

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 40/2025 FILED ON 4TH APRIL 2025

BETWEEN

POLES AND POSTS

TREATMENT PLANT LTD.....APPLICANT

AND

DIRECTOR,

KENYA FOREST SERVICE.....RESPONDENT

Review against the decision of the Director, Kenya Forest Service, in relation to TENDER NO. KFS/DISP/90/2024-2025 – Disposal of Forest Plantation Materials in Kiambu County (Salvage).

BOARD MEMBERS PRESENT

Mrs. Njeri Onyango	Panel Chairperson
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Ms. Jessica M’mbetsa	Member
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Mr. Daniel Langat	Member
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IN ATTENDANCE

Mr. Philemon Kiprop

Holding brief for Acting Board
Secretary

Ms. Dokatu Godana

Secretariat

Mr. Erickson Nani

Secretariat

PRESENT BY INVITATION

APPLICANT

POLES AND POSTS TREATMENT PLANT LTD

Mr. Ongeru

Advocate, Gicheha Kamau & Company
Advocates

RESPONDENT

DIRECTOR, KENYA FOREST SERVICE

Mr. Lutta

Advocate, Lutta & Company Advocates

Ms. Ruth Kerubo

Legal Officer, Kenya Forest Service

Mr. Fredrick Ojwang

Inventory Officer, Kenya Forest Service

Mr. John Mburu

Procurement Officer, Kenya Forest Service

OTHER BIDDERS

Janwill Enterprises Limited

Mr. Evans Oduor

Advocate

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The Kenya Forest Service (hereinafter referred to as "the Procuring Entity") invited tenders through the open tendering method pursuant to Tender No. KFS/DISP/90/2024-2025 for the Disposal of Forest Plantation Materials in Kiambu County (Salvage) (hereinafter referred to as "the subject tender"). According to the Tender Document, the deadline for submission of tenders was set for 3rd April 2025 at 11:00 a.m.

Addenda

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"), the Procuring Entity issued Addendum No. 1. The addendum revised the eligibility criteria for sub-compartments Thogoto 11C and Thogoto 12A, initially reserved for bidding by large-scale forest industry investors within and outside Kiambu County. Following the addendum, the said sub-compartments were now reserved for bidding by large-scale plywood investors within and outside Kiambu County.

3. Further, the addendum clarified that sub-compartment Kinale 10P (Portion 1–22), which was initially reserved for bidding by small-scale forest industry investors within and outside Kiambu County, would henceforth be reserved for bidding exclusively by small-scale forest industry investors within Kiambu County. It was further specified that the tender submission deadline would remain as 3rd April 2025.

Submission of Bids and Tender Opening

4. According to the Tender Register dated 3rd April 2025, which was submitted as part of the confidential documents, a total of ten (10) tenders were received in response to the subject tender. The tenders were recorded as follows:

N0.	Tenderer
1.	Matharu Sawmill
2.	Ascom Freighters and Logistics Limited
3.	Elwood Ventures
4.	Luchar Ventures
5.	Liton Limited
6.	Westlands Choma Stopover Limited
7.	Brookside Timber Limited
8.	Waranna AO Enterprises
9.	Janwill Enterprises Limited
10.	Evergreen Ever Limited

Evaluation of Bids

5. According to the confidential documents submitted to the Board, there was no evaluation report on record, indicating that the evaluation process had presumably not commenced.

REQUEST FOR REVIEW

6. On 4th April 2025, the Applicant, through the firm of Gicheha Kamau & Company Advocates, filed a Request for Review dated the same day. The application was accompanied by a Statement in Support of the Request for Review, signed by Judy Muthoni Mwaura, a Director of the Applicant, and similarly dated 4th April 2025. In the said application, the Applicant sought the following orders:

a) Annul and or quash the decision of the procuring entity in the tender BID NO. KFS/DISP/90/2024-2025 dated MARCH 2025 restricting the eligible bidders in the small scale category to only those within Kiambu county.

b) Annul and or quash the decision of the respondent contained in the Tender Addendum No. 1 dated 27th March 2025 altering and restricting the eligible bidders in respect to sub-compartments Thogoto 11 (C) and Thogoto 12 (A) to large scale plywood investors within and outside Kiambu County.

c) Condemn the respondent to pay the cost of this request for review to the applicant.

d) Such other orders the Honourable board may deem just and expedient.

