

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2025 OF 14TH MARCH 2025

BETWEEN

PEESAM LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

THARAKA UNIVERSITY 1ST RESPONDENT

THARAKA UNIVERSITY 2ND RESPONDENT

Review against the decision of the Accounting Officer Tharaka University in relation to re-advertisement of Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category.

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCI Arb & IP - Chairperson
2. Ms. Jessica M'mbetsa - Member
3. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

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

PPARB No.30 /2025
4th April, 2025



PRESENT BY INVITATION

APPLICANT

Mr. Karugu Mbugua

PEESAM LIMITED

- Advocate, Karugu Mbugua & Co. Advocates

RESPONDENT

Ms. Faith Mutua

THE ACCOUNTING OFFICER, THARAKA UNIVERSITY & THARAKA UNIVERSITY

- Advocate, Mutua Eboso & Company Advocate

BACKGROUND OF THE DECISION

The Tendering Process

1. Tharaka University, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category (hereinafter referred to as “the 1st Tender”). The invitation was by way of an advertisement on 27th November 2024 on the Procuring Entity’s website www.tharaka.ac.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document’) was available for download. The subject tender’s submission deadline was scheduled on 9th December 2024 at 12.00 p.m.



Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes dated 9th December 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board' pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), five (5) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	JC Cleaning Services Ltd
2.	Peesam Limited
3.	Ice Clean Care Group
4.	Greenshine Cleaning
5.	Butterfly Facilities

Letter from PPRA

3. The Procuring Entity received a letter dated 2nd December 2024 addressed to it from the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") concerning the subject tender.



Re-advertisement

4. The Procuring Entity re-advertised the 1st Tender on 2nd March 2025 whose submission deadline was scheduled on 18th March 2025 (hereinafter referred to as "the 2nd Tender").

REQUEST FOR REVIEW NO. 30 OF 2025

5. On 14th March 2025, Peesam Limited, the Applicant herein, filed Request for Review No. 30 of 2025 dated 14th March 2025 together with a Supporting Affidavit sworn by Samuel Mburu Nganga on 14th March 2025 (hereinafter referred to as "the instant Request for Review") through the firm of Karugu Mbugua & Co. Advocates seeking the following orders from the Board:

- a) The Tender Document whose bids closes on 18th March (Tender for the Provision of Cleaning, Sanitary and Fumigation Services- Tender No. TUN/OPNT/002/2024-2025) be annulled in it's entirety;***
- b) The Procuring Entity be directed to award the tender to bring the procurement process to it's logical conclusion;***
- c) The Respondents do bear the Costs for this Request for Review; and***



d) Any other orders that the Honorable Board may deem just and fit in the circumstances.

6. In a Notification of Appeal and a letter dated 14th March 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 14th March 2025.
7. On 20th March 2025, the Respondents jointly filed through Mutua Eboso & Company Advocates a Procuring Entity's Memorandum of Response dated 19th March 2025, a Supporting Affidavit sworn by Peter Murithi Kirige on 19th March 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.
8. *Vide* letter dated 20th March 2025, the Acting Board Secretary notified all tenderers in the subject tenders via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the



Board any information and arguments concerning the tender within three (3) days.

9. On 24th March 2025, the Applicant filed through its advocates a Supporting Affidavit sworn by Samuel Mburu Nganga on 24th March 2025 (also referred to as a "Further Affidavit").
10. On the same day of 24th march 2025, the Respondents filed through their advocates a Procuring Entity's Notice of Preliminary Objection dated 22nd March 2025.
11. Vide email of 25th March 2025, the Respondents through their advocates filed annexure marked as "DOC A" being a letter from PPRA dated 2nd December 2024.
12. *Vide* a Hearing Notice dated 28th March 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 1st April 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.
13. At the hearing on 1st April 2025 at 2.00 p.m. the Board read out the pleadings filed by parties in the matter. Having taken note of the Respondents Preliminary Objection, the Board allocated time for each party to proceed and highlight its case and directed that the hearing of the preliminary objection by the Respondents would be heard as part of



the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

14. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions on the Request for Review and response to the Respondents Preliminary Objection

15. In his submissions, Mr. Karugu relied on the documents filed before the Board on behalf of the Applicant in the instant Request for Review.

16. In response to the Respondents' Preliminary Objection, Mr. Karugu submitted that the Board has jurisdiction to hear and determine the instant Request for Review noting that the 1st Tender was neither terminated pursuant to Section 63 of the Act nor awarded. He pointed out that the only notification on the status of the subject tender came to the knowledge of the Applicant after the Request for Review had been lodged with the Board.



