

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 31/2025 OF 17TH MARCH 2025

BETWEEN

AWELO INVESTMENTS LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER, UGENYA TECHNICAL &
VOCATIONAL COLLEGE RESPONDENT**

Review against the decision of the Accounting Officer Ugenya Technical & Vocational College dated 10th March, 2025 in relation to Tender No. UTVK/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Vice-Chairperson & Panel Chair
2. QS Hussein Were - Member
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for Acting Board Secretary
2. Ms. Christabel Kaunda - Secretariat

PRESENT BY INVITATION

APPLICANT

AWELO INVESTMENTS LIMITED

- | | |
|-----------------------|-----------------------------|
| 1. Mr. Collins Osumba | Advocate, WSM Advocates LLP |
| 2. Mr. Samora Marshal | Advocate, WSM Advocates LLP |

RESPONDENT

UGENYA TECHNICAL & VOCATIONAL COLLEGE

- | | |
|-------------------------|----------------------------------------|
| 1. Mr. Brian Otieno | Advocate, Sagana, Biriq & Muganda Adv. |
| 2. Mr. Innocent Muganda | Advocate, Sagana, Biriq & Muganda Adv. |
| 3. Ms. Faith Kinyua | Advocate, Sagana, Biriq & Muganda Adv. |

BACKGROUND OF THE DECISION

The Tendering Process

1. Ugenya Technical & Vocational College, the Procuring Entity herein, invited tenders in response to Tender No.UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College (hereinafter, "the subject tender"). The invitation was by way of an advertisement on 23rd December 2024 published on the Procuring Entity's website (www.utvc.ac.ke) and the Public Procurement Information Portal (P.P.I.P.) (www.tenders.go.ke) where the blank tender document (hereinafter, 'Tender Document') was available for download. The tender submission deadline was 7th January 2025 at 12.00 noon.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes of 7th January 2025 signed by members of the Tender Opening Committee and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter, "the Board") pursuant to Section 67(3)(e) of the Public Procurement

and Asset Disposal Act, 2015 (hereinafter, "the Act"), eight (8) bidders submitted bids as follows:

Bid No.	Name of The Firm
1.	Fatom Building Contractors
2.	Pawa Villas Limited
3.	Rizdave Concepts
4.	Wambayi & Sons Building Contractors Ltd
5.	Excellium Holdings Limited
6.	Mijosh Enterprises
7.	Awelo Investments Limited
8.	Stoa Investments Company

Evaluation of Tenders

3. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 15th January 2025 in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Evaluation Criteria Preliminary Evaluation of Section III - Evaluation and Qualification Criteria of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage.
5. Six (6) tenders were determined non-responsive including the Applicant's tender, while two (2) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Technical Evaluation of Section III - Evaluation and Qualification Criteria of the Tender Document. Tenders were required to attain the pass mark of 70% at this stage.
7. One tender was determined non-responsive while one tender was determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. Award of the subject tender would be to the lowest

evaluated substantially responsive bidder and the amount indicated in the form of tender would be used for comparison.

9. The Evaluation Committee noted that M/s Mijosh Enterprises Ltd was the only responsive bidder at this stage having quoted Kshs. 7,671,420.00, inclusive of VAT, and was based on the M & E PC Sums as per the Engineer's estimates.

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the tender to M/s Mijosh Enterprises Ltd, being the responsive bidder at its tender price of Kenya Shillings Seven Million Six Hundred and Seventy-One Thousand Four Hundred and Twenty (Kshs. 7,671,420.00) Only, inclusive of VAT.

Professional Opinion

11. In a Professional Opinion dated 15th January 2025, the Procurement Officer, Ms. Bethsheba Oyuga concurred with the Evaluation Committee's recommendation to award the tender to M/s Mijosh Enterprises Ltd, at its tender price of Kenya Shillings Seven Million Six Hundred and Seventy-One Thousand Four Hundred and Twenty (Kshs. 7,671,420.00) Only, inclusive of VAT.

Notification to Tenderers

12. Tenderers were notified of the outcome of evaluation *vide* letters dated 16th January 2025.

REQUEST FOR REVIEW APPLICATION NO. 6 OF 2025

13. On 28th January 2025, Awelo Investments Limited, the Applicant herein, filed a Request for Review dated 28th January 2025 together with a Supporting Affidavit sworn by Erish Awino through WSM Advocates LLP seeking the following orders of the Board:

- a) THAT the Respondent's letter Ref: TVC/RL/PRJ/01/2024/2025 dated 16th January, 2025 notifying the Applicant that its bid was non-responsive for want of a verifiable Tax Compliance Certificate the Tender be set aside in its entirety.*
- b) THAT upon grant of prayer (1) above, the Honourable Review Board be pleased to order that the Applicant's bid had complied with the Preliminary Evaluation Criteria and direct the Respondent to evaluate the Applicant's bid to its logical conclusion.*
- c) THAT the Honourable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.*

d) THAT the Respondents be compelled to pay to the Applicant the costs arising from and incidental to this Request for Review.

14. On 18th February 2025 and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 6 of 2025:

a) The purported Notification Letter dated 28th January 2025 addressed to the Applicant with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and is hereby nullified and set aside.

b) The Notification Letters dated 16th January 2025 addressed to the Interested Party, the Applicant and other unsuccessful bidders with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and are hereby nullified and set aside.

c) The Respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to re-admit the Applicant's tender back into procurement process and to re-evaluate its tender from the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.

d) Further to Order C above, the Respondent is directed to proceed with the procurement process of the subject tender to its logical conclusion, including the making of an award, within 21 days from the date of this decision.

e) In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

15. In the absence of judicial review proceedings in the High Court, the Board's Decision dated 18th February 2025 in Request for Review No. 6 of 2025 became final and binding to all parties after 14 days in accordance with Section 175(1) of the Act.

RE-EVALUATION OF TENDERS

16. According to the letter dated 10th March 2025 issued to the Applicant by the Respondent, the Evaluation Committee re-instated the tender submitted by the Applicant and all other tenderers who were responsive in preliminary/mandatory evaluation to technical evaluation.

Technical Evaluation

17. At this stage, the Evaluation Committee was required to examine the re-admitted tenders for responsiveness using the criteria provided under Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenders were required to attain the pass mark of 70% at this stage

18. The Procuring Entity's re-evaluation process found that the Applicant's bid was non-responsive as the Tax Compliance Certificate attached to its tender was invalid as verified by Kenya Revenue Authority.

19. It was the Procuring Entity's finding that none of the considered bids met the requirement on Tax Compliance and hence decided to terminate the subject tender.

Notification to Bidders

20. The Applicant was notified of the outcome of the Procuring Entity's re-evaluation in a letter dated 10th March 2025 that it had failed at the preliminary evaluation stage on account of its Tax Compliance Certificate that could not be verified.

21. Aggrieved by the decision of the Procuring Entity, the Applicant approached the Board in this Request for Review.

REQUEST FOR REVIEW NO. 31 OF 2025

22. On 17th March 2025, Awelo Investments Limited, the Applicant herein, filed a Request for Review dated 17th March 2025 together with Supporting Affidavit sworn by Erish Awino through WSM Advocates LLP seeking the following orders of the Board:

***a) THAT the Respondent's letter Ref:
UTVC/RL/PRJ/01/2024/2025 dated 10th March, 2025***

notifying the Applicant that its bid was non-responsive on account that the Applicant's Tax Compliance Certificate was invalid be set aside in its entirety.

b) THAT the Respondent's decision to terminate the tendering process be set aside in its entirety.

c) THAT upon granting prayers (1) and (2) above, the Honourable Board be pleased to declare that the Applicant, having met all the requirements set out under section 86(1) of the Act and the tender document was the successful tenderer.

d) THAT upon granting prayer (3) above, the Honourable Review Board be pleased to order the Respondent to issue the Applicant with a notification of successful tender in compliance with the letter and spirit of section 87(1) of the Act.

e) THAT the Honourable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

f) THAT the Respondents be compelled to pay to the Applicant the costs arising from and incidental to this Request for Review.

31. In a Notification of Appeal and letter dated 17th March 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender. He also forwarded to the Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 17th March 2025.
32. The Respondent, through the law firm of Messrs. Sagana, Biriq & Muganda Advocates LLP, filed a Memorandum of Appearance together with a Replying Affidavit and sworn by Elizabeth A.O. Okullu, all dated and filed on 2nd April 2025 together with confidential documents concerning the subject tender in line with Section 67(3) (e) of the Act.
33. The Applicant also filed and served its written submissions dated 2nd April 2025.

34. *Vide* a Hearing Notice issued to parties, the Acting Board Secretary notified parties and all tenderers of an online hearing of the instant Request for Review slated for 3rd April 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
35. At the hearing on 3rd April 2025, parties confirmed with the Board the pleadings they would be relying on in support of their respective cases. The Applicant confirmed that it would be relying on the instant Request for Review and Supporting Affidavit both of 17th March 2025 together with written submissions dated 2nd April 2025 and highlights of the same to be made at the time of the hearing.
36. The Respondent confirmed that it would be relying on the Replying Affidavit dated 2nd April 2025, bundle of documents submitted to the Board pursuant to Section 67(3) (e) of the Act and oral submissions to be made at the hearing in support of its case.
37. Parties were thereafter allocated time to highlight their cases and the instant Request for Review proceeded for virtual hearing.

PARTIES' SUBMISSIONS

Applicant's Submissions

38. Counsel for the Applicant Mr. Osumba submitted that the Applicant's bid was found non-responsive on account of a Tax Compliance Certificate which the Procuring Entity indicated could not be verified from the Kenya Revenue Authority's portal despite the

Respondent failing to adduce evidence to the effect that they attempted to verify the same from the Authority's portal.

39. Mr Osumba invited the Board to consider the provisions of Section 112 of the Evidence Act, Cap 80 Laws of Kenya wherein that where a party in any civil proceedings fails to adduce evidence or facts within its knowledge then a negative inference must be made as to the existence of the same.

40. He submitted further that the provisions of Section 80(2) of the Act were couched in mandatory terms compelling a Tender Evaluation Committee to evaluate and compare bids with criteria contained within the tender document, which tender document in this instance provided that parties had to avail a valid and verifiable tax compliance certificate. Counsel further submitted that it was important to note that the said requirement was a mandatory requirement at the preliminary evaluation stage.

41. He also submitted that on the face of it, it appeared the Applicant's bid had passed all the stages of evaluation and was only eliminated when the Respondent wrote to the Kenya Revenue Authority (KRA).

42. Counsel referred to paragraph 10 of the Respondent's Replying Affidavit wherein the Procuring Entity's Principal deponed that she wrote to Kenya Revenue Authority vide letter dated 26th February 2025 seeking confirmation of the validity of the Applicant's tax compliance certificate. Counsel averred that the response from Kenya

Revenue Authority dated 25th February 2024 made reference to the Respondent's letter dated 24th February 2024, which said letter had sought verification of the compliance status of listed bidders as at 15th January 2025.

43. He averred further that in any event, the response from Kenya Revenue Authority dated 28th February 2025 did not contain the Applicant's name thus it was to be appreciated that the due diligence on the Applicant's bid was done on the basis of compliance status as opposed to validity of the tax compliance certificate.

44. The Applicant, in reference to the provisions of Section 83 of the Act, argued that the due diligence done by the Respondent failed firstly because the Procuring Entity wrote to KRA seeking confirmation of the compliance status of the Applicant rather than the validity of its tax compliance certificate as submitted, essentially creating a new criterion for evaluation not provided for in the tender document, in contravention of Section 80(2) of the Act.

45. Secondly, it was the Applicant's argument that the Respondent erred in its letter to KRA in that it lumped all bidders together in its request for confirmation without indicating which entity had been determined to be the lowest evaluated bidder, in contravention of Section 83 of the Act.

46. The Applicant, in inviting the Board to consider a holding in High Court decision ***Republic vs Public Procurement Administrative Review Board & another: Premier Verification Quality***

Services (PVQS) Limited (Interested Party), submitted that due diligence, if and where provided for in the tender document, was mandatory and that the same ought to be conducted in accordance with the provisions of the tender document.

47. Mr. Osumba contended that the Applicant was not subjected to fairness in evaluation insofar as the Respondent sought to confirm the compliance status rather than the validity of its tax compliance certificate as had been provided for in the tender document.

Respondent's Submissions

48. Counsel for the Respondent Mr. Muganda submitted that the tender document provided, as a preliminary mandatory requirement, a valid and verifiable tax compliance certificate, a document issued by an independent entity, the Kenya Revenue Authority and further that the dispute which had arisen had been a lack of evidence of the verifiability of the issue of the tax compliance certificate.
49. Counsel invited the Board to look at the relevant provisions of the Tax Procedures Act Cap 469B on the definition of a tax compliance certificate in stating that the same was issued by the Commissioner if satisfied that the person had complied with the tax law in respect of filing returns and had paid all the tax due based on self-assessment or had made an arrangement with the Commissioner to pay any tax due.

50. Counsel averred that the only way to verify that the tax compliance certificate was valid as per the relevant statutory provisions, was through confirmation by the regulator, Kenya Revenue Authority. Taking the same into consideration, the Procuring Entity wrote a letter to the regulator, making reference to the status of the said tax compliance certificates, to which the regulator responded to it vide correspondence marked '**E.O.-2**' in the Replying Affidavit, advising bidders to settle liabilities or visit its offices.

51. Counsel therefore contended that in view of the definition of a tax compliance certificate as per the provisions of the Tax Procedures Act, it could not be said that the certificate submitted by the Applicant was valid in that regard.

52. Mr. Muganda, on the contents of paragraph 132 of the Board's decision of 18th February 2025, stated that the Respondents had followed due process by conducting due diligence at the end of the evaluation process. He took issue with what it termed as the Applicant asking the Board to disregard the fact that it lacked a valid tax compliance certificate as it had not challenged or contradicted the findings of Kenya Revenue Authority and only raised the issue that the Procuring Entity's inquiries had been made at the wrong time.

53. He submitted that since there had been a challenge of validity of more than one institution, it would have been foolhardy to disregard the fact that the Board had determined that all qualified bidders were to be re-admitted for evaluation on parties that had been eliminated

on similar issues hence the two letters to the regulatory body by the Procuring Entity adding that none of the other parties stepped forth to oppose the said letters from KRA.

54. The Respondent averred that failing to have a valid tax compliance certificate could not be considered to be a minor issue that was to be disregarded and further, that a valid tax compliance certificate was one of the mandatory requirements for a party to meet before proceeding to the next stage of evaluation.

55. It wound up its submissions by stating that the entire Request for Review stood on the issue of interpretation of the tax compliance certificate's validity and compliance arguing that neither the Applicant nor other invited parties met the threshold as per the provisions of Section 80 and 83 of the Act and that in view of the same, it was necessary to terminate the subject tender in line with the provisions of Section 63 of the Act.

56. The Respondent therefore urged the Board to dismiss the Request for Review with costs to it.

Applicant's Rejoinder

57. In rejoinder, Mr. Osumba for the Applicant, disputed the assertions that no party had challenged the position of Kenya Revenue Authority as produced by the Respondent, by referring to a letter dated 10th March 2025 addressed to the Applicant by KRA.

58. He stated that whereas the Procuring Entity's Principal had deponed in the Replying Affidavit of 2nd April 2025 that the Procuring Entity had been unable to verify the status of the tax compliance certificate from KRA's portal, no evidence to that effect was adduced by the Respondent.

59. In final rejoinder, Mr. Osumba submitted that the Board was being invited to interpret the scope of the provisions of Section 83 of the Act and whether the same allowed a procuring entity a blank cheque to carry out due diligence outside the scope of the tender document.

CLARIFICATIONS

60. The Board sought clarification from Applicant whether it had tax liabilities as alleged by the Respondent and how the Applicant came into the submitted tax compliance certificate despite the stated liabilities. In response Mr. Osumba stated that there were no outstanding tax liabilities at the point of obtaining the tax compliance certificate and submission of the tender. In any event, he stated, the Applicant was still operating as a going concern and was expected to have tax obligations arising from time to time.

61. Asked what its bid sum was in respect to the subject tender, Mr. Osumba stated that the Applicant's bid sum was Kshs. 7,368,679.60.

62. The Board sought a number of clarifications from the Respondent. Firstly, on when it received information from KRA regarding the status of bidders to which Mr. Muganda clarified that they sent out

letters dated 24th and 26th February 2025 to the KRA and received responses dated 25th and 28th February 2025, respectively. Counsel further clarified that the tender submission date was 15th January 2025.

63. Secondly, on the compliance status of parties as of the tender submission and opening date, Mr. Muganda referred to a due diligence report dated 7th March 2025 which report formed part of the confidential documents forwarded to the Board by the Respondent.

64. The third query was on whether validity of a tax compliance certificate was synonymous with compliance status of a taxpayer. In response Mr. Muganda made reference to various provisions of the Tax Procedures Act arguing that at the point of issuance of the certificate a party must have made all requisite payments in law for the Tax Compliance Certificate to be issued. According to counsel, following with the logic of the Tax Procedures Act the party in question must be compliant.

65. The Board further inquired on what the bid sum for the successful tender was as well as the recommendations by the evaluation committee to which Mr. Muganda clarified that the Applicant submitted a bid price of Kshs. 7,368,679.60 and that in the light of correspondence shared by KRA that no bidder was in compliance, there was no successful bidder for their bid price to be considered.

66. Counsel added that owing to the nature of the procurement process where confidentiality was key, it could not copy the Applicant

in its said correspondence to KRA pointing out that the Respondent had been guided by interests in making the said inquiry.

67. Counsel further pointed out that in any event, records available to the Board indicated that both the Respondent and the Applicant had received respective correspondence with contrasting information from two different offices within Kenya Revenue Authority, being Head of Debt Enforcement Western Region and Domestic Tax Department thus the Respondent relied on the correspondence issued to it in specific response to its correspondences. Counsel further pointed out that in both sets of correspondences relied upon by parties the sum owing by the Applicant was not in dispute thus the test remained undisturbed to the best of the Respondent's knowledge.

68. The Board had a follow-up query to Mr. Muganda on whether it was beyond KRA to issue a tax compliance certificate to a party who had outstanding tax liabilities to which counsel reiterated that the letters issued by Kenya Revenue Authority of 25th and 28th February 2025 answered the same sufficiently. Counsel went on to add that the issue of non-compliance was not questioned and as such, compliance or non-compliance was not a function of Kenya Revenue Authority but by virtue of the relevant provisions of the Tax Procedures Act.

69. The Board sought clarification on the discrepancies in dates to which counsel for the Respondent submitted that whereas tender opening took place on 7th January 2025, tender evaluation took place on 15th January 2025 thus essentially, the tender validity period ran

from 7th and included the 15th. Counsel further added that it was necessary that a party be compliant on both dates to avoid disenfranchising a bidder who might have been compliant as at tender submission and not at evaluation.

70. The Board sought final clarification at which stage the verification and validity of tax compliance certificate was done and whether the same was done on just the Applicant or on all parties participating in the bid. Counsel for the Respondent stated that the same had been carried out at re-evaluation and on all bidders that had qualified for technical evaluation in accordance with the finding in the Board's decision of 18th February 2025.

BOARD'S DECISION

71. The Board has considered the parties' pleadings, oral as well as written submissions with authorities thereto together with confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- a) Whether the Board has jurisdiction to determine the instant Request for Review on account of termination of the subject tender.*
- b) Whether the Procuring Entity failed to comply with the Orders of the Board dated 18th February 2025 in PPARB Application No. 6 of 2025.*

c) Whether the Procuring Entity failed to conduct proper due diligence thereby breaching the provisions of Section 83 of the Act.

d) Whether the Procuring Entity evaluated the Applicant's tender in regard to tax compliance certificate outside the criteria set in the Tender Document, in breach of the provisions of Section 80 (2) of the Act.

e) What Orders the Board should grant in the circumstances.

The Board will now proceed to address the issues framed for determination as follows:

As to whether the Board has jurisdiction to determine the instant Request for Review on account of termination of the subject tender.

72. Though not pleaded by any party, this Board must as a matter of prudence satisfy itself that it is clothed with the requisite jurisdiction to determine the present Request for Review. This is because termination of a procurement process divests the Board of jurisdiction to entertain the subject matter under Section 167(4)(b) of the Act.

73. The foregoing is in line with 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 good judgment enquire into it before doing anything concerning such a matter in respect of which it is raised. It is only upon satisfying itself to have the requisite jurisdiction will the Board proceed to pronounce itself on the merits of the Request for Review.

74. 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."

75. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" - v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. 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 other evidence. A court of law downs tools in

respect of the matter before it the moment it holds that it is without jurisdiction.”

76. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act, which provides that:

“(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.”

77. Section 28 of the Act provides for the functions of the Board as:

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

78. The jurisdiction of the Board is provided for under Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Sections 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

Section 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 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

...

79. Superior Courts have on numerous occasions offered guidance on the interpretation of Section 167(4)(b) of the Act and the ousting of the Board's jurisdiction on account of termination of tenders.

80. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted..."

See also ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants***

81. Drawing from the above judicial pronouncements, this Board is clothed with jurisdiction to first interrogate whether the preconditions for termination of a tender under Section 63 have been satisfied. It is only upon satisfying itself that the said preconditions have been met that the Board can down its tools in the matter. Where any precondition has not been met, the Board will exercise its jurisdiction to hear and determine the Request for Review.

82. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

"63. Termination or cancellation of procurement and asset disposal Proceedings

(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) – (e);

(f) all evaluated tenders are non-responsive;

(g) - (i);

(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.

83. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings:
- i. The termination must be based on any of the grounds under section 63(1) (a) to (i) of the Act;
 - ii. The Accounting Officer must give a Written Report to the PPRA within 14 days of termination giving reasons for the termination; and

- iii. The Accounting Officer must, within 14 days of termination, give a written notice to the tenderers in the subject tender communicating the reasons for the termination.
84. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act.
85. The substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the facts that support such termination.
86. The procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act that is, (i) the submission of a Written Report to the PPRA on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
87. The Board shall now interrogate whether the Respondents satisfied the substantive and procedural requirements under Section 63 of the Act when terminating the procurement proceedings in the subject tender:

88. The Board has sighted the Procuring Entity's letter dated 10th March 2025 addressed to the Applicant, reproduced hereunder:

M/s Awelo Investments Limited

P.O Box 539 – 40601

BONDO

Dear Sir/Madam,

***RE: REGRET FOR TENDER NO. UTVc/PRJ/01/2024/2025:
PROPOSED TUITION BLOCK FOR UGENYA TECHNICAL AND
VOCATIONAL TRAINING COLLEGE***

I wish to thank you most sincerely for your participation in the above tender at Ugenya Technical and Vocational College. However, I would like to inform you that following the ruling and directive by the Public Procurement Administrative Review Board on 18/02/2025, the re-evaluation process was conducted by the ad-hoc tender evaluation committee, and your bid was unsuccessful.

Below are the reasons for your non-responsiveness.

- Your Tax Compliance Certificate was invalid as verified by the Kenya Revenue Authority. The Authority advises that you settle the liability or visit their office.***

In view of the above, the procurement process for the tender No. UTVC/PRJ/01/2024/2025 was terminated since none of the bidders was responsive.

Yours faithfully

Signed

Mrs. Elizabeth A. O. Okullu

PRINCIPAL

89. From the letter dated 10th March 2025, the Procuring Entity communicated to the Applicant that the subject tender was terminated on account of non-responsiveness of all evaluated tenders.
90. Section 63(1)(b) of the Act recognizes non-responsiveness of all evaluated tenders as one of the grounds under which an Accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the grounds for termination, they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist.
91. The Board has keenly studied the Respondents' Affidavit sworn on 2nd April 2025 by Elizabeth A. O. Okullu, the Procuring Entity's Principal and spotted paragraphs 10 and 11 which read:

.../

"10. That upon verification, the Evaluation Committee was unable to confirm the authenticity of the Applicant's Tax Compliance Certificate (TCC) from the Kenya Revenue Authority (KRA) portal. Consequently, the Respondent, via a letter dated 26th February, 2025, formally requested KRA to authenticate the validity of the Tax Compliance Certificates submitted by the various bidders ...

11. That in response, KRA confirmed that the Applicant herein was non-compliant as it had outstanding tax arrears amounting to Kshs. 341,383.00 ..."

92. The Respondents equally attached the letter from KRA marked EO - 2.
93. The Board has also studied the Supporting Affidavit to the Request for Review sworn on 17th March 2025 by Erish Awino, Director, and notes that paragraphs 10, 11 and 15 state as follows:

"10. That on 10th March, 2025, the Applicant wrote to the Kenya Revenue Authority seeking confirmation of the validity of her Tax Compliance Certificate No. KRAKSM1443271224...

11. That Kenya Revenue Authority respondent vide letter dated 10th March, 2025 confirming that the Applicant's Tax Compliance Certificate was duly processed at KRA Kisumu

TSO on 15th November, 2025 with a validity of twelve (12) months and as such expires on 14th November, 2025...”

"15. That the Tender Document required a prospective bidder to furnish a valid and verifiable Tax Compliance Certificate which the Applicant did. There was no requirement for proof of Compliance status from the Kenya Revenue Authority and the Respondent is simply relying on extraneous issues to deny the Applicant a tender for which it qualified and deserved to be declared the successful tenderer ...

94. Applicant also attached a letter marked E0-4 and Tax Compliance Certificate E0-3 to the Statement in Support of the Request for Review.
95. The Board takes note that the Applicant submitted a Tax Compliance Certificate (TCC) No. KRAKSM1443271224 issued by Kenya Revenue Authority to Awelo Investment Limited on 15th November, 2024 and valid for 12 months up to 14th November, 2025. The Board further notes that the TCC was neither revoked nor declared invalid by KRA in its correspondence with the Respondent dated 25th February, 2025.
96. The Board therefore finds that, on the substantive requirement of Section 63 (1), the Respondent has failed to meet the threshold of termination of the subject tender.

97. Turning to the procedural requirement under Section 63(4) of the Act, the Board has sighted from the Confidential File the termination letters dated 10th March, 2025 addressed to the different bidders in the subject tender, including the Applicant. In the absent of evidence to the contrary, the Board is convinced that the Respondents notified bidders in the subject tender of the termination of the tender within 14 days.
98. On the other procedural requirement under Section 63(2) of the Act for the Procuring Entity to furnish the Public Procurement Regulatory Authority with a Written Report within 14 days of the termination, the Board has verified this on the PPIP Portal (Public Procurement Information Portal) accessible at www.tenders.go.ke. The Board observes that the subject tender is not listed in the PPIP Portal, which is a platform managed by the Public Procurement Regulatory Authority.
99. The Board has also perused the contents of the Replying Affidavit and found annexure in the form of a letter addressed to the Public Procurement Regulatory Authority dated 10th March 2025. However, the Board has not seen evidence to show that the purported letter was delivered.
100. The requirement to report the termination of the tender to the Public Procurement Regulatory Authority has therefore not been satisfied.

101. It is notable from the above that the Respondents failed to satisfy the substantive and procedural requirements set out under Section 63 for termination of the subject tender. A finding that the subject tender was properly terminated will automatically strip the Board of jurisdiction to inquire into the merits of the Request for Review and the Board will have no option but to down its tools and strike out the Request for Review. This is however not the case in the instant Request for Review.
102. In view of the foregoing, the Board finds that the Accounting Officer terminated the subject tender based on an incorrect reasoning that none of the evaluated tenders was responsive. Further, no written report of the termination was filed with the Public Procurement Regulatory Authority. In the circumstances the Board holds that the Respondents failed to satisfy the substantive and procedural requirements set out under Section 63 of the act for terminating the subject tender. Accordingly, this ground of challenge to the Board's jurisdiction fails and is disallowed. The Board now proceeds to inquire into the merits of the Request for Review.

As to whether the Procuring Entity failed to comply with the Orders of the Board dated 18th February 2025 in PPARB Application No. 6 of 2025.

103. The matter was first brought before the Board by way of Request for Review No. 6 of 2025 filed by the Applicant on 28th January, 2025. After hearing the matter, the Board returned a Decision dated 18th February 2025 with the following final orders:

- a) The purported Notification Letter dated 28th January 2025 addressed to the Applicant with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and is hereby nullified and set aside.*
- b) The Notification Letters dated 16th January 2025 addressed to the Interested Party, the Applicant and other unsuccessful bidders with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and are hereby nullified and set aside.*
- c) The Respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to re-admit the Applicant's tender back into procurement process and to re-evaluate its tender from the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.*
- d) Further to Order C above, the Respondent is directed to proceed with the procurement process of the subject tender to its logical conclusion, including the making of an award, within 21 days from the date of this decision.*
- e) In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.*

104. In essence, the Board allowed Request for Review No. 6 of 2025 and nullified letters of notification dated 16th and 28th January, 2025.

It ordered the Procuring Entity to re-admit the Applicant's tender back into procurement process and to re-evaluate its tender from the Technical Evaluation stage and proceed with the procurement process of the subject tender to its logical conclusion within 21 days.

105. The Board notes that there was neither appeal nor judicial review application following the decision dated 18th February, 2025. In the absence of judicial review proceedings in the High Court, the Board's Decision dated 18th February 2025 in Request for Review No. 6 of 2025 became final and binding to all parties after 14 days in accordance with the provisions of Section 175(1) of the Act.

106. The question that arises is whether the Procuring Entity complied with the Board's orders in Request for Review No. 6 of 2025.

107. The Board has sighted the response at paragraphs 8 and 9 of the replying affidavit that state:

"8. That in strict compliance with the directive of the Honourable Tribunal, the Respondent formally notified the Applicant of its reinstatement into the bidding process, specifically indicating that the Applicant's bid would be re-evaluated at the Technical Stage alongside all other bids that had successfully advanced to this stage..."

That consequently, the Tender Evaluation Committee proceeded to re-admit and re-evaluate the following bids from the technical evaluation stage:

<i>Index</i>	<i>Bidder</i>	<i>Bid Reference No.</i>
<i>1.</i>	<i>Rizdave Concepts</i>	<i>TB03</i>
<i>2.</i>	<i>Mijosh Enterprises</i>	<i>TB06</i>
<i>3.</i>	<i>Awelo Enterprises</i>	<i>TB07</i>

“

108. The Board has further sighted the letter of notification dated 10th March 2025 and reproduced elsewhere in this Decision communicating the outcome of the re-evaluation process that resulted in the termination of the subject tender.

109. The Board notes that both the response and the letter dated 10th March, 2025 are not in dispute. To that extend, the Board is satisfied and finds that the Respondent complied with the orders issued on 18th February, 2025 in PPARB No. 6/2025.

110. Accordingly, this ground of review fails and is disallowed.

As to whether the Procuring Entity failed to conduct proper due diligence thereby breaching the provisions of Section 83 of the Act

111. The Board has heard the Applicant’s argument that by the Respondent writing to Kenya Revenue Authority seeking proof of Compliance status the Respondent was simply relying on extraneous issues to deny the Applicant a tender for which it was qualified and deserved to be declared the successful tenderer.

112. The Respondents, on its part, stated that upon verification, the Evaluation Committee was unable to confirm the authenticity of the Applicant's Tax Compliance Certificate (TCC) from the Kenya Revenue Authority (KRA) portal. Consequently, the Respondent, via a letter dated 26th February, 2025, formally requested KRA to authenticate the validity of the Tax Compliance Certificates submitted by the various bidders and which found all the bidders to be non-responsive.
113. From the rival submissions, the Board is invited to make a determination on whether the Procuring Entity carried out due diligence in accordance with the requirements of the Tender Document and hence in keeping with the provisions of Section 83 of the Act.
114. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

115. Further Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”

116. In **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another**, the Board established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.
117. The Board appreciates that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct post-qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. This is so stated because a reading of Section 83 of the Act makes reference to the word ‘may’ which implies discretion as opposed to the word ‘shall’ that would otherwise make conduct of the exercise an obligation.
118. In the Board’s considered view where a tender document has not provided for post-qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation.

119. In the instant Request for Review, the Board notes that the Tender Document provided at page 61 under Financial Evaluation that:

"A due Diligence shall be conducted where necessary."

120. By the Respondent's submission, due diligence was conducted at the last stage of evaluation and recommendation of award of the subject tender by the Evaluation Committee. The Procuring Entity, via letters dated 24th and 26th February, 2025, formally requested Kenya Revenue Authority to authenticate the validity of the Tax Compliance Certificates submitted by the various bidders.

121. The letter dated 24th February 2025 read as follows:

The purpose of this letter is to request your office to help us verify the compliance status as at 15th January, 2025 of our bidders whom we intend to engage in the construction of a Tuition Block.

The details of the bidders are as indicated in the table below:

<i>S/NO.</i>	<i>COMPANY NAME</i>	<i>KRA PIN</i>
<i>1</i>	<i>Wambayi & Sons Building Contractors Ltd</i>	<i>P051341673Y</i>
<i>2</i>	<i>Excellium Holding Ltd</i>	<i>P052124507M</i>
<i>3</i>	<i>Awelo Investment Ltd</i>	<i>P0518543227J</i>

...."

122. The letter dated 26th February 2025 read as follows:

I wish to request your office to help us verify the validity of the Tax Compliance Certificate attached as at 15th January, 2025 and as at 26th February 2025 for our bidders whom we intend to engage in the Tender No. UTVC/PRJ/01/2024/2025 for proposed construction of a Tuition Block.

<i>S/NO.</i>	<i>COMPANY NAME</i>	<i>KRA PIN</i>
<i>1</i>	<i>Mijosh Enterprises Ltd</i>	<i>P051916470T</i>
<i>2</i>	<i>Rizdave Concepts</i>	<i>P052061506H</i>
<i>3</i>	<i>Pawa Villas Limited</i>	<i>P051238631C</i>
<i>4</i>	<i>Faith Njeri Obiero</i>	<i>A005385387I</i>
<i>5</i>	<i>Stephen Omondi Ayugi</i>	<i>A007827724H</i>
<i>1</i>	<i>Wambayi & Sons Building Contractors Ltd</i>	<i>P051341673Y</i>
<i>2</i>	<i>Excellium Holding Ltd</i>	<i>P052124507M</i>
<i>3</i>	<i>Awelo Investment Ltd</i>	<i>P0518543227J</i>

***Thank you for your continued support.
Yours faithfully,***

(Signed)

Mrs. Elizabeth A.O. Okullu
PRINCIPAL

123. The Board notes that the Kenya Revenue Authority, Siaya TSO through letters dated 25th and 28th February, 2025n and signed by Fredrick Adiel, TSO Head, indicated the Compliance Status of the bidders, save for one, as 'Not Compliant' and showed amounts owed. On the comment section he wrote, 'Advise the bidder to settle the tax liability or visit our office. The amount owed for the Applicant was shown as Kshs. 341,383.

124. It is the Board's considered view that the letters written by the Respondent dated 24th and 26th February, 2025 do not constitute due diligence for the reasons that:

- i) They did not seek information on the lowest evaluated responsive bidder as required under Section 83 of the Act but was about all persons who submitted bids in the subject tender.
- ii) Compliance sought was as at 15th January 2025, the date of tender evaluation, and not as at 7th January 2025, being the date of tender submission that also marks the commencement of tender validity period.
- iii) Information sought was on compliance status and not Validity of Tax Compliance Certificates submitted.

125. The Board takes note of the finding of the trial court in ***Republic v Procurement Administrative Review Board & another; Wodex Technologies Ltd (Exparte Applicant); Tana Solutions Limited (Interested Party) (Judicial Review Miscellaneous Application E104 of 2023) [2023] KEHC 24930 (KLR)*** on due diligence at paragraph 13 as hereunder:

"It was not and should not be in the courts remit to direct, control or micromanage procurement entities on the manner in which due diligence was conducted once a requirement was set in the tender documents. The court's jurisdiction was invoked only where there were illegalities, irregularities or procedural lapses and there were none in the instant case."

126. In the instant case, the Board has detected illegalities, irregularities and procedural lapses in the conduct of due diligence by the Procuring Entity in that it was not conducted on the lowest evaluated bidder; it was not applied to cover the correct period, which was the date of tender submission; and did not seek to verify the Tax Compliance Certificate, which was the document in issue.

127. It was incumbent upon the Procuring Entity to verify the validity of the Tax Compliance Certificate of the lowest evaluated bidder only who, in this case, was determined by the Procuring Entity's Evaluation Committee to be the Applicant. The verification is provided for by way of a Tax Compliance Checker on the Kenya Revenue Authority *I-tax* portal. In the Board's considered view, it was not necessary to determine the validity of a Tax Compliance Certificate by writing to Kenya Revenue Authority when the mechanism for verification is already provided on the *i-tax* system. In any case the response the Procuring Entity received from KRA did not invalidate the Tax Compliance Certificate submitted by the Applicant in its tender.

128. the For the stated reasons, the Board finds that the exercise carried out by the Procuring Entity does not amount to due diligence, and holds that the Respondent failed to carry out due diligence in accordance with the provisions of Section 83 of the Act as read with Regulation 80 of Regulations 2020.

129. Accordingly, this ground of review succeeds and is allowed

As to whether the Procuring Entity evaluated the Applicant's tender in regard to tax compliance certificate outside the criteria set in the Tender Document, in breach of the provisions of Section 80 (2) of the Act.

130. It was the Applicant's case that the Procuring Entity erroneously disqualified its tender based on compliance status and not the validity of its Tax Compliance Certificate No. KRAKSM1443271224 submitted with its tender.
131. It contended that its Tax Compliance Certificate as submitted in its bid document was obtained from KRA on 15th November 2024 and its validity could be confirmed from the KRA i-Tax portal using the TCC Checker as evidenced by the correspondence it received from the Authority dated 10th March 2024 and marked as Exhibit EO-4 in its Supporting Affidavit dated 17th March 2025.
132. The Respondent on its part argued that the validity of a Tax Compliance Certificate was synonymous with the compliance status of the taxpayer in line with the relevant provisions of the Tax Procedures Act.
133. That upon the Procuring Entity making inquiries on the status of the Applicant's compliance with Kenya Revenue Authority, the Authority responded that the Applicant had outstanding tax liabilities of Kshs. 341,383. The Procuring Entity proceeded to terminate the procurement process of the subject tender having established that there was no responsive bidder.

134. The Board is alive to the objective of public procurement which 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)"

135. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:

Section 80 - Evaluation of tender:

(1) "....."

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, ..."

136. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document.

137. Having perused the Applicant's letter of Notification dated 10th March 2025, it is noted that the reason for disqualification of its bid was laid out as follows:

"I would like to inform you that following the ruling and directive by the Public Procurement Administrative Review Board on 18/02/2025, the re-evaluation process was conducted by the ad-hoc tender evaluation committee, and your bid was unsuccessful.