7. In a Notification of Appeal and a letter dated 4th April 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, 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 4th April 2025.
8. On 11th April 2025, the Respondent filed a Response to the Request for Review, dated the same day. On that day as well, the Respondent submitted the confidential documents to the Board in compliance with Section 67(3) of the Act.
9. On 17th April 2025, the Acting Board Secretary issued a Hearing Notice, dated the same day, notifying the parties that the hearing of the Request for Review would be conducted virtually on 22nd April 2025 at

2:00 p.m. via the provided link.

10. On 22nd April 2025, the hearing did not proceed due to unforeseen circumstances. Consequently, it was rescheduled to 23rd April 2025 at 2:00 p.m., and all parties were duly notified of the change.
11. On 23rd April 2025, the scheduled hearing day, the Respondent, through the firm of Lutta & Company Advocates, filed a Notice of Appointment, along with a Notice of Preliminary Objection dated 22nd April 2025 and a List of Authorities dated 22nd April 2025.
12. On 23rd April 2025, the Applicant filed Further Documents in Support of the Request for Review, dated the same day.
13. When the Board convened for the hearing on 23rd April 2025 at 2:00 p.m., the Applicant was represented by Mr. Ongeru, while the Respondent was represented by Mr. Lutta. The Board reviewed the pleadings filed by the parties, both of whom confirmed that the documents had been properly filed and exchanged. The Board then allocated time for each party to make their respective submissions. The Board also directed that the substantive Application for Review and the Preliminary Objection would be heard together.

PARTIES SUBMISSIONS

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

14. In opposing the preliminary objection, Counsel for the Applicant referred the Board to Sections 2 and 167 of the Act, contending that an application for review may be made by both a candidate and a tenderer. Counsel further argued that, in this case, the Applicant was a tenderer.
15. Counsel further submitted that the second ground of the preliminary objection lacked merit, as the focus of the application for review was on the Addendum dated 27th March 2025, which introduced restrictions that effectively locked the Applicant out. Counsel emphasized that the Request for Review was filed on 4th April 2025, within the 14-day period required by law.
16. On the substantive submissions regarding the Request for Review, Counsel submitted that the Addendum was issued less than a third of the way through the tender period, and no extension was provided to accommodate this change, thereby contravening Section 75 of the Act.
17. Counsel further argued that the Addendum introduced restrictions without providing reasons to the public, which, in their view, was contrary to Section 4 of the Fair Administrative Action Act.
18. Counsel contended that, by the time the Addendum was issued, the Applicant had already conducted a ground assessment of the materials and incurred costs in the process.

Respondent's Submissions on the Preliminary Objection and

the Request for Review

19. Counsel for the Respondent argued that the Applicant is not a bidder, as the original tender document outlined four categories for large-scale forest investors, in which the Applicant could have participated. The Respondent further contended that the Applicant failed to demonstrate that they were candidates who had applied for the Kinale and Kamae sub-compartments.
20. Counsel submitted that the Applicant's arguments would have merit if the Applicant were a bidder for Kinale and Kamae, which they are not. Instead, the Applicant is making an application for Thogoto 11C and 12A. Counsel contended that this renders the Applicant ineligible under Section 167 of the Act. Counsel further relied on the case of *Al Ghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy & Another; Public Procurement Administrative Review Board (Interested Party) (Civil Appeal 63 of 2017) [2017]* and PPARB Application No. 9 of 2018, *Integrity Concern International vs National Irrigation Board*, in support of their position.
21. Counsel argued that the Applicant's registration is limited to Murang'a County, and that the Applicant was aware of the potential limitations based on their registration. Consequently, Counsel contended that the Applicant cannot be said to have been discriminated against in any way.
22. Regarding the Addendum, Counsel submitted that the Procuring Entity is permitted to modify the tender documents under Section 75 of the

Act. Counsel further argued that the grounds for these changes were intended to safeguard the interests of plywood operators, as outlined in the Response to the Request for Review.