17. Counsel submitted that the Applicant was a bidder in the 1st Tender and that at the time of filing the instant Request for Review, the 1st Tender was still alive and is capable of being awarded.
18. With regard to the substantive issues in the instant Request for Review, counsel submitted that the letter alluded to from PPRA that was received on 9th December 2024 was never brought to the attention of the Applicant. He further submitted that notification to bidders is a cardinal principle in public procurement and that the Procuring Entity breached Section 87 of the Act by failing to notify all bidders of the outcome of the procurement process in the 1st Tender.
19. The Applicant averred that it learnt of advertisement of the 2nd Tender that is due to close on 18th March 2025 from the PPIP portal yet no notification was issued to it on the outcome of the 1st tender so as to justify such a draconian action by the Procuring Entity. It further averred that the decision to re-advertise the 1st Tender without having completed the procurement process is illegal, absurd, and unreasonable in the circumstances and ought to be set aside.
20. Mr. Karugu submitted that PPRA did not recommend a termination of the procurement proceedings in the 1st Tender.
21. He urged the Board to allow the instant Request for Review with costs as prayed.



Respondent's submissions on their Preliminary Objection and the substantive Request for Review

22. In her submissions, Ms. Mutua relied on the documents filed before the Board on behalf of the Respondent in the instant Request for Review.

23. With regard to the Respondents' Preliminary Objection, Ms. Mutua submitted that the Board lacks jurisdiction to entertain the instant Request for Review as there is no valid procurement process upon which the Board's jurisdiction can be invoked.

24. By way of background, counsel submitted that at the time of advertising the 1st Tender, the Procuring Entity held the view that the same was done in a valid way and in compliance with the provisions of the Act. She pointed out that the 1st Tender's submission deadline was on 9th December 2024 and that on the same day of 9th December 2024, the Procuring Entity received an advisory from PPRA advising it that the 1st Tender as advertised was non-complaint with Regulations 2020 and PPRA Circular No. 1 of 2024 regarding implementation of the Public Procurement Capacity Building Levy that was enacted in 2023.

25. She pointed out that at this point in time when the Procuring Entity realized that the 1st Tender was non-compliant with Section 72 of the Act, the tendering period had lapsed. She further pointed out that even without this communication from PPRA, the Procuring Entity realized that



there was a mistake and that the prudent thing to do was either to amend or abandon this unlawful process which would have caused the Procuring Entity much more or brought about an influx of cases.

26. Ms. Mutua made reference to Section 75 and 76 of the Act on modification of bids; Section 72 of the Act on the responsibility of a supplier to comply with provisions of the Act and Regulations and argued that the Applicant, being in receipt of the 1st Tender that was devoid of the requirements under PPRA Circular No. 1 of 2024, ought to have known that the procurement process was unlawful and thus not have participated in an unlawful process or at the very least ensured compliance. She pressed on that the tendering process having closed made it impossible to amend the Tender Document in the 1st Tender as provided in law.

27. Counsel submitted that there was no valid invitation to tender as the 1st Tender did not comply with Regulation 72(1)(j) of Regulations 2020 and that this was a regrettable oversight on the part of the Procuring Entity and the Applicant.

28. She indicated that the prudent recourse was to re-advertise the 1st Tender and that it is not in contest that the Applicant was aware of the 2nd Tender that was compliant with the Act and Regulations 2020 though it neglected to participate in the said tender.



29. Ms. Mutua submitted that Section 87 of the Act contemplates the existence of a valid tender and that the communication complained about by the Applicant ought to ideally be made to the successful bidder and all other bidders who participated in the tendering process but this is preceded by evaluation of tenders as contemplated under Section 80 of the Act. Counsel argued that there cannot be a successful bidder without evaluation and in the circumstance, the tendering process having been unlawful and incompetent was abandoned and no evaluation was carried out to necessitate notification as envisioned under Section 87 of the Act.
30. Counsel submitted that cancellation of a procurement process under Section 63 of the Act is governed by a certain criterion and a procuring entity can only cancel the tendering process under Section 63 of the Act where there exists a valid tender and valid reasons for termination as envisioned under Section 63 of the Act.
31. She further submitted that the circumstances in the present case do not fit any of the criteria for cancellation under Section 63 of the Act that would subsequently lead to bidders being notified of the cancellation.
32. Counsel urged the Board to decline the invitation by the Applicant to annul the 2nd Tender noting that the Applicant failed to participate in and argued that the Applicant lacks standing. In support of her argument, she referred the Board to the holding by Lord Atkin in *Macfoy v United Africa Co. Ltd* where the court stated that a void act is a nullity, not a mere



irregularity, and any proceedings based on it are also bad and incurably bad. She reiterated that the 1st Tender was a nullity for being non-compliant noting that the non-compliance was discovered beyond the period for amendment and the Procuring Entity could do nothing at that juncture.

33. Ms. Mutua urged the Board to dismiss the instant Request for Review with costs.

Applicant's rejoinder

34. On the issue of whether the Applicant has *locus standi*, Mr. Karugu submitted that the moment the Applicant submitted its bid with the Procuring Entity in the 1st Tender, it gained *locus standi* to challenge the procurement process.

35. As to whether the 1st tender is still alive, counsel answered this in the affirmative and pointed out that the Applicant only came to learn of the outcome of the 1st Tender following filing of the instant Request for Review. He pointed out that the communication from PPRA did not amount to a termination of the 1st tender. He reiterated that the Procuring Entity had an obligation to notify all bidders in the 1st Tender on its outcome and that the same could not be terminated without any justifiable cause. Further, that the action of re-advertising the 1st Tender by the Procuring Entity was a nullity in itself.



36. He urged the Board to grant the prayers sought in the instant Request for Review.

Respondents' rejoinder on their Preliminary Objection

37. Ms. Mutua submitted that the pursuant to Section 167(1) of the Act, the Applicant ought to have pleaded or attempted to show himself as having suffered or being likely to suffer some loss or damage and none had been shown before the Board in the instant Request for Review.

Clarifications

38. Asked if the Applicant participated in the 2nd Tender, Mr. Karungu submitted that the Applicant did not participate in the 2nd Tender.

39. The Board called on the Respondents to clarify the recommendations issued to the Procuring Entity by PPRA in its letter dated 2nd December 2024 with regard to the 1st Tender. In response, Ms. Mutua submitted that the recommendation was for the Procuring Entity to comply by amending the Tender Document in the 1st Tender subject to Section 75 and 76 of the Act. She pointed out that by the time the Procuring Entity got the letter by PPRA, time had already lapsed and it could therefore not make any amendments or issue addendum per Section 75 of the Act and in any event, bidders could also not be able to submit any further documents or addendums that would be compliant with Section 76 of the Act.



40. She indicated that even without the letter from PPRA, had the Procuring Entity come to the realization that the process as initiated was a nullity, it would have taken similar steps.
41. Asked to clarify on other reasons that led to re-advertisement of the 1st Tender, Ms. Mutua submitted that the Tender Document in the 1st Tender as floated was erroneous having not provided a price schedule column indicating capacity building levy at 0.03% pursuant to PPRA Circular No. 1 of 2024.
42. Having noted that the reasons leading to the Procuring Entity to consider the 1st Tender a nullity did not fall under Section 63 of the Act, the Board sought to know if the circumstances in the tendering process in the 1st Tender can be considered to be force majeure. In response, Ms. Mutua submitted that it was not a force majeure and that the Procuring Entity would still have abandoned the tendering process upon realizing that it failed to comply with PPRA Circular No.1/2024.
43. Asked if the Act envisions a situation whereby a procuring entity can abandon a tender, Ms. Mutua responded by stating that the Act was silent on this.
44. As to what fate befell the bids submitted on 9th December 2024, Ms. Mutua submitted that since the tendering process in the 1st Tender was a



nullity, the submitted bids were equally a nullity and founded on a process that was unlawful and inconsonance with the provisions of the Act.

45. As to whether this information was conveyed to bidders, she indicated that the information conveyed was per the re-advertisement of the 1st Tender.

46. The Board called upon the Respondents to address it on whether there was the option to extend the tender submission period pursuant to Section 75(5) of the Act allowing the Procuring Entity to issue a commensurate addendum that would allow the Procuring Entity incorporate amendments communicated by PPRA with regard to the capacity building levy without leaving the 1st Tender in a state of abeyance. In response, Ms. Mutua referred the Board to Section 74(j) of the Act and concurred that no extension was given pointing out that the understanding of the Procuring Entity was that as per the terms of the PPRA letter, it could not proceed with the 1st Tender.

47. As to whether the 1st Tender would be termed as having been overtaken by operation of the law, Ms. Mutua submitted that the circumstances in the procurement proceeding in the 1st Tender was not overtaken by operation of the law since the legal provisions on the capacity building levy was already in existence and the error in the Tender Document for the 1st Tender was an oversight that could be corrected by way of amendment.



48. On whether non-observance of the law by the 1st Respondent can be termed as a material governance issue, Ms. Mutua submitted that this was not a material governance issue but rather an oversight and that when it came to the attention of the Respondents, they took steps to immediately and reasonably correct the error.

49. Asked to clarify which law contemplates existence of two tenders of a similar nature at the same time, Ms. Mutua indicated that there were no two tenders in existence and that the understanding of the Procuring Entity was that nothing much could be done with regard to the 1st Tender in view of lapse of the tender submission deadline and non-compliance of the Tender Document rendering it a nullity.

50. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 14th March 2025 was due to expire on 4th April 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

51. The Board has considered each of the parties' submissions and documents placed before it 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 whether the Applicant has the requisite *locus standi* before the Board by dint of Section 167(1) of the Act.

Depending on the outcome of Issue A

B. Whether the Respondents carried out the procurement process with regard to the 1st tender and 2nd tender in accordance with provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution.

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

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

52. This Board is mindful of the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.



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

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

54. The *locus classicus* case on the question of jurisdiction is the celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** which underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, made the oft-cited dictum:

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



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

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

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

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well



beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

57. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both. This Board is a creature of statute owing to its establishment as provided under Section 27 (1) of the Act which reads:

"(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."

58. Further, the functions of the Board are provided under Section 28 of the Act as follows:

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

59. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function



being reviewing, hearing and determining tendering and asset disposal disputes.

60. The jurisdiction of this 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 Powers of the Board.

61. Turning to the instant Request for Review, the Respondents filed a Procuring Entity's Notice of Preliminary Objection dated 22nd March 2025 in opposition of the Board hearing and determining the instant Request for Review on the grounds that (a) the Applicant lacks *locus standi* before the Board, and (b) the procurement process with regard to the 1st Tender was a nullity hence the Board lacks jurisdiction to entertain the instant Request for Review as there was no valid procurement process upon which the Board's jurisdiction could be invoked.

62. In response, the Applicant submitted that it has standing before the Board and that having submitted its bid in the 1st Tender, it was entitled to be notified of the outcome or any other circumstances affecting the said tender. It further submitted that the procurement process in the 1st Tender is still alive and that the Board has jurisdiction to hear and determine the instant Request for Review.



63. Having considered parties' submission, the Board notes that the question of whether or not the Applicant has the requisite *locus standi* is a jurisdictional issue since it is not just any and every person that may move the Board or invoke the jurisdiction of the Board by way of a Request for Review under Section 167 (1) of the Act which states:

"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."

64. At ground 4 of the Respondent's Preliminary Objection, the Respondents contend that the Applicant is a busy body who lacks standing before the Board since it was neither a candidate or tender to the procurement proceeding whose tendering closed on 19th March 2025 which the Applicant seeks to hold in abeyance at the prejudice of the genuine candidates and tenderers.

65. The Board is cognizant of the holding by the High Court in **Otolo Margaret Kanini & 16 others v Attorney General & 4 others [2022] eKLR** which defined *locus standi* as follows:



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.

66. 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.

67. 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.

68. Having keenly perused the instant Request for Review we note that the Applicant, being aggrieved with the procurement proceedings in the 1st Tender and re-advertisement of the same, resulted to lodge the instant Request for Review with the Board challenging the decision of the 1st Respondent to re-advertise the 1st Tender yet it had not communicated the outcome of the procurement proceedings in the 1st Tender to bidders.



69. As to whether the Applicant has *locus standi* before the Board with regard to challenging the actions of the 1st Respondent, it is not in contest that the Applicant was a tenderer in the 1st Tender having submitted its bid to the Procuring Entity as at the tender submission deadline of the 1st Tender. Section 2 of the Act provides for a tenderer to mean:

"a person who submitted a tender pursuant to an invitation by a public entity."

70. In this regard therefore, there is no doubt that the Applicant has *locus standi* before the Board by virtue of being a tenderer in the 1st Tender whose procurement process it challenges in the instant Request for Review. Accordingly, ground 4 of the Respondent's Preliminary Objection dated 22nd March 2025 fails.

71. In the same vein, we note that the Respondents at paragraph 1 of the Procuring Entity's Memorandum of Response contend that the Applicant failed to disclose any loss or risk of loss or damage suffered arising from any breach of duty imposed on the Procuring Entity by the Act. During the hearing, Ms. Mutua for the Respondents submitted that pursuant to Section 167(1) of the Act, the Applicant ought to have pleaded or attempted to show himself as having suffered or being likely to suffer some loss or damage and that none has been shown before the Board in the instant Request for Review and as such, it lacks *locus standi* before the Board.



72. 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]

73. 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.

74. The Board has also on numerous occasions held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

75. Having carefully scrutinized the instant Request for Review, the issue that calls for our determination is whether the Applicant, from its pleadings in the instant Request for Review, has at the very least demonstrated that it has suffered or risks suffering loss or damage due to the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 to enable it establish that it has *locus standi* before the Board.



76. We note that the Request for Review as filed does not explicitly contain the words 'loss' or 'damage'. The key question however remains on whether the pleadings by the Applicant, when read holistically, sufficiently demonstrate the risk of suffering loss or damage as a result of breach by the procuring entity as contemplated under the Act. This Board differently constituted in **PPARB No. 21 of 2025 Precision Experts Limited v The Accounting Officer, Kenya Bureau of Standards & Another** held that absence of specific words does not automatically negate the substance of the claim and found as follows:

".....

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.

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.

....."



77. Turning to the instant Request for Review, the Applicant clearly demonstrated prejudice by illustrating the challenge faced in the procurement process in the 1st Tender having failed to receive any communication pertaining to the outcome of the 1st Tender which it still regards as being alive and re-advertisement of the same as the 2nd Tender which it regards a nullity. It is the Applicant's position that the decision by the Procuring Entity to re-advertise the 1st Tender without having completed the procurement process and notified bidders therein of the outcome is illegal, absurd, and unreasonable. In our considered view, there being a procurement process that the Applicant participated in and was not made aware of the outcome is in itself prejudicial to the Applicant since it is placed in a precarious situation where it cannot outrightly weigh the loss and damage suffered as a result of the decision by the Procuring Entity. This in itself constitutes a tangible risk of loss by the Applicant in the procurement proceedings it challenges.

78. From the foregoing, we find that the Applicant has *locus standi* before the Board. Accordingly, this ground of objection also fails.

79. The effect of our findings under Issue A is that the Board has jurisdiction to hear and determine the instant Request for Review and shall now proceed to address the substantive issue framed for determination.



Whether the Respondents carried out the procurement process with regard to the 1st Tender and 2nd Tender in accordance with provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution.

80. We understand the Applicant's case on this issue to be that the Respondents breached provisions under Section 87 of the Act by failing to notify it and other bidders of the outcome of the procurement process in the 1st Tender and instead elected to re-advertise the said tender on 2nd March 2025. The Applicant contends that the procurement process in the 1st Tender has not been completed and cannot be said to have been terminated in accordance with the Act and is thus alive and ought to be completed to its logical conclusion.

81. We understand the Respondents' case on this issue to be that the procurement process in the 1st Tender did not run its course for purposes of notification as contemplated under Section 87 of the Act. This was attributed to the invitation to tender with respect to the 1st Tender being fatally flawed and a nullity, a fact that was brought to the Respondents attention by PPRA *vide* letter dated 2nd December 2025 received on 9th December 2025 upon lapse of the tender submission deadline.

82. It is the Respondents case that no valid modification could be made on the 1st Tender as advised by PPRA rendering the 1st Tender as initiated a nullity, a fact that the Applicant ought to have known. Further, that there



being no valid or lawful procurement process, no notification could be issued pursuant to either Section 63 or 87 of the Act and that the re-advertisement of the 1st Tender was lawfully made with the intention of curing the manifest breach of the Act as pointed out by PPRA.

83. Having considered parties' pleadings, submissions and the confidential documents submitted by the Respondents, the Board is called upon to make a determination on whether the Respondents carried out the procurement process with regard to the 1st Tender and 2nd Tender in accordance with provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution. In doing so, the Board will address its mind to the import of PPRA's letter dated 2nd December 2025 with regard to the 1st Tender; whether or not the 1st Tender was logically concluded by the Respondents; and the net effect of advertisement of the 2nd Tender by the Respondents.

84. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles stated in Article 227 of the Constitution which provides as follows:

Article 227 - Procurement of public goods and services:

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



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

a)d)”

85. The legislation contemplated in Article 227(2) of the Constitution is the Act. The gist of the Applicant’s case is failure by the Respondents to notify it of the outcome of the procurement process in the 1st Tender as provided under Section 87 of the Act. The Applicant took issue with the conduct of the Respondents with regard to the procurement proceedings in the 1st and 2nd Tender and submitted that the reasons leading to advertisement of the 2nd Tender only came to its attention during the course of hearing of the instant Request for Review.

86. We note that Section 87 of the Act read with Regulation 82 of Regulations 2020 is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity. An accounting officer of a procuring entity is mandated to notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a



tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender.

87. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted simultaneously and in a transparent manner.

88. The Respondents have taken the position that since the procurement process in the 1st Tender did not run its course; it was not possible for them to determine the successful or unsuccessful tenderer for purposes of notification as contemplated under Section 87 of the Act.

89. The reason as to why the procurement process in the 1st Tender did not run its course has been attributed by the Respondents to PPRA's letter dated 2nd December 2024 which reads in part as follows:

".....

***PROVISION OF CLEANING, SANITARY AND FUMIGATION
SERVICES (ELIGIBILITY; SPECIAL CATEGORY (AGPO)
TENDER NO: TUN/OPNT/002/2024-2025)***

***Reference is made to the tender documents for the above
subject tenders which you uploaded in the Public***



Procurement Information Portal on 27th November 2024 and due to close on 9th December, 2024.

1. We have noted you have indicated to the bidders that they are invited to undertake a site visit on 2nd December, 2024 before the bidding to verify details and scope of services.

It is our view that interested bidders did not attend the site visit should not be disqualified from the procurement process.

2. We have reviewed the contents of the tender documents noted that in your price schedule you have not provided bidders with a column to indicate capacity building levy which is 0.03% of the tender sum exclusive of Value Added Tax (VAT).

This is contrary to PPRA Circular No. 01/2024 on the implementation of the public procurement capacity building levy order, 2023.

Taking cognizance of the foregoing, you are required to issue an addendum under sections 75 and 76 of the Act, the same should be promptly uploaded in the PPIP. Subsequently, you are required to inform the Authority, with documentary evidence, of the actions you have taken by 6th December 2024.

This Authority remains available to provide your institution with procurement advice and technical



support in addressing any challenges that may be hindering the efficient execution of your responsibilities under the Public Procurement Law.”

90. From the contents of the above letter, we note that PPRA reviewed the Tender Documents with respect to the 1st Tender and noted certain anomalies with the 1st Tender as floated being that (a) bidders were required to undertake a site visit on 2nd December 2024 prior to bidding and (b) the price schedule did not provide bidders with a column to indicate capacity building levy tabulated at 0.03% of the tender sum exclusive of VAT contrary to PPRA Circular No. 01/2024 on implementation of the Public Procurement Capacity Building Levy Order, 2023.

91. To remedy these anomalies, we note that PPRA required the Respondents to, *inter alia*, issue an addendum pursuant to Section 75 and 76 of the Act and inform it with documentary evidence of the actions taken by 6th December 2024.

92. We note that Section 75 of the Act referred to provides for modification of tender documents as follows:

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



(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders. "[Emphasis Board]"

93. The import of the above provision is that (a) a Procuring Entity may amend a tender document at any time before the tender submission deadline by issuing an addendum that does not materially alter the substance of the original tender, (b) such amendment may be made on



the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer, (c) the procuring entity shall promptly issue a copy of the addendum to each person whom it had issued a copy of the tender document and this addendum shall be deemed to be part of the tender document and, (d) where a tender document is amended when the time remaining before the tender submission deadline is less than one third of the time allowed for preparation of tenders or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer shall extend the tender submission deadline as necessary to allow the amendment of the tender documents to be taken into account in preparation or amendment of tenders. It is clear that discretion is afforded to the 1st Respondent to extend the tender submission deadline where necessary to allow amendment of a tender document.

94. Further, Section 76 of the Act provides for modification of bids as follows:

(1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—

(a) the change or withdrawal shall be in writing; and

(b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender.



95. Interpretation of the above provision is that a bidder may only change or withdraw its bid before the tender submission deadline and in accordance with the procedure of submitting tenders.
96. In essence, PPRA required the Respondents to be guided by provisions under Section 75 and 76 of the Act in issuing an addendum to rectify the anomalies pointed out in the 1st Tender.
97. Turning to the instant Request for Review, the Respondents at paragraphs 5 and 6 of their Supporting Affidavit sworn on 19th March 2025 by Peter Murithi Kirige depone that they received the aforementioned letter from PPRA on 9th December 2024 and that at the time of receiving this letter, the tender submission deadline for the 1st Tender had lapsed and they could therefore not effect the modifications to remedy the anomalies pointed out by PPRA. Subsequently, the Respondents submitted that they did not take further steps to complete the procurement process in the 1st Tender, having come to the conclusion that the invitation to tender in the 1st Tender was fatally incompetent and a nullity. However, no evidence has been led before this Board to prove that the time the PPRA letter was being received, the tender submission deadline had lapsed and bids had proceeded for tender opening and as such, the 1st Respondent was constrained to extend the submission deadline and issue an addendum so as to allow bidders modify their bids.



98. We note that it was not until 2nd March 2025 that the Respondents made the decision to re-advertise the 1st Tender as seen from the 2nd Tender in an attempt to cure the breach of the public procurement law as highlighted by PPRA. This is despite the fact that the left margin of the PPRA letter dated 2nd December 2024 received by the Respondents reveals that the letter was marked as noted and directions issued for it to be placed in the PPRA file on 17th December 2024.

99. Further, no information has been availed to show whether the Respondents took steps to seek procurement advice or technical support from PPRA on the appropriate course of action, having come to the alleged realization that the tender submission deadline had lapsed on the said 9th December 2024 and prior to making the decision to re-advertise the 1st Tender on 2nd March 2025 despite marking PPRA's letter for action on 17th December 2024.

100. Instead, the Respondents resulted to abandon the 1st Tender having reached a conclusion that the procurement process in the 1st Tender was unsalvageable for being a nullity since inception. The question that arises is whether the Respondents were justified in abandoning the procurement proceedings in the 1st Tender and proceeding to re-advertise the same?

101. It is the Board's considered view that the only circumstance whereby a procuring entity can abandon procurement proceedings as provided under the Act is in instances whereby the tender validity period lapses



without any attribution to a rogue procuring entity and the tender is deemed as having 'died a natural death'.

102. We note that the only legal recourse provided under the Act for not proceeding with a procurement process to logical conclusion is upon termination or cancellation of procurement or asset disposal proceedings prior to notification of tender award as stipulated under Section 63 of the Act which provides that:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;



- (e) material governance issues have been detected;***
 - (f) all evaluated tenders are non-responsive;***
 - (g) force majeure;***
 - (h) civil commotion, hostilities or an act of war; or***
 - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) A report under subsection (2) shall include the reasons for the termination.***
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."***

103. Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done by an accounting officer prior to notification of award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the



procedure to be followed by a procuring entity when terminating a tender which entails notification of the termination to both PPRA and bidders informing them of reasons for termination. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

104. In the circumstances herein, the Respondents held the position that since the procurement proceedings in the 1st Tender was a nullity, there was no basis of notification to any party since no rights or duties could be founded on a nullity. We find this to be a misconstrued position because the 1st Tender did not come to a logical or lawful conclusion since it neither died a natural death as a result of lapse of the tender validity period noting that the tender validity period is due to lapse on 9th April 2025 nor were the procurement proceedings terminated or cancelled pursuant to Section 63 of the Act in view of the pre-conditions provided under Section 63 (1)(a) to (i) of the Act.

105. Consequently, the procurement proceedings in the 1st Tender are alive and the 1st Respondent bearing the responsibility pursuant to Section 44 of the Act of ensuring that the manner in which a procurement process is initiated and concluded complies with the provisions of the Act erred in advertising the 2nd tender (which is basically the same tender as the 1st tender) before completing the procurement proceedings in the 1st Tender. It was never the intention of the framers of the Constitution and the Act



that a procuring entity would circumvent the manner in which a procurement process is initiated and concluded. A procuring entity cannot float the same tender twice before completing the procurement proceedings initiated in the first tender. This has been the holding of the Board in **PPARB Application No. 2 of 2015 Victoria Cleaning Services v Kenya Medical Training College** where the Board held that:

"The Procuring Entity could not proceed to invite new quotations for the same services since the first tender process had not been extinguished.

The Board having determined that the first tender process was not terminated (even as the Procuring Entity embarked on the second process), holds that the second process cannot stand. To allow it to stand will amount to having two processes running concurrently with both desiring a common outcome."

106. It has been the respectful view of this Board that public procurement is a serious business and procuring entities ought to treat tenders submitted to it in response to invitations to tender with due seriousness. The national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:



"(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);

(b);

(c) good governance, integrity, transparency and accountability" [Emphasis ours].

107. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

108. In the instant Request for Review, we have found that the 1st Respondent erred in failing to notify the Applicant and other bidders in the 1st Tender of the decision to not take further steps to complete the



tendering process and the emerging issues in the procurement proceedings such as directions by PPRA as communicated in the letter dated 2nd December 2024 and the net effect thereof. Further, the Respondents also erred in advertising the 2nd Tender while the procurement proceedings in the 1st Tender had not come to a logical conclusion.

109. We note that the import of full disclosure by a procuring entity in procurement proceedings is to ensure that the right to fair administrative action is achieved in public procurement processes. Article 47 of the Constitution provides that:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) 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"

110. Further, section 5 of the Fair Administrative Actions Act No. 4 of 2015 provides:

"(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights



of interests of a group of persons or the general public, an administrator shall:

(a);

(b);

(c);

(d) where the administrator proceeds to take the administrative action proposed

(i) give reasons for the decision of administrative action as taken”

111. On its part, section 6 of the Fair Administrative Actions Act, 2015 states that:-

“(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review

(2) The information referred to in subsection (1) may include:-

(a) the reasons for which the action was taken

(b) any other relevant documents relating to the matter”



112. The constitutional right to fair administrative action including the right to provide a person with sufficient reasons and information following an administrative action is codified in section 5 and 6 of the Fair Administrative Actions Act.

113. In view of the foregoing, the Board finds that the Respondents failed to carry out the procurement process with regard to the 1st Tender and 2nd Tender in accordance with provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution.

As to what orders the Board should grant in the circumstances?

114. The Board has found that it has jurisdiction to hear and determine the instant Request for Review.

115. The Board has further found that the Respondents failed to carry out the procurement process with regard to the 1st Tender and 2nd Tender in accordance with provisions of the Act and Regulations 2020 as read with Article 227(1) of the Constitution. Any actions undertaken by the Respondents emanating from an unlawful process cannot be allowed to stand since they are consequently null and void.

116. Section 173 of the Act donates wide discretionary powers to the Board and provides as follows:

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.

117. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution. It is our considered view that the most



appropriate orders in the instant Request for Review is for the Board to invalidate the re-advertisement and procurement proceedings in the 2nd Tender.

118. We also deem it just and fit to extend the 1st Tender's validity period in view of the fact that the validity period of 120 days is due to lapse on 9th April 2025; to order the Respondents to revert to the point of receipt of PPRA's letter dated 2nd December 2024 and proceed to issue an addendum under Section 75 and 76 of the Act as directed by PPRA while extending the tender submission deadline so as to allow the 1st Tender to proceed to its logical and lawful conclusion as provided under the Act, Regulations 2020 as read with Article 227 of the Constitution.

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

FINAL ORDERS

120. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

A. The Procuring Entity's Notice of Preliminary Objection dated 22nd March 2025 be and is hereby dismissed.



B. The decision by the Respondents to advertise and publish on 2nd March 2025 Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category (the 2nd Tender) including any subsequent procurement process undertaken with respect to the 2nd Tender be and is hereby annulled and set aside.

C. The tender validity period of Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category (the 1st Tender) that was advertised on 27th November 2024 be and is hereby extended for a period of 120 days from 9th April 2025.

D. Further to Order B above, the 1st Respondent is hereby directed to issue written notifications to tenderers in Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category (the 1st Tender) notifying them of extension of the tender validity period for a period of 120 days from 9th April 2025.


E. The 1st Respondent is hereby ordered to revert to the point of receipt of PPRA's letter dated 2nd December 2024 and proceed to issue an addendum under Section 75 and 76 of




the Act as directed by PPRA with respect to Tender No. TUN/OPNT/002/2024-2025 for Provision of Cleaning, Sanitary and Fumigation Services – AGPO Category (the 1st Tender) while extending the tender submission deadline and proceed with the procurement proceedings therein to their lawful and logical conclusion taking into consideration the Board’s findings herein, the provisions of the Tender Document, the Act and the Constitution.

F. In view of the Board’s findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 4th Day of April 2025


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