Below are the reasons for your non-responsiveness.

- ***Your Tax Compliance Certificate was invalid as verified by the Kenya Revenue Authority. The Authority advises that you settle the liability or visit their office.***

In view of the above, the procurement process for the tender No. UTVc/PRJ/01/2024/2025 was terminated since none of the bidders was responsive."

138. The Board has carefully studied the Tender Document and notes that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria of the Tender Document. Mandatory requirements were provided for under Evaluation Criteria Preliminary Evaluation where Mandatory Requirement No. 3 provided as follows:

<i>No</i>	<i>Requirement</i>	<i>Responsive or Non-Responsive</i>
<i>....</i>	<i>.....</i>	<i>.....</i>
<i>3</i>	<i>Attach a valid Tax Compliance Certificate (verifiable)</i>	<i>.....</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>

139. It is clear that a bidder was required to submit a valid Tax Compliance Certificate that was to be verified with the issuing authority.

140. A perusal of the re-evaluation report dated 24th February, 2025 that was submitted to the Board pursuant to Section 67(3)(e) of the Act reveals as follows:

"Recommendation

Having conducted the evaluation process to the final stage, that is financial stage, the committee recommends that M/s Awelo Investments Limited should be awarded the tender, being the most responsive lowest bidder.

However, as per the guidance of the Board via a clause in the tender document, "a due diligence shall be conducted where necessary", the committee recommends for due diligence on M/s Awelo Investment Limited ... through the TCC Checker"

141. The Applicant argued that its Tax Compliance Certificate as submitted in its bid document was obtained from KRA on 15th November 2024 and its validity could be confirmed from the KRA i-Tax portal using the TCC Checker as evidenced by the KRA TCC Checker Result of the said certificate confirmed on 28th January 2025.

142. In the instant Request for Review, the Board notes that the Tender Document provided at page 61 under Financial Evaluation that:

"A due Diligence shall be conducted where necessary."

143. The Board notes from the documentation provided by the Respondent that when the Procuring Entity made its inquiries with Kenya Revenue Authority, it did so seeking the compliance status of several participant bidders, the Applicant inclusive, results of which

indicated that the bidders were non-compliant for outstanding tax liabilities.

144. The Board takes cognizance of the finding in ***Republic vs. Public Procurement Administration Review Board & Another Exparte Gibb Africa Ltd. [2022] eKLR*** wherein the Court held as follows:

"...the Procuring Entity is bound by its own tender document. It has no discretion to introduce new conditions during the evaluation process."

145. It is therefore on the Board to evaluate the manner in which the Procuring Entity evaluated the Applicant's bid, specifically on the criterion requiring provision of a valid and verifiable tax compliance certificate and find whether the Procuring Entity was correct.

146. The Boards notes that whereas the Procuring Entity made an inquiry on the compliance status of the bidders, tender document required a valid and verifiable tax compliance certificate.

147. In the Board's view correspondences received from the Revenue Authority confirmed that the Applicant as a taxpayer was non-compliant in that it had an outstanding tax liability of Kshs. 341,383. On this, the Board agrees with the Applicant that for as long as it carried out business as a going concern, it was expected that it would incur taxes to which counsel for the Applicant submitted that the

Revenue Authority had never made demands for the said tax liabilities.

148. The Board further notes that at the point of inquiry by the Applicant, the Revenue Authority had the opportunity to declare Tax Compliance Certificate No. KRAKSM1443271224 invalid on account of the said tax liabilities if at all those outstanding tax liabilities were material.

149. In view of the fact that the evaluation criterion related to provision of a valid and verifiable tax compliance certificate, the Board disallows the argument advanced by the Respondent that the onus of proving regularized compliance with the Revenue Authority lay with the Applicant.

150. The Board further finds that the evaluation criterion applied by the Procuring Entity in evaluating other bidders and ultimately finding all of them non-responsive was not in the tender document and as such, irregular.

151. The Board therefore ultimately finds that the conclusion arrived at by the Procuring Entity of cancelling the subject tender on the basis that there was no responsive bidder is erroneous and misguided in terms of the provisions of Section 63(1) (f) of the Act.

152. In the circumstances, we find that the Procuring Entity's Evaluation Committee, in upholding the Applicant's tender, acted in

line with the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

153. Accordingly, this ground of review fails and is disallowed

As to what orders the Board should grant in the circumstances

154. The Board also finds that it has jurisdiction to listen to and determine the instant Request for Review Application.

155. The Board finds that the Procuring Entity complied with the Orders this Board made in ***PPARB Request for Review Application No. 6 of 2025*** on 18th February 2025.

156. The Board also finds that the Procuring Entity did not conduct due diligence in accordance with the provisions of Section 83 of the Act as considered together with the relevant provisions of the tender document.

157. The Board also finds that the Applicant's submitted tender bid was responsive with regard to the specific requirement on the tax compliance certificate as per the subject tender's blank tender document.

158. The upshot of the findings is that the instant Request for Review succeeds in the following terms, subject to recourse under the provisions of Section 175 of the Act within 14 days:

FINAL ORDERS

159. 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 this Request for Review:

- 1) The letters of notification dated 10th March 2025 addressed to the Applicant and all other bidders with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and are hereby nullified and set aside.**
- 2) The Respondent is hereby directed to conduct due diligence on the Applicant's Tax Compliance Certificate and complete the procurement process of the subject tender within 21 days from the date of this decision taking into consideration the Board's findings herein.**
- 3) In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 7th Day of April 2025.



.....
PANEL CHAIRPERSON

PPARB



.....
SECRETARY

PPARB