23. Counsel argued that industry players located within the county or local geographical areas are granted priority in participation, often to the exclusion of external parties. This approach is grounded in the recognition that these individuals and organizations are key stakeholders, as their operations occur within the local communities.

Applicant's Rejoinder

24. Counsel submitted that the Applicant did not tender for Kinale and Kamae because these areas do not contain eucalyptus species. Counsel further argued that the Applicant was interested in Thogoto because it holds a license for large-scale production of treated transmission poles, which are derived from eucalyptus species, available in Thogoto.
25. Counsel further argued that, under the Fair Administrative Action Act, the Procuring Entity had a duty to provide reasons for its actions in order to prevent any abuse of its powers.

CLARIFICATIONS

26. The Board sought clarification from the Respondent's Counsel regarding the issuance of the Addendum at a time when less than a third of the period allocated for tender preparation remained.

27. In response, the Respondent's Counsel stated that the Addendum was issued on 27th March 2025, by which time one-third or more of the time allocated for tender preparation remained.

BOARD'S DECISION

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

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

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

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

Depending on the finding of the first sub-issue:

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

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

B. Whether the Addendum No. 1 dated 27th March 2025 materially altered the substance of the Tender document contrary to Section 75 (1) of the Act.

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

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

29. In response to the Request for Review, the Respondent filed a Notice of Preliminary Objection on two grounds. First, the Respondent contended that the Applicant lacked locus standi, as it had not complied with the mandatory requirements of Section 167(1) of the Act, being neither a candidate nor a tenderer. Second, the Respondent argued that the Request for Review was filed outside the 14-day statutory period prescribed by Section 167(1) of the Act.
30. In response, the Applicant argued that it was a candidate and that the Request for Review was filed within the 14-day period, as the main cause of action pertains to the Addendum dated 27th March 2025.
31. The effect of either of the two grounds mentioned above, if proven, would deprive this Board of jurisdiction to entertain the present Request for Review. Consequently, due to the preliminary nature of these objections, they must be addressed as a matter of priority.
32. This Board is mindful of the well-established legal principle that courts

and decision-making bodies can only adjudicate matters within their jurisdiction. When a question of jurisdiction arises, it is essential that the court or tribunal seized of the matter addresses it as a threshold issue before proceeding further.

33. As a fundamental principle, when the issue of jurisdiction is raised before a court or decision-making body, it must be addressed as a priority before any other matters are considered. Jurisdiction is the cornerstone of adjudication, and in its absence, a court or tribunal lacks the legal authority to proceed further.
34. In ***Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022)***, the Supreme Court reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process. Where a question of jurisdiction is raised, it must be addressed and resolved at the earliest stage of the proceedings.

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

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way

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

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

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

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

The functions of the Review Board shall be – reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function

conferred to the Review Board by this Act, Regulations or any other written law.

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

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

39. The Respondent and the Interested Party submitted that the Applicant lacked the requisite locus standi under Section 167(1) of the Public Procurement and Asset Disposal Act to institute or sustain the administrative proceedings. Counsel argued that the Applicant was neither a candidate nor a tenderer.
40. In response, Counsel for the Applicant submitted that the Applicant is a tenderer within the meaning of Section 2, as read together with Section 167(1) of the Act.
41. Section 167(1) of the Act provides:

167. Request for a review

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

42. In essence, to properly invoke the jurisdiction of the Review Board under Section 167(1) of the Act, an applicant must satisfy the following conditions:
- (a) they must qualify as either a candidate or a tenderer, as defined under Section 2 of the Act;
 - (b) they must claim to have suffered, or be at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Act or its Regulations; and
 - (c) they must file the request for administrative review within fourteen (14) days from the date of notification of the award or the occurrence of the alleged breach, in accordance with Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020.
43. The central issue for determination in this Request for Review is whether the Applicant, in approaching the Board, qualifies as a candidate or a tenderer for the subject tender, or neither, as posited by

the Respondent. This determination is crucial in ascertaining whether the Applicant possesses the requisite locus standi to bring the matter before the Board.

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

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

45. 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.

46. 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.

47. The key provision in determining this issue is Section 167(1) of the Act.

A plain reading of the section reveals that only a candidate or a tenderer may bring an application for review before the Board. A candidate is defined under Section 2 of the Act as a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity, while a tenderer is defined as a person who has submitted a tender in response to an invitation by a public entity.

48. The Board carefully reviewed the documents filed by the parties and their submissions. During the hearing, the Applicant asserted that it was a candidate. Based on this submission, the Board sets aside the consideration of the Applicant being a "tenderer" and focuses on determining whether the Applicant meets the criteria to be considered a candidate.
49. As noted above, a candidate is defined as a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity. The Board observes that the Applicant produced registration notifications issued by the Respondent, indicating that the Applicant is a forest industry investor registered by the Kenya Forest Service under both the Small and Large Scale categories, pursuant to KFS/DIS/01/2024-2025.
50. Furthermore, the Board notes that the Applicant annexed both the blank tender document for the subject tender and the amended tender document. The Board also observes that the Respondent did not controvert the Applicant's assertions that it obtained the tender documents pursuant to an invitation by the Procuring Entity, nor did it

dispute the fact that the Applicant possesses the registration notifications mentioned above

51. Additionally, the Board notes that the Applicant claimed to have incurred costs in visiting the site for the subject tender and conducting preliminary assessments. These observations suggest that the Applicant has a vested interest in the subject tender and is not someone without any involvement or interest in the matter. It is not a Busy Body as alleged by the Respondent.
52. Based on the foregoing observations, the Board finds no difficulty in concluding that the Applicant qualifies as a candidate for the subject tender, having obtained the tender documents from the Procuring Entity pursuant to its invitation.
53. The Board is therefore satisfied that the Applicant has sufficiently demonstrated its status as a candidate for the subject tender. This fulfills the locus standi requirement under Section 167(1) of the Act.

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

54. In opposing the Request for Review, the Respondent, through its Notice of Preliminary Objection, argued that the application was filed outside the 14-day statutory period stipulated under Section 167(1) of the Act.
55. In response, the Applicant contended that the Request for Review was

filed on 4th April 2025, and that the main issue forming the basis of the action is the Addendum dated 27th March 2025.

56. A plain reading of Section 167(1) of the Act, which the Board has already referenced in addressing the first aspect of this issue, clearly establishes that the Board's jurisdiction must be invoked within a strict timeline of fourteen (14) days.
57. Regulation 203(2)(c)(i) of the Regulations, 2020 similarly reinforces the fourteen (14) day timeline, stating as follows:

Request for a review

- 1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***
- 2) The request referred to in paragraph (1) shall—***
 - a. state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***
 - b. be accompanied by such statements as the applicant considers necessary in support of its request;***
 - c. be made within fourteen days of—***
 - i. the occurrence of the breach complained of, where the request is made before the making of an award;***
 - ii. the notification under section 87 of the Act; or***

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

58. Our interpretation of the above provisions is that an Applicant seeking the Board's intervention in any procurement proceedings must file their request within the prescribed 14-day statutory timeline. Consequently, any Request for Review filed beyond this period would be time-barred, thereby divesting the Board of jurisdiction to entertain it.
59. Section 167 of the Act and Regulation 203 of the Regulations 2020 establish the benchmark events for the commencement of the statutory timeline as either the date of notification of the award or the date of occurrence of the alleged breach. In the context of the instant Request for Review, the critical point of reference is the date of occurrence of the alleged breach.
60. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR***, the High Court provided guidance on the commencement of the statutory timeline, stating as follows:

