighted that ITA 8.3 of the Pre-Qualification document allowed questions and requests for clarifications up to seven (7) days before the submission deadline. Given that the submission deadline was set for 3rd March 2025, the clarification period ended on 24th February 2025. Therefore, Counsel asserted that the Applicant was within the statutory timelines under Section 167(1) of the Act, as the Request for Review was filed on 28th February 2025.

98. A plain reading of Section 167(1) of the Act establishes that the jurisdiction of the Board must be invoked within a strict timeline of fourteen (14) days:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity

by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

99. Regulation 203(2)(c)(i) of the Regulations similarly reinforces the fourteen (14) days' timeline in the following terms:

Request for a review

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

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

a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b) be accompanied by such statements as the applicant considers necessary in support of its request;

c) be made within fourteen days of —

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

ii. the notification under section 87 of the Act; or

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

successful bidder

100. Our interpretation of the above provisions is that an Applicant seeking the Board's intervention in any procurement proceedings must file their request within the prescribed 14-day statutory timeline. Consequently, any Request for Review filed beyond this period would be time-barred, thereby divesting the Board of jurisdiction to entertain it.

101. Section 167 of the Act and Regulation 203 of the Regulations establish the benchmark events for the commencement of the statutory timeline as either the date of notification of the award or the date of occurrence of the alleged breach. In the context of the instant Request for Review, the critical point of reference is the date of occurrence of the alleged breach.

102. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR***, the High Court provided guidance on the commencement of the statutory timeline, stating as follows:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach.

103. From the foregoing, in computing time under Section 167(1) of the

Act and Regulation 203(2)(c)(i), consideration should be given to the specific breach complained of in the Request for Review and the point at which the Applicant became aware of the alleged breach.

104. Turning to the instant Request for Review, the Applicant's cause of action arises from the Pre-Qualification documents published on the 2nd Respondent's website on 21st January 2025. However, the mere fact that the documents were uploaded on that date does not necessarily imply that the Applicant accessed them on the same day.

105. The Board notes that it is undisputed that the Procuring Entity issued six (6) addenda, one of which extended the submission deadline to 3rd March 2025. Additionally, the Board has reviewed ITA 8.3 of the Pre-Qualification document, which stipulates that questions and requests for clarifications could only be made up to seven (7) days before the submission deadline.

106. Section 75(1) of the Act provides that:

Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing addendum without materially altering the substance of the original tender.

107. In line with the above provision, the Board observes that since the

addenda had the effect of modifying the tender documents, it was reasonable for the Applicant to have held a legitimate expectation that the Procuring Entity might alter the terms of the Pre-Qualification document.

108. Furthermore, the Board notes that filing a Request for Review before the lapse of the period for seeking clarifications and addenda would have been premature. This is because the very cause of action underlying such a Request for Review might have been addressed and resolved through the addenda issued by the Procuring Entity.

109. Furthermore, the Board notes that filing a Request for Review before the deadline for seeking clarifications and addenda would have been akin to sounding the alarm before spotting the fire. After all, what if the Procuring Entity, in a display of responsiveness, had actually addressed the concerns through its addenda? Rushing to file the Request for Review prematurely would not only have been unnecessary but also a classic case of "jumping the gun"—or, in this case, firing before even loading the bullets.

110. Considering the above analysis, time began to run from 24th February 2025. The Request for Review was filed on 28th February 2025, merely four days after the commencement of the timeline. Accordingly, we find that the Request for Review complies with the mandatory statutory time limit under Section 167(1) of the Act and is not time-barred.

111. Accordingly, the Board finds that it has jurisdiction to hear and determine this Request for Review. This determination grants the Board the requisite authority to proceed with addressing the remaining issues for determination.

Whether the procurement terms and requirements for the subject tender comply with the principles of non-discrimination, and promotion of local industry as required by the Constitution and the Act

112. The Applicant asserted that the terms and requirements of the subject tender were discriminatory, exclusionary, and unreasonably restrictive against citizen contractors. Additionally, the Applicant argued that the provisions were designed to unfairly and unlawfully favor international contractors.

113. Applicant's Counsel submitted that the alleged discriminatory aspects fell into two categories: those embedded within the Mandatory Requirements and those arising from the Technical Evaluation Criteria.

114. According to Counsel, Mandatory Requirement No. 7 obligated candidates to submit certified copies of licenses to conduct business in each country where they intended to undertake the Conformity Assessment. Counsel invited the Board to contrast this requirement with the provision under Section V – Scope of Works, Performance Specifications, paragraph 2.6, which applies exclusively to international candidates. This provision stipulates that, following the

award and signing of the contract, an international contractor is only required to establish an operational office in Kenya within six (6) months from the contract's commencement date.

115. The Applicant also took issue with Mandatory Requirement No. 8 under the preliminary examination for determining responsiveness. This requirement mandated candidates to hold current accreditation to ISO/IEC 17020:2012 (Type A accreditation) and further required that the scope of accreditation extend to all countries where the candidate intended to provide services. Counsel argued that demanding an extended scope of accreditation before pre-qualification was not only excessively burdensome for citizen contractors but also patently unreasonable.

116. Under the criteria for technical proposals, Applicant's Counsel asserted that the requirements were discriminatory, exclusionary, and unfairly biased against citizen contractors. He argued that the technical terms contravened Section 89(f) of the Act, as the margin of preference adopted was ineffective and failed to achieve the intended purpose of the provision.

117. According to Counsel, Requirement No. 1—evidence of the tenderer's physical presence and location to provide PVoC services—is unduly burdensome to citizen contractors and lacks a basis in international standards.

118. According to Counsel, Criteria No. 3 of the technical evaluation—

which mandates that suitable candidates must have at least five (5) years of cumulative experience in a similar Conformity Assessment Program—is unreasonable and imposes an unjustifiably excessive requirement.

119. Furthermore, the Applicant challenged Criteria No. 7 of the technical proposal evaluation, which required candidates to submit a schedule of their own or affiliated laboratories. Counsel argued that this requirement undermines the principle of global recognition of accreditation and disregards the benefits of strategic partnerships.

120. In response to the Request for Review, the Respondents argued that in setting the requirements for inspection bodies seeking engagement, the 2nd Respondent must align with its mandate under both the Standards Act and the Constitution. Counsel emphasized that these requirements are designed to ensure that only competent entities with the necessary infrastructure are awarded the tender.

121. Respondents' Counsel submitted that Section 93(2) of the Act empowers the Respondents to conduct pre-qualification for complex and specialized services. She further argued that Section 93(4) of the Act mandates that an invitation for such goods, works, and services must include a statement outlining the key requirements and criteria for pre-qualification, a declaration that the process is open to bidders who meet the eligibility criteria, and a stipulation that only bidders with the capacity to perform may apply.

122. On the requirement for an operational office both in the country of supply and in Kenya, Respondents' Counsel refuted the Applicant's claims of discrimination. She argued that the Applicant had misapprehended or misunderstood the tender requirements regarding operational offices. Counsel clarified that the tender document explicitly specifies the countries where a tenderer must have an operational office, which is essential for facilitating Conformity Assessment Activities. This office would serve as the primary point for receiving inspection applications, reviewing documents, and coordinating physical inspections and laboratory testing.

123. In light of the competing submissions regarding various sections of the Pre-Qualification document, the Board shall proceed to analyze the specific provisions challenged by the Applicant.

124. The first section of the Pre-Qualification document that warrants determination is Mandatory Requirement No. 7, juxtaposed against the provision under Section V – Scope of Works, Performance Specifications, paragraph 2.6, which applies exclusively to international candidates.

125. The Board has meticulously reviewed and analyzed the cited sections of the Pre-Qualification document, along with all documents submitted by the parties. It is undisputed that the sections are as quoted by the Applicant. The glaring issue that demands determination is whether these provisions amount to discrimination within the Pre-Qualification document.

126. In ***Jacqueline Okeyo Manani & 5 others v Attorney General & another*** [2018] eKLR, the High Court expounded on the concept of discrimination in the following terms:

26. ***Black's Law Dictionary***, 9th Edition defines "discrimination" as (1) ***"the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship"*** (2) ***"Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured"***.

27. In the case of ***Peter K Waweru v Republic*** [2006]eKLR, the court stated of discrimination thus:-

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

127. From the above definition, discrimination, in simple terms, refers to any distinction, exclusion, or preference based on factors such as race, color, sex, religious beliefs, political persuasion, or other attributes that effectively or potentially nullify or impair equality of opportunity or treatment between individuals or groups.

128. Article 27 of the Constitution expressly prohibits all forms of discrimination, stating that:

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

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

129. The Constitution upholds non-discrimination as a fundamental right, ensuring that individuals in similar circumstances receive equal treatment in both law and practice, without unjustified distinctions or differentiation. However, not every form of distinction constitutes discrimination. As defined, discrimination arises when individuals or groups in comparable situations are treated differently without an objective or reasonable justification, or where there is no proportionality between the intended objective and the means used to achieve it.

130. The Applicant's grievance is that, as a citizen contractor, it faces discrimination because international candidates are granted time to

achieve compliance for contract execution, whereas citizen contractors must meet compliance requirements and incur expenses upfront, even before establishing a legitimate expectation of securing the business.

131. In response, Counsel for the Respondent submitted that the tender document specifies the countries where a tenderer must have an operational office. This requirement, the Respondents argued, is essential for facilitating Conformity Assessment Activities, as the office would serve as the central point for receiving inspection applications, reviewing documents, and coordinating physical inspections and laboratory testing.

132. Furthermore, Counsel emphasized that the operational office is integral to the inspection body's functions and must be established at the time of bidding. She clarified that this requirement should not be confused with the obligation to establish an operational office in Kenya, which applies only to inspection bodies not already registered in the country. The latter office, she explained, is intended to function as an administrative and liaison hub for communication and coordination with the 2nd Respondent and other regulatory agencies, given that imports are subject to examination by various regulatory bodies depending on the nature of the goods.

133. Counsel stressed that the liaison office is not integral to the actual inspection process, as inspections would have already been conducted abroad. She maintained that this distinction is essential in illustrating that the requirement does not amount to discrimination.

134. The Board acknowledges the justification for the different treatment and finds it to be reasonable. This determination is based on the fact that the operational office to be established in Kenya is not essential to the Conformity Assessment process and can be set up after the tender award, within the stipulated six-month grace period.

135. The Board recognizes the nature of the services required under the tender and acknowledges that, during the pre-qualification process, it is reasonable for the Procuring Entity to ensure that all essential infrastructure necessary for the performance of the Conformity Assessment exercise is in place before awarding the tender.

136. The Board acknowledges the Applicant's Counsel's argument that Conformity Assessment exercises primarily take place in laboratories and the field, rather than in an open office. However, the Board finds it necessary to recognize that all data collected from laboratories and field assessments must be analyzed and processed. To facilitate this, it is reasonable to require each tenderer to have at least one centralized location for such operations, thereby justifying the need for a physical office.

137. The next sections of the Pre-Qualification document that require analysis and determination, as challenged by the Applicant, include: Mandatory Requirement No. 8 under the preliminary examination for responsiveness; Requirement No. 1, which demands evidence of the tenderer's physical presence and location to provide PVoC services;

Criteria No. 3, which mandates that candidates must have at least five years of cumulative experience in a similar Conformity Assessment Program; Criteria No. 4, which requires personnel certification of employees by a competent authority under ISO/IEC 17024:2012; and Criteria No. 7, which stipulates that candidates must submit a schedule of their own or affiliated laboratories.

138. Given the nature of the complaints raised regarding these sections of the Pre-Qualification document, the Board shall analyze them collectively rather than individually.

139. In response, the Respondents' Counsel submitted that they had provided a justification for each of the requirements.

140. On the requirement for current accreditation to ISO/IEC 17020:2012, the Respondents' Counsel submitted that Conformity Assessment services are highly technical. The accreditation requirement ensures that the inspection body meets established competency standards and operates with professionalism and integrity.

141. On the requirement for evidence of physical presence, the Respondents' Counsel submitted that an inspection body must demonstrate stability to provide services throughout the contract's duration. Such stability is evidenced by business continuity plans, a key component of which is a secured and permanent physical location.

142. On the requirement for experience in providing conformity assessment services, the Respondents' Counsel submitted that this criterion ensures bidders possess the necessary skills and expertise to deliver the required services effectively. This, in turn, mitigates the risks of certifying non-compliant products and minimizes delays in the certification process.

143. On the requirement for personnel qualifications and expertise, the Respondents' Counsel submitted that this criterion ensures that the personnel possess the necessary skills and knowledge to perform their tasks effectively. This measure is intended to uphold high standards and guarantee the quality of services provided.

144. On the requirement for laboratories accredited to ISO/IEC 17025:2017, the Respondents' Counsel submitted that this criterion ensures that the laboratory meets international standards for testing and calibration, thereby guaranteeing the reliability and accuracy of conformity assessment services.

145. In response to the issue of the margin of preference for citizen contractors, the Respondents' Counsel submitted that the Prequalification Data Sheet ITA 24.1 provided for such a margin of preference.

146. Section 93 (1) and (2) of the Act provides that:

93 Pre-qualification

(1) Subject to provision of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.

(2) Pre-qualification shall be for complex and specialized goods, works and services.

(3) In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified.

(4) The invitation referred to in paragraph (2) shall include—

(a) the name, address and contact details of the procuring entity;

(b) outline of the procurement requirement, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;

(c) statement of the key requirements and criteria to pre-

qualify;

(d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and

(e) instructions on the location and deadline for submission of applications to pre-qualify;

(f) applicable preferences and reservations or any conditions arising from the related policy;

(g) declaration that it is open to bidders who meet the eligibility criteria; and

(h) requirement that only bidders with capacity to perform can apply.

147. The Court of Appeal, in the case of *Sicpa SA v Public Procurement Administrative Review Board & 2 others* (Civil Appeal E474 of 2024) [2024] KECA 939 (KLR) (2 August 2024) (Judgment), addressed whether a Procuring Entity has the discretion to tailor bid documents to meet its specific needs. The Court held as follows:

We agree with the above finding. A Procuring Entity is permitted to customize its bid document to suit its needs.

148. The above case law affirms that a Procuring Entity has the legal authority to tailor its bid documents to meet its specific needs. However, this discretion is not absolute. The exercise of such powers must align with the principles of fairness, transparency, and competition as enshrined in the relevant procurement laws and regulations.

149. The Procuring Entity, like all other entities and individuals in the Republic of Kenya, is bound by the Constitution and all applicable laws.

150. Article 10 of the Constitution provides that:

National values and principles of governance.

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

151. In accordance with the above laws, a Procuring Entity is not exempt from compliance when customizing its bid documents. This process must adhere to the rule of law and uphold the principle of non-discrimination.

152. Narrowing down to the instant Request for Review, the question arises whether the Procuring Entity exceeded its mandate and failed to comply with the Constitution and other laws, given that its powers are not absolute. We do not find this to be the case. This conclusion is based on the fact that the Procuring Entity has provided a reasonable justification for all the requirements outlined in the Pre-Qualification document.

153. Given the nature of the Conformity Assessment exercise to be undertaken upon contract award, it is essential for the Procuring Entity to ensure that potential bidders have the capacity to uphold and maintain the required standards. This is in line with the provisions of the Standards Act, as read together with Article 46 of the Constitution.

154. Upon reviewing the Tender Document, the Board confirms that ITA 24.1 includes a provision for a margin of preference. The Applicant's belief that this provision is ineffective appears to stem from the manner in which the pre-qualification documents were structured. However, given the complexity and sensitivity of the subject tender, the Board finds that the Respondents did not violate the law concerning the margin of preference.

155. Therefore, based on the foregoing analysis, the Board finds that the Respondents adhered to the principles of non-discrimination and the promotion of local industry, as required by the Constitution and the Act.

What orders should issue in the circumstance.

156. The Board has found that it has jurisdiction over the present Request for Review, as the Applicant have *locus standi*, having demonstrated a risk of suffering loss and damages. Additionally, the Request for Review was filed within the statutory timelines stipulated under Section 167(1) of the Act.

157. The upshot of the Board's findings is that Request for Review dated

28th February 2025, in respect of Tender No. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVOC) to Standards for the years 2025-2028, fails and is disallowed.

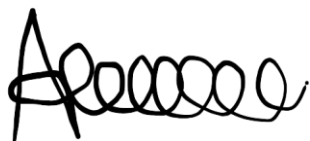
FINAL ORDERS

158. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 28th February 2025:

- 1. The Interested Party's Grounds of Opposition dated 13th March 2025 fails;**
- 2. The Applicant's Request for Review dated 28th February 2025 in respect of Tender No. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVOC) to Standards, The Year 2025-2028 be and is hereby dismissed.**
- 3. The Accounting Officer of the Kenya Bureau of Standards be and is hereby directed to proceed with the subject procurement proceedings in Tender No. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVOC) to Standards, The Year 2025-2028 to its logical and lawful conclusion.**

4. Each party shall bear its own costs.

Dated at NAIROBI, this 20th day of March 2025.



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PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB