

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 29/2025 FILED ON 14TH MARCH 2025

BETWEEN

BOURICE CONSTRUCTION SERVICES.....APPLICANT

AND

**ACCOUNTING OFFICER,
MOLO ACADEMY PRIMARY SCHOOL.....1ST RESPONDENT**

MOLO ACADEMY PRIMARY SCHOOL.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Molo Academy Primary School, in relation to Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School.

BOARD MEMBERS PRESENT

Mr. George Murugu FCIArB & IP Chairperson

Mr. Jackson Awele Member

Dr. Susan Mambo Member



IN ATTENDANCE

Mr. Philemon Kiprop Holding brief for Acting Board
Secretary

Mr. Erickson Nani Secretariat

PRESENT BY INVITATION

APPLICANT BOURICE CONSTRUCTION SERVICES

Mr. Felix Mulaku Advocate, Koome Muketha Advocates

**RESPONDENTS ACCOUNTING OFFICER,
MOLO ACADEMY PRIMARY SCHOOL**

MOLO ACADEMY PRIMARY SCHOOL

Ms. Edna Kapsowe Principal, Molo Academy Primary School

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. Molo Academy Primary School (hereinafter the "Procuring Entity"), in collaboration with its Principal (hereinafter the "1st Respondent"),



invited tenders through open tendering for Tender No. MAPS/B-DORM/001/2024-2027, concerning the supply of labor for the proposed construction and completion of a three-story dormitory at Molo Academy Primary School (hereinafter the "subject tender"). The Tender Document was publicized via a Tender Notice displayed on public notice boards, including but not limited to local church notice boards and those of public administration offices, such as chiefs' and sub-county offices. The deadline for bid submission was set for 16th December 2024 at 9:00 a.m.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 18th December 2024, submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter the "Act"), seven (7) bidders were recorded as having submitted their bids by the tender submission deadline. The tenders were opened in the presence of the tenderers' representatives during the tender opening session, with the details recorded as follows:

#	Bidder
1.	Monmwas Enterprises Limited
2.	Rover Rainbow Company Limited
3.	Pascoh Afrique De'cor Limited
4.	Faib (K) Limited
5.	Bourice Construction Services Limited
6.	Cranberry Designers Limited



7.	Vibrant Eagle Holdings
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1ST Evaluation of Bids

3. A Tender Evaluation Committee (hereinafter the "Evaluation Committee"), appointed by the 1st Respondent, evaluated the seven (7) tenders as documented in the Evaluation Report, following these stages:
 - i. Preliminary Stage
 - ii. Technical Stage
 - iii. Financial Evaluation
 - iv. Combination of Technical and Financial Score

1ST Preliminary Evaluation

4. At this stage of evaluation, the submitted bids were examined against the criteria outlined in Stage 1—Determination of Responsiveness, as set out in Section III: Evaluation and Qualification Criteria, on pages 26 to 27 of the blank Tender Document.
5. The evaluation was conducted on a Yes/No basis, and any bid that failed to meet any criterion at this stage was disqualified from further evaluation.



6. The Evaluation Report does not clearly indicate how the bidders progressed through this stage of the evaluation.

1ST Technical Evaluation

7. At this stage of evaluation, bids that passed the Preliminary Evaluation Stage were assessed based on the criteria outlined in Stage 2—Completeness of the Tender Document, as set out in Section III: Evaluation and Qualification Criteria, on pages 27 to 30 of the blank Tender Document.
8. Bids were evaluated against various requirements with a cumulative score of 100 marks. To qualify for further evaluation, a bid had to attain a minimum of 70 marks. Any bid that failed to meet this threshold was disqualified from further evaluation.
9. The Evaluation Report does not clearly specify how the bidders progressed through this stage of the evaluation.

1ST Financial Evaluation

10. At this stage of evaluation, bids that succeeded in the preceding Evaluation Stage were assessed based on the criteria outlined in Stage 3—Financial Evaluation, as set out in Section III: Evaluation and Qualification Criteria, on page 30 of the blank Tender Document.



11. Bids were evaluated through a comparison of their tender prices. The Evaluation Committee was to compute the average of all tender prices of bids qualifying for evaluation at this stage, excluding abnormally high and low bids. Abnormally high or low bids were those whose tender prices deviated by 20% or more above or below the average.
12. The Tender Document provided a graduated scale indicating the awardable marks for different percentages of deviation. The Financial Score for any bid was calculated by multiplying 20 by the lowest tender price and dividing it by the respective bid being considered.
13. The Financial Evaluation Report indicates that Pascoh Afrique Décor Ltd was ranked No. 1, having submitted the lowest tender price of Kshs. 7,658,220/-

1ST Combination of Technical and Financial Scores

14. At this stage of evaluation, bids that succeeded in the preceding stage were to be assessed based on the criteria outlined in Stage 4—Financial Score, as set out in Section III: Evaluation and Qualification Criteria, on page 32 of the blank Tender Document.
15. The total score for any bid would be determined by summing the Technical Score and the Financial Score.
16. The Evaluation Reports do not indicate whether the combination of scores was carried out.



1st Evaluation Committee's Recommendation

17. The Evaluation Committee, in its undated Financial Evaluation Report, recommended the award of the subject tender to Cranberry Designers at their tendered price of Kshs. 11,487,330/-.

1st Professional Opinion Report

18. In a Professional Opinion dated 18th December 2024 (hereinafter referred to as the "1st Professional Opinion"), the Procuring Entity's Procurement Officer, Scolastica Njoroge, reviewed the manner in which the subject procurement process was conducted and recommended the award of the subject tender to Cranberry Designers, in accordance with the Evaluation Committee's Report.
19. It is unclear whether the Professional Opinion was approved; however, Notification Letters were subsequently issued to the bidders.

1st Notification to Tenderers

20. All bidders in the subject tender were notified of the outcome of the evaluation exercise through letters dated 9th January 2025. However, the letters did not indicate the name of the bidder awarded the subject tender.



REQUEST FOR REVIEW NO. 7 OF 2025

21. On 28th January 2025, the Applicant herein filed a Request for Review dated 27th January 2025 supported by an Statement dated 27th January 2025, seeking the following orders:

a) The 1st Respondent's Regret Letter dated 9th January, 2025 notifying the Applicant of its unresponsiveness in Tender No MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be nullified.

b) The Applicant's tender be and is hereby readmitted for re-evaluation in respect of Tender No: MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School.

c) That re-evaluation in respect of Tender No: MAPS /B-DORM/001/2024-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be conducted to its logical conclusion.

d) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for



Review; and

e) Such other and further relief that this Board shall deem just and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

22. Following an online hearing of Request for Review No. 7 of 2025 on 12th February 2025, the Board, in exercise of the powers conferred upon it by Section 173 of the Act, issued the following orders in its Decision dated 18th February 2025:

a) The Letters of Notification of award dated 9th January 2025 addressed to the Applicant and the rest of the unsuccessful bidders be and are hereby cancelled and set aside.

b) The Letters of Notification of award dated 9th January 2025 addressed to the Interested Party be as the successful bidder be and is hereby set aside.

c) The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating all bids received in Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory from the Preliminary Evaluation Stage while



having regard to the Board's findings in this Decision.

d) All the bids received in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 4 No. Storey Dormitory be and are hereby re-admitted for evaluation from the Preliminary Evaluation Stage and conclusion of the procurement process including issuing an Notification of an Intention to Award to the successful bidder within 21 days from the date of this Decision.

e) Each party shall bear their costs.

RE-EVALUATION OF BIDS

23. Following the Decision of the Board in Application No. 7 of 2025, the Respondents commenced the re-evaluation of the bids in accordance with the Board's directions, under the following stages:

- i. Preliminary Stage
- ii. Technical Stage
- iii. Financial Evaluation
- iv. Financial and Technical Stage



2nd Preliminary Evaluation

24. The Evaluation Committee was required to assess the tenders for responsiveness based on the criteria outlined in Stage 1—Determination of Responsiveness, as set out in Section III: Evaluation and Qualification Criteria, on pages 26 to 27 of the blank Tender Document.
25. At the conclusion of this stage, five (5) tenderers, including the Applicant, were deemed non-responsive, while two (2) tenderers were declared responsive. Only the responsive tenderers proceeded to the Technical Evaluation stage.

2nd Technical Evaluation

26. The Evaluation Committee was required to assess the tenders' responsiveness based on the criteria outlined in Stage 2—Completeness of the Tender Document, as set out in Section III: Evaluation and Qualification Criteria, on pages 27 to 30 of the blank Tender Document.
27. At the conclusion of the evaluation at this stage, one bidder, Monmwas Enterprises Limited, scored 64%, while the other, Cranberry Designers Limited, scored 79%. The Evaluation Committee proceeded with Cranberry Designers Limited, having scored above 70%, and advanced to the financial evaluation stage.



2nd Financial Evaluation

28. The Evaluation Committee was required to assess the tenders for responsiveness based on the criteria outlined in Stage 3—Financial Evaluation, as set out in Section III: Evaluation and Qualification Criteria, on page 30 of the blank Tender Document.
29. At the conclusion of this stage, the Evaluation Committee recommended the award of the tender to Cranberry Designers Limited at a contract sum of Kenya Shillings Eleven Million, Four Hundred and Eighty-Seven Thousand, Three Hundred and Thirty Only (KES 11,487,330).

2nd Evaluation Committee's Recommendation

30. The Evaluation Committee recommended awarding the subject tender to Cranberry Designers Limited at a contract sum of Kenya Shillings Eleven Million, Four Hundred and Eighty-Seven Thousand, Three Hundred and Thirty Only (KES 11,487,330).

2nd Professional Opinion

31. In a Professional Opinion dated 28th February 2025 (hereinafter referred to as the "2nd Professional Opinion"), and submitted as part of the confidential documents, the 1st Respondent reviewed the procurement process for the subject tender. She concurred with the Evaluation Committee's recommendation to award the tender to M/S Cranberry Designers Limited at a contract sum of Kenya Shillings Eleven



Million, Four Hundred and Eighty-Seven Thousand, Three Hundred and Thirty Only (KES 11,487,330).

2nd Notification to Tenderers

32. Tenderers were notified of the evaluation outcome through Letters of Notification to Award dated 28th February 2025, signed by the 1st Respondent.
33. Subsequently, through a Letter of Acceptance dated 4th March 2025, submitted to the Board as part of the confidential documents, Cranberry Designers Limited accepted the contract. According to the Submissions of Response on the Review Background to the Tender Evaluation Report and Procurement's Professional Opinion filed on 17th March 2025 by the Respondents, a contract for the subject tender was signed on 10th March 2025.

REQUEST FOR REVIEW NO. 29 OF 2025

34. On 14th March 2025, Bourice Construction Services, the Applicant herein, filed a Request for Review dated 12th March 2025, together with an Applicant's Statement in Support of the Request for Review sworn on 12th March 2025 by Patrice Awuor Omolo, the Applicant's Director, through the firm of Koome Muketha Advocates. The Applicant sought the following orders from the Board:

a) The 1st Respondent's Notification to Award letter dated



28th February, 2025 notifying the Applicant of the successful bidder in Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be nullified.

b) The Applicant's tender be and is hereby readmitted for re-evaluation in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School.

c) That re-evaluation in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be conducted to its logical conclusion.

d) The Respondents be and are hereby directed to reconstitute a different Evaluation Committee for purposes of re-evaluating the Applicant's tender alongside the tenders that qualified for evaluation at the Preliminary Evaluation Stage in respect of Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School.



e) That in the alternative, the Honourable Board be pleased to direct that the procurement proceedings in the subject Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School be transferred to a different procuring entity.

f) That the Respondents be directed and/or compelled to award the Applicant the subject Tender No. MAPS/B-DORM/001/2024-2027 for Supply of Labor for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School as the rightful and qualified tenderer being the lowest and most qualified tender.

g) The Respondents be compelled to pay to the Applicant the costs arising from, and incidental to, this Request for Review; and

h) Such other and further relief that this Board shall deem just and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

35. In a Notification of Appeal and a letter dated 14th March 2025, Mr. James Kilaka, the Acting Secretary of the Board, informed the Respondents of the filing of the Request for Review and the suspension



of the procurement proceedings for the subject tender. The letter also forwarded a copy of the Request for Review to the Procuring Entity, along with the Board's Circular No. 02/2020 dated 24th March 2020, which outlined administrative and contingency measures to mitigate the spread of COVID-19. Additionally, the Respondents were directed to submit a response to the Request for Review, along with confidential documents related to the tender, within five (5) days from 14th March 2025.

36. On 17th March 2025, the Respondents filed Submissions of Response on the Review Background to the Tender Evaluation Report and Procurement's Professional Opinion filed on 17th March 2025 (hereinafter referred to as the "Response on Appeal"), together with the confidential documents, in compliance with Section 67(3) of the Act.
37. On 21st March 2025, the Acting Board Secretary issued a Hearing Notice informing the parties that the hearing of the Request for Review would be held virtually on 2nd April 2025 at 11:00 AM via the provided link.
38. When the Board convened for the hearing on 2nd April 2025 at 11:00 AM, the Applicant was represented by its Advocates on record. The Respondents did not join the session until the Board's Secretariat had to call them to remind them about the hearing. Consequently, the 1st Respondent appeared in person, representing herself and the 2nd Respondent.
39. The Board read the documents filed by the parties to confirm whether



they were indeed the documents as filed and to verify whether the parties had served each other with their respective pleadings. All parties confirmed that the documents read by the Board were the ones they had filed and served each other. Thereafter, the Board allocated time to the parties for their respective submissions.

40. However, barely ten minutes into the hearing, the 1st Respondent's call kept dropping, a fact which led the Board to issue directions for the parties to proceed by way of written submissions. The parties indicated that they would not be filing any additional submissions, as they would be relying on their pleadings as filed.

PARTIES SUBMISSIONS

Applicant's Submissions

41. According to the pleadings filed by the Applicant, the Applicant contends that it had previously filed a Request for Review of the instant tender via its application dated 28th January 2025. Upon hearing the matter, the Board decided in favor of the Applicant and, in its decision issued in Request for Review Application No. 7 of 2025 on 18th February 2025, ordered the Respondents to admit the Applicant's tender and all other tenders submitted in the subject tender to the Preliminary Evaluation stage and proceed with the re-evaluation of the subject tender to its logical conclusion.
42. The Applicant states that pursuant to the aforementioned orders of the



Board and vide the Respondent's Letter of Notification to Award dated 28th February 2025 and signed by Mrs. Edna Kapsowe, the Accounting Officer of the 2nd Respondent, the Applicant was notified of the successful bidder of the tender Ref. MAPS/B-DORM/001/2024-2027. Further, the Applicant was informed of the unsuccessfulness of other bidders and the reasons for their unsuccessfulness.

43. The Applicant contends that it was not included in the list of bids that were evaluated, thereby signifying that the Applicant's bid for tender Ref. MAPS/B-DORM/001/2024-2027 was never re-evaluated, despite the Applicant being the cause for the re-evaluation.
44. The Applicant argues that it was not notified of the reason why its bid was not re-evaluated, contrary to the orders and directives of the Board. Further, the Applicant contends that if its bid was re-evaluated, it was not notified of the reasons why its bid was deemed non-responsive, contrary to the provisions of Section 87 of the Act and the attendant Regulations.
45. According to the Applicant, the Respondents breached the provisions of Sections 80 and 87(3) of the Act, as read together with Regulations 82(2) & (3) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the Regulations 2020), by failing to re-evaluate the Applicant's bid and further failing to disclose the reason why the Applicant's bid was not re-evaluated, as per the Decision of this Board delivered on 18th February 2025.



Respondents' Submissions

46. According to the pleadings filed by the Respondents, on 26th February 2025, the bids were readmitted for evaluation, starting from the preliminary evaluation stage, followed by the technical, financial, and technical-financial stages. The minutes of the evaluation were tabled before the School Board of Management on 28th February 2025, the winner was determined, and reasons for the non-success of all the unsuccessful bids were stipulated by the committee in the minutes.
47. The Respondents contended that Letters of Notification of Intention to Award were written and sent to the bidders who did not win via email. They were also called to the Procuring Entity to collect hard copies of the same. Notification of Award was also given to the winning bidder.
48. The Respondents argued that the Applicant received the email for the notification of intention to award and even went to the Procuring Entity to collect the hard copy of the same, yet did not ask any questions or request a debriefing. The Respondents emphasized that it is clearly indicated in the notification of intention to award letter that one may request a debriefing if not satisfied with the evaluation report.
49. The Respondents contended that the Notification of Award was issued, and having not received any complaint, and based on the professional opinion, the contract agreement was signed on 10th March 2025.



BOARD'S DECISION

50. The Board has reviewed all documents, submissions, pleadings, and confidential materials submitted pursuant to Section 67(3)(e) of the Act. The following issues arise for determination:

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review in view of Section 167(4)(c) of the Act;

B. Whether the Professional Opinion dated 28th February 2025 is proper in the context of Section 47 and 84 of the Act as read together with Regulation 78(2) of the Regulations 2020.

C. Whether the Respondents met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

D. What orders the Board should issue in the circumstances.

Whether the Board has jurisdiction to hear and determine the instant Request for Review in view of Section 167(4)(c) of the Act

51. During the hearing, the Applicant brought to the attention of the Board



that the Respondents signed a contract with regard to this subject tender despite the 14-day standstill period having not lapsed.

52. The Board notes that the signing of the contract goes to the root of the jurisdiction of the Board, as the same has the potential to divest the Board of jurisdiction to handle the instant Request for Review. Given the centrality of the issue of jurisdiction, the Board finds it prudent to address this issue first.
53. The Applicant filed its Request for Review, contending that its bid was not part of the bids re-evaluated by the Procuring Entity in accordance with the Board's Decision dated 18th February 2025. The Applicant further contended that it received a Letter of Notification to Award dated 28th February 2025 on 3rd March 2025, which did not state the reasons for disqualifying the Applicant.
54. In response to the Request for Review, the Respondents stated, inter alia, that they notified all bidders who did not win, and a contract with the successful tenderer for the subject tender has since been signed on 10th March 2025.
55. Considering that the contract for the subject tender has since been signed, this Board is mandated to ascertain whether it has jurisdiction in line with the provisions of Section 167(4)(c) of the Act.
56. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as ***"...the authority which a Court has to decide matters that are***



litigated before it or to take cognizance of matters presented in a formal way for decision."

57. In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to 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 [or other decision-making body] 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." [Emphasis by the Board]

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

".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question



and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

59. Such is the centrality of jurisdiction that the Court of Appeal has held in ***Isaak Aliaza v Samuel Kisiavuki [2021] eKLR***, that "***whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.***" (Emphasis ours).

60. In consideration to the foregoing, we observe it to be trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi, JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR***:

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



court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[Emphasis is ours]

61. The assumption of jurisdiction by courts and other decision-making bodies in Kenya is governed by the Constitution, statutory law, or both.
62. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

27. Establishment of the Public Procurement Administrative Review Board

(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.

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

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***



64. The provisions above establish that the Board is a specialized, independent procurement appeals review body, with its primary function being the review, hearing, and determination of disputes related to tendering and asset disposal.
65. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

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

167. Request for a review

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

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—



- (a) the choice of a procurement method;*
(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 [i.e. Section 63 of the Act] of this Act; and
(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*
(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the



procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

66. In light of the foregoing provisions of the Act, the Board is a creation of the Act, and its jurisdiction is derived from Section 167(1) of the Act, read in conjunction with Sections 172 and 173, which grant the Board the authority to conduct an administrative review of procurement proceedings before it.

67. Turning to the issue at hand, the creation of procurement contracts is governed by Section 135 of the Act. When a contract is signed in accordance with Section 135, the Board is divested of its jurisdiction by virtue of Section 167(4)(c) of the Act.

68. Section 135 of the Act provides as follows:-

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the



accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;



(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence. [Emphasis ours]

69. From the foregoing, the mere signing of a procurement contract does not automatically oust the jurisdiction of the Board under Section 167(4)(c) of the Act. The provisions of Section 167(4)(c) are conditional upon the procurement contract being signed in accordance with Section 135 of the Act.
70. The preconditions for signing a procurement contract under Section 135 are as follows: (a) the procurement contract must be in writing, (b) it must be signed by an accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer, and (c) the procurement contract must be signed within the tender validity period, but not earlier than fourteen days after the notification of award has been issued.
71. In ***Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR Judicial Review 589 of 2017*** Justice Aburili held as follows with respect to the Board



interrogating whether a procurement contract has been signed in accordance with Section 135 of the Act before making a determination that the Board's jurisdiction has been ousted by Section 167(4)(c) of the Act:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction....."

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error



by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder.”

72. It is crucial to determine whether the Procuring Entity and the successful bidder, Cranberry Designers Limited, signed the contract for the subject tender in compliance with Section 135 of the Act. This determination can only be made by reviewing the contract dated 10th March 2025 to ensure it meets the statutory preconditions for the signing of a contract as outlined in Section 135 of the Act.
73. Section 135(3) of the Act provides that a procurement contract must be entered into within the period specified in the notification, but not earlier than fourteen days after the notification has been issued, as long as the contract is signed within the tender validity period. Additionally, Section 87(3) of the Act mandates that notification of the outcome must be sent to the unsuccessful tenderers simultaneously with the notification to the successful tenderer that their tender has been accepted. This ensures that the statutory 14-day period under Section 167(1) of the Act starts running for both the successful and unsuccessful tenderers at the same time. Furthermore, during the 14-day period, there is a standstill period during which a contract cannot be signed, in order to preserve the right of an aggrieved party to file a Request for Review under Section 167(1) of the Act.
74. In the present Request for Review, the Board observes that the Letters of Notification of Award are dated 28th February 2025, while the



contract for the subject tender is dated 10th March 2025.

75. Based on the foregoing and considering that the 14-day standstill period stipulated in Section 135(3) of the Act could only commence once all tenderers were notified of the evaluation outcome in accordance with Section 87(1) and (3) of the Act, as read with Regulation 82 of the Act, the earliest a contract for the subject tender could have been signed would be 15th March 2025, and not 10th March 2025.
76. Additionally, the Board notes that the Applicant contended it received the letter of notification of award on 3rd March 2025, and attached an email confirming this. In the absence of any evidence to the contrary, the Board is satisfied that the letter was indeed served on the Applicant on 3rd March 2025.
77. This observation further reinforces the point that the Respondents signed the contract prematurely, as the standstill period was still in effect. Consequently, the Board finds that the contract dated 10th March 2025, regarding the subject tender, was signed by the Respondents and Cranberry Designers Limited in violation of Section 135(3) of the Act, as it was executed before the 14-day period had elapsed from the date of notification of the evaluation outcome to all tenderers.
78. In light of the above, the contract regarding the subject tender was not signed in compliance with Section 135 of the Act, and as such, the Board is not divested of its jurisdiction under Section 167(4)(c) of the



Act. Therefore, we find that the Board has jurisdiction to hear and determine the instant Request for Review.

Whether the Professional Opinion dated 28th February 2025 is proper in the context of Section 47 and 84 of the Act as read together with Regulation 78(2) of the Regulations 2020.

79. In its Decision dated 18th February 2025 concerning the subject tender and the same parties, the Board had issued an order for the re-evaluation of all the bids in accordance with the criteria outlined in the Tender Document and the applicable procurement law.
80. The Board observes that the re-evaluation was carried out, which led to the filing of the present Request for Review. In making this determination, the Board thoroughly analyzed all the steps undertaken by the Respondents in the re-evaluation process. One key aspect the Board wishes to highlight is the 2nd professional opinion provided.
81. The Applicant claimed that the tendering process was tainted with illegalities and irregularities. In reply, the Respondents contended that they properly re-evaluated all the bids and argued that the Request for Review was a mere attempt to delay proceedings, as the Procuring Entity had adhered to the due process. The Respondents further submitted the 2nd professional opinion, among other documents, as part of the confidential file.
82. The Board observes that, in accordance with the Evaluation Report



dated 26th February 2025, the Evaluation Committee re-evaluated the bids as directed by the Board and recommended awarding the contract to Cranberry Designers Limited. Following this, the 2nd Professional Opinion was prepared by the 1st Respondent.

83. Section 47 of the Act provides as follows:

Procurement function

(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.

(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.

(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement.

84. Section 84 of the Act further provides that;

Professional Opinion

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and



provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

85. Regulation 78 (2) of the Regulations 2020 provides that:

Evaluation Report and professional opinion

(2) The evaluation report under paragraph (1) shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.

86. The implication of the above sections is that a professional opinion should be prepared by a procurement professional, who then forwards it to the accounting officer. Given the term "professional opinion," it is clear that the opinion must be drafted by a qualified professional; if it



is not, it loses its essential characteristic of being professional.

87. In the present Request for Review, the 2nd Professional Opinion is reproduced, in part, as follows:

...

**RE: PROFESSIONAL OPINION FOR PROPOSED
CONSTRUCTION OF A MODERN BOYS DORMITORY TENDER
NUMBER (MOLO/MAPS/B-DORM/001/2024-27)**

***This opinion is issued pursuant to section 47 and 84 of the
Public Procurement and Asset Disposal Act, 2015,
hereinafter referred to as the Act, 2015 for the procurement
subject opened on 16th December 2024 at 9:00 A.M and
opening minutes prepared thereafter.***

....

....

...

**PART C: RECOMMENDATION TO ACCOUNTING OFFICER
FOR APPROVAL/REJECTION**

In my opinion I consider that the process has satisfied the



constitutional requirements of article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act 2015 and subsequent regulations. In line with section 84 of the Act, 2015, I concur with Evaluation Committee. It is my professional opinion that you may accept the recommendation of the Evaluation Committee and award the bid to M/S Cranberry Designers Limited P.O. Box 2614-20100 Nakuru at a contract sum of Kenya shillings eleven million, four hundred and eighty seven thousand three hundred and thirty only (Ksh. 11,487,330.00) as it was within the budgetary allocation.

MRS EDNAH KAPSOWE

THE PRINCIPAL/ACCOUNTING OFFICER

ACCOUNTING OFFICER'S DECISION

88. The 2nd professional opinion, as shown above, was authored by Mrs. Edna Kapsowe, the 1st Respondent, in her capacity as the accounting officer. This is inconsistent with the explicit provisions of the Act and the Regulations 2020. As such, the professional opinion and any actions stemming from it are rendered null and void in law.
89. Consequently, the Board finds that the professional opinion dated 28th February 2025 does not comply with Section 47 and 84 of the Act, as read together with Regulation 78(2) of the Regulations 2020, since it



was signed by the 1st Respondent in her capacity as the accounting officer of the Procuring Entity.

Whether the Respondents met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

90. The Applicant argued that it received a Letter of Notification of Award dated 28th February 2025, which informed it that its bid had been unsuccessful. However, the letter did not provide reasons for the decision.
91. In response, the Respondents stated that letters of notification of intention to award were sent to the unsuccessful bidders via email. They further indicated that the bidders were given the option to collect hard copies of the letters from the Procuring Entity.
92. The Respondents contended that some bidders visited the Procuring Entity to inquire about the reasons for their failure. However, the Respondents claimed that the Applicant only collected the letter without asking any questions. The Applicant, on the other hand, argued that the letter clearly stated that a bidder could request a debriefing if dissatisfied with the Evaluation Report.
93. The objective of public procurement is to ensure the provision of quality goods and services within a framework that upholds the principles



enshrined in Article 227 of the Constitution, which states as follows:

227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a...

b...

c...

d...

94. The legislation referred to in Article 227(2) of the Constitution is the Public Procurement and Asset Disposal Act, and Section 87 of the Act provides clear guidelines on how the outcome of the evaluation process should be communicated to both successful and unsuccessful tenderers. The section states:



87. Notification of intention to enter into a contract

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

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

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

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

95. Section 87 of the Act stipulates that the notification of the outcome of a tender evaluation must be made in writing by the accounting officer of the procuring entity. Additionally, the notification must be issued simultaneously to both the successful and unsuccessful tenderers. The notification to the unsuccessful tenderer must include the identity of the successful tenderer and provide reasons for the unsuccessful status of the tenderer.



96. The procedure for notification under Section 87(3) of the Act is further clarified by Regulation 82 of the Regulations 2020, which provides the following guidelines:

"82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.***

97. In line with Section 87 of the Act and Regulation 82 of the Regulations 2020, the Board observes that the accounting officer of a procuring entity is required to notify, in writing, the successful tenderer of the outcome before the expiry of the tender validity period. Simultaneously, the accounting officer must notify all unsuccessful tenderers, detailing the reasons for their failure, identifying the successful tenderer, explaining why the successful tenderer was chosen in accordance with Section 86(1) of the Act, and providing the price at which the successful



tenderer was awarded the tender.

98. Adherence to the above provisions of the Act and Regulations 2020 is essential to upholding the principles of transparency and accountability in public procurement and public finance, as enshrined in Articles 227 and 232 of the Constitution. This ensures that all processes within the public procurement system, including the notification to unsuccessful tenderers, are carried out in a transparent manner.
99. In ***Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited*** the High Court held as follows:

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

100. From the above case, the Board notes that the High Court was



essentially expounding on one of the rules of natural justice, as outlined in Article 47(2) of the Constitution, which provides:

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

101. In essence, the rules of natural justice under Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation, allowing an unsuccessful tenderer the opportunity to challenge the reasons if necessary. Furthermore, the Act does not mandate that an unsuccessful tenderer must seek clarification in order for the accounting officer to provide the outcome of the evaluation or the reasons for its disqualification in the tendering process.

102. Turning to the instant Request for Review, it is undisputed that the Respondents issued Letters of Notification of Intention to Award dated 28th February 2025 to all the bidders. It is also not in contention that the applicant's letter did not provide reasons for disqualification. Furthermore, it is acknowledged that the letters offered the option for bidders to request a debriefing regarding the evaluation of their tenders.

103. Given the above undisputed facts, the central issue now is whether the aforementioned letters comply with the provisions of Section 87 of the



Act, read in conjunction with Regulation 82 of the Regulations 2020.

104. The Board reviewed the letter of notification of intention to award dated 28th February 2025 issued to the Applicant and noted that it failed to include the reasons for the Applicant's disqualification. Instead, it merely indicated that the Applicant had the option to request a debriefing concerning the evaluation of its tender and the right to lodge a complaint if dissatisfied with the award decision.

105. The Board observes that the letter of notification of award issued to the Applicant does not comply with the requirements set out in section 87 of the Act, as read with Regulation 82 of the Regulations 2020, as it failed to provide the reasons for the Applicant's disqualification. The law does not stipulate that bidders must request a debriefing in order to learn the reasons for the disqualification of their bids.

106. In light of the foregoing, the Board finds that the Respondents failed to meet the requirements set out in Section 87(3) of the Act, read together with Regulation 82 of the Regulations 2020, concerning the notification of the intention to enter into a contract in respect of the subject tender.

What orders the Board should issue in the circumstance.

107. The Board determines that it has jurisdiction over the present Request for Review, as the contract for the subject tender, dated 10th March 2025, was signed by the Respondents and Cranberry Designers Limited within the standstill period, which is contrary to the provisions of



Section 135(3) of the Act and is a nullity in law.

108. The Board further finds that the Professional Opinion dated 28th February 2025 is a nullity in law, as it was signed by the 1st Respondent in her capacity as the Accounting Officer of the Procuring Entity, which contravenes Section 47 and 84 of the Act, as read together with Regulation 78(2) of the Regulations 2020.

109. The Board finds that the Letter of Notification of Award dated 28th February 2025, issued to the Applicant by the Respondents, fails to meet the requirements under Section 87(3) of the Act, as read together with Regulation 82 of the Regulations 2020, due to its failure to disclose the reasons for the Applicant's disqualification.

110. Consequently, the Request for Review dated 14th March 2025, pertaining to Tender No. MAPS/B-DORM/001/2024-2027 for the Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School, succeeds in the following specific terms:

FINAL ORDERS

111. 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 10th March 2025:

1. The Notification of intention to award letters sent to the



Applicant, other unsuccessful bidders and the successful bidder in respect to Tender No. MAPS/B-DORM/001/2024-2027 for the Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School all dated the 28th of February, 2025 be and are hereby annulled and set aside.


- 2. The contract dated the 10th of March, 2025 signed in respect to Tender No. MAPS/B-DORM/001/2024-2027 for the Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School is illegal and is hereby annulled in its entirety.**
- 3. The Professional Opinion dated 28th February 2025, along with all subsequent tendering proceedings resulting from it, are invalid and hereby annulled;**
- 4. The Procuring Entity is directed to prepare a lawful Professional Opinion in respect to Tender No. MAPS/B-DORM/001/2024-2027 for the Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School taking into account the Board's findings in this decision;**
- 5. Upon preparing a lawful Professional Opinion, the**




Procuring Entity is to proceed with the procurement process to its lawful and logical conclusion, considering the Board's findings in this decision;

- 6. All tenderers are to be issued with lawful notifications in accordance with Section 87 of the Act and Regulation 82 of the Regulations 2020 pursuant to compliance with order No. 5 hereinabove;**
- 7. The Procuring Entity is at liberty to seek guidance from the Public Procurement Regulatory Authority (PPRA) to ensure adherence with the Act, Regulation's and the Constitution while complying with the Boards orders in this decision;**
- 8. Each party shall bear its own costs of the proceedings.**

Dated at NAIROBI, this 4th day of April 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