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

61. From the foregoing, in computing time under Section 167(1) of the Act and Regulation 203(2)(c)(i) of the Regulations 2020, consideration should be given to the specific breach complained of in the Request for Review and the point at which the Applicant became aware of the alleged breach.
62. Turning to the present Request for Review, the Applicant's submissions indicate that its cause of action stems from the Addendum dated 27th March 2025. In line with the cardinal principle that a party is bound by its own pleadings, the Board carefully reviewed the pleadings filed by the Applicant to determine the basis of its claim. The Board observed that the Applicant's case is fundamentally centered on the aforementioned Addendum.
63. In light of the above, the Board finds that the timeline commenced on 27th March 2025, the date when the Applicant became aware of the Addendum. The Board further notes that the Request for Review was filed on 4th April 2025.
64. With the above in mind, the Board now focuses on the period between when the Applicant became aware of the Addendum on 27th March 2025 and whether the 14-day period had already elapsed by the time the Applicant filed the present Request for Review on 4th April 2025.
65. The Board notes that there are eight days between 27th March 2025 and 4th April 2025. This period of eight days clearly demonstrates that

the Applicant filed the Request for Review within the statutory timeframe outlined in Section 167(1) of the Act.

66. Consequently, the second ground of the preliminary objection, which contended that the Request for Review was filed outside the 14-day statutory timeframe stipulated in Section 167(1) of the Act, fails. The Board finds that the Request for Review complies with the mandatory statutory time limit under Section 167(1) of the Act and is not time-barred.
67. Accordingly, the Board finds that it has jurisdiction to hear and determine this Request for Review. This determination grants the Board the necessary authority to proceed with addressing the remaining issues for determination.

Whether the Addendum No. 1 dated 27th March 2025 materially altered the substance of the Tender Document contrary to Section 75 (1) of the Act.

68. The Board understands the Applicant's contention to be two-pronged, both arising from the Addendum dated 27th March 2025. Firstly, the Addendum restricted bidders in sub-compartments Thogoto 11(C) and Thogoto 12(A) to large-scale plywood forest industry investors within and outside Kiambu County. Secondly, it restricted eligible bidders in the small-scale category to those located within Kiambu County.
69. According to the Applicant, the subject tender, as advertised on 15th

March 2025, was open to the public. The subsequent restrictions were introduced through the Addendum. The Applicant contended that the Addendum was unlawful on multiple grounds, including that it was discriminatory contrary to Article 27 of the Constitution; it violated Article 47 of the Constitution, as the Procuring Entity failed to provide reasons for the changes; and it contravened Article 227, which underpins the public procurement framework in Kenya. The Applicant further submitted that the Addendum materially altered the substance of the tender.

70. In response to the above allegations, the Respondent submitted that plywood operators had raised concerns with the Procuring Entity that previous tenders had not reserved any materials for their participation, as such tenders were historically restricted to timber operators only. The Respondent argued that plywood operators, as a recognized category of Forest Industry Investors, had undergone the same rigorous registration process as other categories and similarly require access to forest materials to sustain their operations.
71. Counsel submitted that it was deemed prudent to reserve the two sub-compartments for plywood operators to ensure they did not feel excluded or discriminated against. Counsel further pointed out that the subject tender had already reserved two other sub-compartments—Kinale 4(Y)1 and Kamae 6(K)—for which the Applicant was eligible to bid. The Addendum, according to Counsel, was therefore intended to promote fairness in the distribution of forest materials across the various categories of registered forest investors.

72. On the second limb of the Applicant's allegations, the Respondent's Counsel submitted that the center of operation and management of forest plantations is ordinarily the county in which the plantations are situated. Counsel argued that preference in the reservation of forest materials for bidding is typically given to entities located within the respective county, given their proximity to the forests under disposal. These local bidders often participate in the management and replanting activities in line with the principles of participatory forest management.
73. The Respondent submitted that small-scale forest industry investors within Kiambu County have not benefitted from material reservations in the last four (4) tender series, whereas their counterparts in other counties have had such opportunities in recent tenders. Given that Kiambu County hosts seventy-two (72) small-scale sawmillers, it was deemed prudent to restrict bidding to investors within the County to afford them a realistic opportunity to access forest materials. This approach, according to the Respondent, was also in line with Section 157(4)(b) of the Act, which seeks to protect and promote the participation of micro, small, and medium enterprises.
74. As noted above, the central issue in dispute pertains to the Addendum dated 27th March 2025. To facilitate a proper determination of the matter, the Board has reproduced the relevant portions of the said Addendum that bear directly on the present Request for Review, as outlined below:

TO: ALL PROSPECTIVE TENDERERS

Tender Addendum No.1: Tenders for sale of Forest Plantation Materials

Reference is made to the above-mentioned tenders for sale of forest plantation materials uploaded on the KFS website on 15th March 2025 and will close on Thursday 3rd April 2025. The tender documents are hereby amended as follows:

1. Tender No. KFS/DISP/90/2024-2025: Sale of forest plantation materials in Kiambu County (Salvage)

i. Sub-compartment Thogoto 11C and Thogoto 12 A which were reserved for bidding by Large Scale Forest industry Investors within and outside Kiambu County are now to be bid by Large scale plywood investors within and outside Kiambu County.

ii. Sub-compartment Kinale 10(P) portion 1 – 22 which were reserved for bidding by Small Scale Forest Industry Investors within and outside Kiambu County are now to be bid by Small Scale Forest Industry Investors within Kiambu County.

2. ...

3

75. The Board observes that the Addendum cited above effectively revised the bidding criteria for specific forest sub-compartments. Notably, Thogoto 11(C) and Thogoto 12(A), which were initially open to large-scale forest industry investors generally, were reclassified to be exclusively available to large-scale plywood investors from both within and outside Kiambu County. Additionally, the sub-compartment Kinale 10(P) portions 1–22, which was initially accessible to small-scale investors across different regions, was subsequently restricted to small-scale forest industry investors based solely within Kiambu County.
76. In light of the Addendum outlined above and the accompanying allegations that it contravened several legal provisions, the Board narrows its focus to the specific claim that the Addendum materially altered the Tender Document. This issue is critical as it falls squarely within the ambit of Section 75(1) of the Act, which governs the circumstances under which a tender document may be amended.
77. The amendment of Tender Documents is governed by Section 75 of the Public Procurement and Asset Disposal Act, which provides as follows:

75. Modifications to tender documents

(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.

78. Section 75(1) of the Act permits a procuring entity to amend tender documents at any time before the tender submission deadline. However, such amendments must not materially alter the substance of the tender documents.

79. An amendment is considered material if it changes the fundamental terms of the tender in a way that could require bidders to significantly

adjust their bids or alter their response strategies. Such alterations are not allowed under the Act, as they would undermine the fairness and integrity of the procurement process.

80. In the present Request for Review, the Board observes that the Addendum dated 27th March 2025 amended the Tender document by revising the eligibility criteria as follows: Thogoto 11C and 12A, originally reserved for large-scale forest industry investors, are now specifically open to large-scale plywood investors from both within and outside Kiambu County. Additionally, Kinale 10(P) portion 1–22, which was previously available to small-scale investors from various regions, is now restricted to small-scale forest industry investors located within Kiambu County only.
81. The eligibility of a tenderer is a critical component of a Tender document, and this is expressly addressed in various sections of the Act. These provisions ensure that the criteria for participation are clearly outlined and adhered to in order to maintain fairness and transparency in the procurement process.

74. Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(g) applicable preferences and reservations pursuant to this Act;

(h) a declaration that the tender is only open to those who meet the requirements for *eligibility*;

(2) All tender documents shall be sent out to *eligible* bidders by recorded delivery.

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the *eligibility* and other mandatory requirements in the tender documents.

93. Pre-qualification

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

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

119. Notice inviting expressions of interest

(2) The notice inviting expressions of interest shall set out the following—

(c) *eligibility* and the qualifications necessary to be invited to submit a proposal; and

82. The above provisions of the law reinforce the importance of the eligibility criteria as a fundamental component of the Tender document. In fact, Section 79 of the Act explicitly states that for a tender to be deemed responsive, it must first satisfy the eligibility criteria before even being assessed against the mandatory requirements.

83. In light of the above, the Board now turns its attention to the Addendum dated 27th March 2025 to assess whether it materially altered the Tender document.

84. In making this determination, the Board observes that the Addendum dated 27th March 2025 materially altered the Tender document by modifying the eligibility criteria. This conclusion is drawn in light of the earlier analysis regarding the significance of eligibility criteria within the Tender document.
85. The Respondent, in justifying the change in the eligibility criteria, cited the need to protect large-scale plywood investors who have been sidelined in previous tenders. Additionally, the Respondent argued that small-scale forest investors within Kiambu County, as the immediate community, should be given preference in the usage of resources within their County. While these reasons may appear justifiable, the Board finds that such considerations should have been addressed at the outset. Changing the eligibility criteria mid-process effectively alters the substance of the Tender document, which contravenes Section 75(1) of the Act.
86. Procuring Entities in implementing the preference and Preservation are required to provide Data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefited. In this instance, the procuring entity did not furnish the Board with data it has provided to the Authority indicating the number of disadvantaged groups which have benefited from preference and reservation for the Board to establish whether the disposal as envisaged in the instant tender must of necessity be reserved for the target group/groups of tenderers. There is also no indication why this was not considered at the time of preparation of the tender document allowing the eligibility criteria as

provided in the tender document before the Addendum

87. While the Board appreciates the good intentions of the Procuring Entity in issuing the Addendum and as orally submitted at the hearing, in recognizing the need to protect otherwise hitherto disadvantaged categories of tenderers, this action must not only be materially supported by data, it must come in timeously such as not to create a legitimate expectation of would be tenderers only to have those expectations thwarted by way of an Addendum that materially alters the substance of the tender document such as in the instant case. This action is contrary to Section 75(1) of the Act and is therefore null and void
88. In light of the above findings, the Board concludes that the Addendum dated 27th March 2025 materially altered the Tender document by changing the eligibility criteria.

What orders the Board should issue in the circumstance.

89. The Board finds that it has jurisdiction over the present Request for Review, as the Applicant has demonstrated that it is a candidate and, therefore, has locus standi. Furthermore, the Applicant's Request for Review was filed within the 14-day period stipulated under section 167(1) of the Act.
90. Consequently, after hearing the parties and evaluating all the evidence presented, the Board finds that the Addendum dated 27th March 2025 materially altered the Tender document by changing the eligibility

criteria, which is a key component of the Tender document.

91. Consequently, the Request for Review dated 4th April 2025, concerning TENDER NO. KFS/DISP/90/2024-2025 – Disposal of Forest Plantation Materials in Kiambu County (Salvage), is hereby allowed on the following specific grounds:

FINAL ORDERS

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

A. The Respondent's Preliminary Objection dated 23rd April 2025 be and is hereby dismissed.

B. The Addendum No. 1 dated 27th March 2025 issued by the Procuring Entity in relation to TENDER NO. KFS/DISP/90/2024-2025 – Disposal of Forest Plantation Materials in Kiambu County (Salvage) be and is hereby nullified and set aside.

C. The Respondent is hereby ordered to issue a fresh tender submission deadline to the subject tender without the Addendum, to enable all eligible candidates to prepare their bids in accordance with the Act.

D. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this 25th day of April 2025.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB