

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.55/2025 FILED ON 8TH MAY 2025

BETWEEN

TIC QUALITY CONTROL.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
KENYA BUREAU OF STANDARDS.....1ST RESPONDENT**

KENYA BUREAU OF STANDARDS2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Bureau of Standards, in relation to TENDER NO. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services the Year 2025-2028.

BOARD MEMBERS PRESENT

Ms. Alice Oeri	Panel Chairperson
Ms. Jessica M’mbetsa	Member
Mr. Daniel Langat	Member
Mr. Stanslaus Kimani	Member

IN ATTENDANCE

Ms. Sarah Ayoo	Holding brief for the Acting Board Secretary
Mr. Erickson Nani	Secretariat

PRESENT BY INVITATION

APPLICANT

Mr. Andrew Ombwayo

TIC QUALITY CONTROL

Advocate, Andrew Ombwayo & Co.
Advocates

1ST AND 2ND RESPONDENTS

THE ACCOUNTING OFFICER, KENYA BUREAU OF STANDARDS

KENYA BUREAU OF STANDARDS

Ms. Teresa Gachagua

Advocate, Kenya Bureau of Standards

INTERESTED PARTY

QUALITY INSPECTION SERVICES INC. JAPAN

Mr. Justus Omollo

Advocate, Sigano & Omollo LLP

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The Kenya Bureau of Standards (hereinafter referred to as "the Procuring Entity") invited tenders through the open tendering method pursuant to Tender No. KEBS/PRE-Q/T006/2025/2028 for the Pre-Qualification for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services the Year 2025–2028 (hereinafter referred to as "the subject tender"). The subject tender was divided

into eight zones, and interested bidders were permitted to apply for any or all of the zones. Tenderers were required to submit their bid documents to the specified address on or before 11th February 2025 at 12:00 p.m.

Addenda/Clarifications

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter “the Board”) by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter “the Act”), the Procuring Entity issued several addenda providing clarifications on various issues raised by interested bidders. Addendum No. 1, dated 28th January 2025, extended the tender submission deadline to 3rd March 2025 at 12:00 p.m. and provided additional clarifications. Addenda Nos. 2, 3, 4, and 5, dated 29th January 2025, 3rd February 2025, 10th February 2025, and 13th February 2025, respectively, offered further clarifications on matters raised by prospective bidders.

Submission of Bids and Tender Opening

3. According to the Tender Opening Minutes dated 3rd March 2025, a total of nineteen (19) bidders submitted their bids by the tender submission deadline.

#	Bidder
1.	Sunchine Quality Control Technology Service Co.

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

Evaluation of Bids

4. According to the Evaluation Report dated 22nd April 2025, the Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") convened to evaluate the tenders submitted. The evaluation process was undertaken in three stages, as set out below:

- a. Preliminary Evaluation
- b. Technical Evaluation
- c. Due diligence

Preliminary Evaluation

5. At the first stage of evaluation, the Evaluation Committee conducted a preliminary examination of the tenders to determine their responsiveness, in accordance with the criteria outlined in Section III – *Evaluation and Qualification Criteria*, under the heading *Preliminary Examination for Determination of Responsiveness*. Only tenders that fully satisfied all mandatory requirements at this stage were deemed eligible to proceed to the Technical Evaluation stage.
6. Upon conclusion of the preliminary evaluation stage, nine (9) tenders, including that of the Applicant, were found to be non-responsive. The remaining ten (10) tenders, including that of the Interested Party, met all the mandatory requirements and were accordingly declared responsive. These tenders proceeded to the Technical Evaluation stage.

Technical Evaluation

7. During the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements specified in Section III – *Evaluation and Qualification Criteria*, under the heading *Criteria for Evaluation of Technical Proposals*. To qualify for progression to the Financial Evaluation stage, a tender was required to attain a minimum score of 64 out of a maximum possible score of 80.

8. Upon conclusion of the Technical Evaluation stage, all ten (10) tenders were found to be responsive, having attained the minimum required score of 64. Consequently, they were recommended for pre-qualification, subject to the outcome of a due diligence exercise.

Evaluation Committee's Recommendation

9. The Evaluation Committee recommended that the following ten tenderers be pre-qualified for a period of three (3) years under the subject tender, subject to the successful completion of a due diligence exercise: World Standardization, Certification and Testing Group (Shenzhen Co. Ltd); Quality Inspection Services Japan; China Hansom Inspection and Certificate Co. Ltd; ASTC As Test Certification Tech. (Hangzhou) Co. Ltd; China Certification and Inspection Group Inspection Company Limited; Intertek International Limited; Cotecna Inspection SA; TUV Rheinland; Bureau Veritas; and SGS.

Professional Opinion

10. In a Professional Opinion dated 25th April 2025 (hereinafter referred to as "the Professional Opinion"), the Head of Procurement of the Procuring Entity, Ms. Jane Ndinya, reviewed the procurement process, including the evaluation of tenders, and concurred with the Evaluation Committee's recommendation to pre-qualify the ten tenderers, subject to the conduct of due diligence. The Professional Opinion was subsequently approved.

Notification to Tenderers

11. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 24th April 2025.

REQUEST FOR REVIEW

12. On 8th May 2025, the Applicant, through the firm of Andrew Ombwayo & Co. Advocates, filed a Request for Review dated 7th May 2025. The application was accompanied by a Statement in Support dated 7th May 2025. In the Request for Review, the Applicant sought the following orders:

a) The 1st and 2nd Respondents' decision dated 24th April 2025 that disqualified the Applicant's bid be and is hereby reviewed and set aside, and the 1st and 2nd Respondents are directed to evaluate the Applicant's bid and rate its financial proposal as regards the audited accounts submitted for years 2021, 2022, and 2023.

b) The Applicant's bid shall be deemed as qualified and the Applicant be and is hereby awarded the Tender No. KEBS/PRE-Q/T006/2025/2028 for PRE-QUALIFICATIONS FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES, THE YEAR 2025-2028 INTERNATIONAL TENDER.

13. In a Notification of Appeal and a letter dated 8th May 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 8th May 2025.
14. On 9th May 2025, the 1st and 2nd Respondents, through Ms. Teresa Gachagua, jointly filed a Notice of Appointment and a Memorandum of Response to the Request for Review, both dated 9th May 2025. On the same day, the Respondents submitted confidential documents to the Board in compliance with Section 67(3) of the Act.
15. On 15th May 2025, the 1st and 2nd Respondents filed their Written Submissions, dated the same day.
16. On 16th May 2025, the Board Secretary issued a Hearing Notice of the same date, notifying the parties that the hearing of the Request for Review would be conducted virtually on 22nd May 2025 at 11:00 a.m., via the provided link.
17. On 22nd May 2025, the Applicant filed its Written Submissions, dated 21st May 2025.

18. On 22nd May 2025, Quality Inspection Services Japan, the Interested Party filed a Notice of Appointment of Advocates dated 22nd May 2025 through the firm of Sigano & Omollo LLP.
19. When the Board convened for the hearing on 22nd May 2025 at 11:00 a.m., the Applicant was represented by Mr. Ombwayo, while the Respondents were represented by Ms. Gachagua. The Interested Party was represented by Mr. Omolo.
20. Before the hearing commenced, the Board was notified of the existence of a Court Order issued by the Court of Appeal in **Nairobi Civil Appeal No. E301 of 2025 *Precision Experts Limited v. Public Procurement Administrative Review Board & 3 Others***, staying the proceedings in respect of the subject tender pending the hearing and determination of an application scheduled for ruling on 23rd May 2025 before the Court of Appeal.
21. In view of the fact that the Board had not been previously made aware of the existence of the Court Order, it issued an order declaring that the matter was *sub judice* before the Court of Appeal. The Board further directed that the matter be mentioned on 26th May 2025 for further directions, pending the ruling of the Court of Appeal.
22. On 26th May 2025, the Board scheduled the matter for hearing on 5th June 2025 at 10:00 a.m., and directed that any party that wished to file any pleadings including submissions should file and serve the same on their counterparts by 2nd June 2025 at 4:00 p.m.

23. On 30th May 2025, the Board Secretary issued a Hearing Notice of the same date, notifying the parties that the hearing of the Request for Review would be conducted virtually on 5th June 2025 at 10:00 a.m., via the provided link.
24. On 3rd June 2025, the Respondents filed a Notice of Preliminary Objection, dated the same day.
25. On 3rd June 2025, the Interested Party filed a Notice of Preliminary Objection dated 20th May 2025.
26. On 5th June 2025, the Applicant file its Supplementary Submissions dated 5th June 2025.
27. When the Board convened for the hearing on 5th June 2025 at 10:00 a.m., the Applicant was represented by Mr. Ombwayo, the Respondents by Ms. Gachagua, and the Interested Party by Mr. Omolo. The Board read out the pleadings filed by the parties, and Counsel confirmed that the documents had been duly exchanged. The Board thereafter allocated time to Counsel to highlight their respective submissions. The hearing then proceeded as scheduled with each party highlighting its respective submissions.
28. On 10th June 2025, the Applicant filed an application seeking an order compelling the Respondents to submit the Evaluation Report for the subject tender, covering the evaluation stage up to the date of filing the present Request for Review. In the alternative, the Applicant requested that the matter be reopened to allow for oral submissions on

the contents of the Evaluation Report.

29. On 10th June 2025, the Board issued directions on the service of the application and further ordered that the same be canvassed through written submissions.
30. On 11th June 2025, the Applicant filed its Written Submissions in support of the Application dated 10th June 2025.

PARTIES SUBMISSIONS

Respondents' Submissions on the Notice of Preliminary Objection

31. The Respondents' Counsel argued that the Board lacked jurisdiction to entertain or adjudicate over the Request for Review by reason of Section 170 of the Act which provides that the parties to a Request for Review shall include the tenderer(s) notified as successful by the Procuring Entity. Counsel contended that the Applicant had failed to join the successful tenderers rendering the Request for Review defective for want of observance of mandatory provisions in Section 170 of the Act. Counsel relied on the case of **Peesam Limited v Public Procurement Administration Review Board & 2 others [2018] KEHC 7658 (KLR)** and the case of **James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] KECA 916 (KLR)**.

Interested Party's Submissions on the Notice of Preliminary Objection

32. Counsel argued that the Interested Party's Preliminary Objection was anchored on two grounds: first, on the provisions of Section 167(1) of the Act, and second, on the provisions of Section 170 of the Act.
33. On the first ground, Counsel submitted that the Applicant lacked *locus standi* under Section 167(1) of the Act to institute the Request for Review, having failed to demonstrate that it had suffered or was at risk of suffering loss as a result of any alleged breach of a duty imposed on the Procuring Entity. In support of this position, Counsel relied on the case of ***James Oyondi t/a Betoyo Contractors & Another v. Elroba Enterprises Limited & 8 Others* [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)**.
34. Counsel further submitted that the Request for Review was incompetent as it contravened the provisions of Section 170 of the Act. Additionally, Counsel argued that the application violated the rules of natural justice by failing to join, as substantive parties, those tenderers who had been declared successful. He contended that such parties could not participate merely as invitees but were necessary parties to the proceedings.

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

35. The Applicant's Counsel submitted that the preliminary objections

raised by the Respondents and the Interested Party were frivolous and without merit. It was the Applicant's position that contrary to the assertions made by the opposing parties, the harm or injury suffered by the Applicant had been clearly disclosed, specifically that the disqualification from the tender process denied the Applicant an opportunity to contract for the subject services, thereby affecting its livelihood. Counsel further argued that Section 170 of the Act does not impose a requirement that such harm be both specifically pleaded and proved at the preliminary stage.

36. The Applicant's Counsel further submitted that the failure to join the successful tenderers in the Request for Review was not fatal to the proceedings. It was contended that Section 170 of the Act, do not mandatorily require the inclusion of successful bidders. Counsel argued that since successful bidders do not suffer harm from the Procuring Entity's actions, it would be illogical and ambiguous to insist on their joinder. In the Applicant's view, the law only envisages the inclusion of persons who stand to suffer prejudice from the outcome of the review.
37. Counsel for the Applicant also challenged the relevance and applicability of the authorities relied upon by the Respondents and the Interested Party, submitting that they were distinguishable and represented bad law. It was submitted that non-joinder or misjoinder of parties is not fatal to a proceeding and that courts and tribunals generally lean towards allowing amendments to cure such defects rather than striking out a claim, which would be an unnecessarily draconian step. The Applicant asserted that the Board had the discretion to allow joinder of parties at any stage under Section 170 of the Act.

38. The Applicant's Counsel further argued that even if there had been an omission to join all successful bidders, such omission had been effectively cured by the participation of the Interested Party, who was one of the successful tenderers and had voluntarily joined the proceedings. Counsel pointed out that the other successful bidders had been notified of the proceedings and, being aware of the same, including the Court of Appeal's intervention, had chosen not to participate. It was therefore submitted that no prejudice had been occasioned to them as a result of their non-joinder.
39. Counsel placed reliance on the case of ***Karemana v Authority & Kanyi (2021) KEHC 233 (KLR)***, in which the High Court emphasized that joinder is guided by the presence of a definable interest and the likelihood of prejudice, and that judicial discretion must be exercised on a case-by-case basis. Counsel also cited ***Directline Assurance Co. Ltd v James Yatich, Kiambu HCCA No. E099 of 2022***, which cautioned against striking out suits as a first recourse and affirmed the principle that parties should instead be permitted to amend their pleadings to rectify errors.
40. The Applicant's Counsel submitted that the Respondents wrongly disqualified the Applicant's tender on the basis that it had not provided audited financial statements for a five-year period. He pointed out that Clause 5.3 of the Tender Document, particularly footnote 1, expressly permitted the submission of audited financial statements for periods earlier than twelve months from the date of application, provided an explanation was given. The Applicant, he stated, had complied with this requirement by submitting audited financial statements for 2021, 2022,

and 2023, together with an explanation that it had not been operational in 2019 and 2020. Counsel argued that this level of compliance demonstrated the Applicant's financial strength and ought to have been accepted, just as the Respondents had accepted similar departures from other bidders.

41. The Applicant's Counsel further submitted that the failure to provide five years' audited financial statements constituted, at most, a minor deviation that did not materially affect the substance of the Applicant's bid. He stated that such minor deviations had been anticipated by the Tender Document, and the Respondents had discretion to waive them where they did not impact a bidder's technical or financial capability. Counsel emphasized that the PVoC program in question was not capital-intensive and, therefore, financial capacity was not a critical consideration. He noted that the Applicant had demonstrated sufficient technical capacity, and there was no basis to consider the financial deviation as grounds for disqualification.
42. In addition, the Applicant's Counsel drew the Board's attention to Clause 2.1.20 of the Tender Document, which provided for annual financial audits post-contract. He submitted that this clause showed the Procuring Entity's intent to continually assess the financial strength of prequalified contractors throughout the contract period. As such, the requirement for five years of audited accounts was not intended to be strictly determinative at the prequalification stage. The disqualification of the Applicant, despite meeting the substantive requirements of the tender, was therefore unjustified and contrary to Section 79(2)(a) of the Act

43. The Applicant's Counsel also submitted that the Respondents failed to comply with Section 79(3)(a) and (b) of the Act by not quantifying the deviation in the audited accounts or taking it into account during tender evaluation. Instead, they treated the Applicant's explanation as a disqualifying factor without conducting a comparative analysis. This, according to Counsel, amounted to a legally flawed approach to tender evaluation and breached the requirement for objective, fair, and transparent procurement under the Act.
44. On the broader question of arbitrariness, the Applicant's Counsel contended that the disqualification of the Applicant was irrational and in breach of Section 71(2) of the Act. He emphasized that the tender was a prequalification process where the Procuring Entity was under an obligation to consider the Applicant's qualifications and score the bid accordingly, rather than prematurely disqualify it. He noted that page 21 of the Tender Document allocated up to six marks under the category of "Financial Strength," and therefore the proper procedure would have been to assess the bid, not outrightly exclude it. The failure to do so, in his view, reflected a lack of objectivity and the application of double standards.
45. The Applicant's Counsel further challenged the objectivity of the five-year audited financial statements requirement. He argued that the inclusion of the years 2019 and 2020, during which the global and national economies were negatively impacted by COVID-19, rendered the requirement unreasonable and of limited probative value. Counsel cited Economic Surveys by the Kenya National Bureau of Statistics from 2020 to 2022 to support the assertion that economic growth during

those years had either contracted or stagnated. He also noted the inconsistency with the Respondents' earlier tender for 2024–2026, which only required three years of audited financials. In his view, the lack of consistency and economic justification rendered the criterion subjective and in violation of Sections 79 and 80 of the Act as well as Article 227 of the Constitution.

Respondents' Rejoinder on the Notice of Preliminary Objection and Submissions on the Request for Review

46. Counsel submitted that Section 170 of the Act applies to all Requests for Review, irrespective of the procurement method employed. She relied on the decision in ***Peesam Limited v Public Procurement Administrative Review Board & 2 Others* [2018] KEHC 7658 (KLR)**, to assert that it is not sufficient for the Review Board to merely notify successful bidders of the proceedings; rather, it is mandatory that such bidders be joined as substantive parties, not as peripheral participants. Counsel reiterated that, in the absence of their joinder, the Board lacks jurisdiction to hear and determine the matter.
47. The Respondents' Counsel submitted that the Applicant's inquiry regarding the acceptability of financial statements for three years was sent outside the timeline stipulated in Addendum No. 1 to the tender document, which required all clarification requests be submitted at least seven days prior to the tender closing date. Counsel emphasized that the letter dated 19th February 2025 annexed by the Applicant had no evidence of receipt by the Respondents, as it lacked a receiving stamp.
48. The Respondents' Counsel further submitted that even if the

clarification had been timely, any modification to allow three years of financial statements instead of the required five would have amounted to a material alteration of the original tender, contrary to Regulation 75(1) of the Regulations 2020. This, they argued, was impermissible under procurement law.

49. The Respondents' Counsel contended that the tender in question involved the provision of highly specialized services fundamental to the Respondents' constitutional mandate. Accordingly, bidders were required to demonstrate financial stability and experience, which was best assessed through audited financial statements spanning five years. This requirement, they argued, was not cosmetic but central to evaluating the suitability and stability of the bidders.
50. The Respondents' Counsel submitted that the Applicant's failure to provide financial statements for five years could not be categorized as a minor deviation under Section 79(2)(a) of the Act. They referred to judicial pronouncements confirming that even seemingly minor omissions can amount to material nonconformities when they concern mandatory requirements.
51. The Respondents' Counsel relied on the High Court decision in ***Republic v Public Procurement Administrative Review Board; KEMSA Ex parte Emcure Pharmaceuticals Limited*** to argue that omissions in bid documents that concern mandatory requirements are not excusable, regardless of whether they were deliberate or inadvertent. They stressed that accepting such deviations would undermine the procurement process.

52. The Respondents' Counsel further submitted that accepting the Applicant's bid despite the omission would violate the principles of fair competition under Article 227 of the Constitution. They argued that permitting a deviation from a mandatory requirement would confer an unfair advantage to the Applicant over other compliant bidders.
53. The Respondents' Counsel maintained that the Applicant's disqualification was neither unfair nor unreasonable, but rather a lawful consequence of failing to meet a mandatory requirement clearly set out in the tender document. They cited Section 80 of the Act, which mandates that evaluation of tenders must be done strictly using the procedures and criteria set in the tender documents.
54. The Respondents' Counsel supported their position by referring to the Court of Appeal decision in ***Sinopec International Petroleum Service Corporation v PPARB & 3 others***, emphasizing that procurement laws do not allow discretion where bidders fail to comply with mandatory conditions. They argued that noncompliance compromises the fairness and legality of the entire procurement process.
55. The Respondents' Counsel asserted that the Evaluation Committee did in fact consider the Applicant's bid and determined that it included only three years of audited accounts. This admission, they argued, was also confirmed by the Applicant in its Request for Review, and thus justified the Committee's decision to disqualify the bid at the preliminary evaluation stage.

56. The Respondents' Counsel submitted that Regulation 75 of the Regulations 2020 compelled the procuring entity to reject all tenders that fail to meet the mandatory requirements under Section 79 of the Act. On this basis, they maintained that the Evaluation Committee lawfully disqualified the Applicant from proceeding to the technical evaluation stage.

Interested Party's Rejoinder on the Notice of Preliminary Objection

57. Counsel submitted that Section 170 of the Act imposes the obligation to join parties upon the Applicant, given that a Request for Review is initiated at the Applicant's instance. Counsel argued that the authorities cited by the Applicant relate to ordinary civil proceedings and are distinguishable from the present matter, as the parties to be joined in a procurement review are specifically prescribed by law under Section 170 of the Act. Counsel further contended that the provisions of Section 170 are couched in mandatory terms.
58. Counsel submitted that amending the pleadings at this stage would not be practicable, given that the Board's proceedings are subject to strict statutory timelines. Counsel further contended that such an amendment would contravene the timelines stipulated under Section 167 of the Act and Regulation 203 of the Regulations, 2020.
59. Counsel submitted that the position taken by the Court of Appeal in ***James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited & 8 Others* [2019] KECA 916 (KLR)**, with

respect to the interpretation of Section 170 of the Act, is binding on the Board. Accordingly, Counsel argued that the Board lacks jurisdiction to entertain the matter.

Applicant's Rejoinder on the Request for Review

60. Counsel submitted that the requirement to provide five years of financial statements was not a mandatory requirement warranting the disqualification of the Applicant's bid. He referred the Board to pages 102 to 104 of the Applicant's submissions. According to Counsel, the applicable criterion was that the Applicant's bid should have been evaluated based on the financial statements for three years, with a possible allocation of up to six (6) marks, and disqualification would only arise if the Applicant failed to attain the minimum technical score of 64 out of 80 marks. Counsel further argued that the Applicant derived no advantage from the omission of the financial statements for the years 2019 and 2020.

Clarifications

61. The Board sought clarification from Counsel for the Applicant on who would be responsible for initiating an amendment, should one be necessary, the Board or the Applicant. In response, Counsel submitted that it would have been appropriate for the Board to first determine the preliminary objections before delving into the merits of the application. According to Counsel, if the Board were to find that an amendment was necessary, there would still be sufficient time to effect the same.

62. The Board sought clarification from Counsel for the Applicant on whether the Applicant had pleaded loss or damages. In response, Counsel referred the Board to paragraphs 6, 8, 11, and 12, submitting that while loss and damages were not expressly pleaded, they could be implied from the fact that the Applicant incurred costs in preparing and submitting its bid, which was ultimately disqualified. Counsel contended that there is no legal requirement for a party to expressly state that it has suffered, or risks suffering, loss or damages.
63. The Board sought clarification from Counsel for the Applicant regarding Mandatory Requirement No. 9 and how it allegedly created ambiguity. In response, Counsel submitted that when read together with the Technical Evaluation Criteria, the requirement appeared not to be mandatory. He explained that bidders were to be awarded marks out of a maximum of six under the technical evaluation, implying that failure to submit the financial statements should not have resulted in disqualification but rather in the award of zero marks under that criterion.

BOARD'S DECISION

64. 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 Request for Review is defective due to the Applicant's failure to join the successful tenderers as parties to the proceedings in line with Section 170 of the Act.

Depending on the finding of the first sub-issue:

- ii. Whether the Applicants have *locus standi* before the Board.

Depending on the outcome of the first issue:-

B. Whether the Application dated 10th June 2025 is merited.

C. Whether the Procuring Entity properly evaluated the Applicant's tender submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

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

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

65. In responding to the Request for Review, the Respondents filed a Notice of Preliminary Objection contending that the application is incompetent for the reason that it violates Section 170 of the Act since the successful bidders were not included as parties.

66. On the part of the Counsel for the Interested Party, he also filed a Notice of Preliminary Objection arguing that the application is incompetent as it violates Section 170 of the Act in addition to that the Applicant lacked *locus standi* under Section 167(1) of the Act to institute the Request for Review, having failed to demonstrate that it had suffered or was at risk of suffering loss as a result of any alleged breach of a duty imposed on the Procuring Entity. In support of this position, Counsel relied on the case of ***James Oyondi t/a Betoyo Contractors & Another v. Elroba Enterprises Limited & 8 Others* [2019] eKLR (Mombasa Civil Appeal No. 131 of 2018)**.
67. In response to the preliminary objections, it was the Applicant's position that contrary to the assertions made by the opposing parties, the harm or injury suffered by the Applicant had been clearly disclosed, specifically that the disqualification from the tender process denied the Applicant an opportunity to contract for the subject services, thereby affecting its livelihood. Counsel further argued that Section 170 of the Act does not impose a requirement that such harm be both specifically pleaded and proved at the preliminary stage.
68. The effect of the above grounds, if substantiated, 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.
69. 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.

70. 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.
71. 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[sic] 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."

72. 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.

73. 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.***

74. The jurisdiction of this Board is established under Part XV –

Administrative Review of Procurement and Disposal Proceedings. Specifically, Section 167 of the Act state who can bring matters before the Board, and Section 170 states the parties to an application for review while Sections 172 and 173 outline the Board's powers in handling such proceedings.

75. Therefore, in light of the foregoing, the Board has no alternative but to examine its jurisdiction by determining whether the present application for review is incompetent for failure to add the successful bidders as parties in line with Section 170 of the Act and whether the Applicant has locus standi before the Board.

Whether the Request for Review is defective due to the Applicant's failure to join the successful tenderers as parties to the proceedings in line with Section 170 of the Act.

76. The Respondents in opposing the Request for Review argued that the Board lacked jurisdiction to entertain or adjudicate over the Request for Review by reason of Section 170 of the Act which provides that the parties to a Request for Review shall include the tenderer(s) notified as successful by the Procuring Entity. Counsel contended that the Applicant had failed to join the successful tenderers rendering the Request for Review defective for want of observance of mandatory provisions in Section 170 of the Act.
77. On the part of the Counsel for the Interested Party, he also filed a Notice of Preliminary Objection arguing that the application is incompetent as it violates Section 170 of the Act in addition to that the Applicant lacked

locus standi under Section 167(1) of the Act to institute the Request for Review, having failed to demonstrate that it had suffered or was at risk of suffering loss as a result of any alleged breach of a duty imposed on the Procuring Entity.

78. In response to the preliminary objections, Counsel argued that Section 170 of the Act does not impose a requirement that such harm be both specifically pleaded and proved at the preliminary stage.
79. The Applicant's Counsel further argued that the failure to join the successful tenderers in the Request for Review was not fatal to the proceedings. It was contended that Section 170 of the Act, do not mandatorily require the inclusion of successful bidders. Counsel argued that since successful bidders do not suffer harm from the Procuring Entity's actions, it would be illogical and ambiguous to insist on their joinder. In the Applicant's view, the law only envisages the inclusion of persons who stand to suffer prejudice from the outcome of the review.
80. Counsel for the Applicant also challenged the relevance and applicability of the authorities relied upon by the Respondents and the Interested Party, submitting that they were distinguishable and represented bad law. It was submitted that non-joinder or misjoinder of parties is not fatal to a proceeding and that courts and tribunals generally lean towards allowing amendments to cure such defects rather than striking out a claim, which would be an unnecessarily draconian step. The Applicant asserted that the Board had the discretion to allow joinder of parties at any stage under Section 170 of the Act.

81. The Board has considered all the authorities cited by the parties and observes that the determination of this issue hinges on the interpretation of Section 170(c) of the Act, which provides as follows:—

"Parties to review

The parties to a review shall be—

(a);

(b);

(c) the tenderer notified as successful by the procuring entity"

82. The Board understands the above section of the law to mean that it identifies the parties who must participate in a review before the Board. Specifically, paragraph (c) provides that the tenderer who was notified as successful by the procuring entity shall be a party to such a review. This provision ensures that the successful bidder is given an opportunity to be heard in proceedings that may affect the award made in their favour, thereby promoting fairness and adherence to the principles of natural justice in procurement disputes.

83. In ***Judicial Review Miscellaneous Application No. 356 & 362 of 2015 (Consolidated), Republic v. Public Procurement Administrative Review Board & 2 Others ex parte MIG International Limited & another*** [2016] eKLR (hereinafter "JR

Misc. Application No. 356 & 362 of 2015”), the High Court held that:—

"On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Public Procurement and Disposal Act (i.e. section 170 of the 2015 Act). It is however clear that the applicants (referring to the successful bidder) were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its calling to do justice by saving the proceedings in issue. See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.

In Boyes vs. Gathure [1969] EA 385, it was held by Sir Charles Newbold, P that:

"Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."

It is therefore my view that the mere fact that the interested party did not make the applicants [successful bidders] parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent."

84. The Board has considered the decision cited above and notes that the High Court addressed the applicant's failure to include the successful bidder as a party to the request for review. In its determination, the Court examined the circumstances surrounding the request for review and observed that the successful bidder had been notified by the Board of the existence of the review application. The successful bidder also received a notification letter from the Board's Secretariat informing it of the scheduled hearing date. Moreover, the successful bidder was present at the hearing but argued that the Board had not availed to it the pleadings annexed to the filed request for review.

85. The High Court further addressed the question of whether the successful bidder had sought an adjournment to enable it to study the pleadings filed by the applicant. The Court found that the successful bidder had indicated its readiness to proceed with the hearing and had not suffered any prejudice as a result of the applicant's failure to strictly comply with Section 96(c) of the repealed Public Procurement and Disposal Act, 2005 (now Section 170(c) of the Act). Accordingly, the High Court held that the request for review was not fatally defective due to the applicant's failure to join the successful bidder as a party to the proceedings, noting that the successful bidder had fully participated in the review process and had not suffered any prejudice.
86. Turning to the circumstances of the present case, the Board distinguishes the ***Peesam case***, cited by the Procuring Entity and the Interested Party, from the current Request for Review. In this instance, the successful bidders were notified of the hearing through the Board Secretary, with notifications issued on 16th May 2025 and 30th May 2025. Moreover, one of the successful bidders, the Interested Party in these proceedings, appeared before the Board through its Counsel on record and was afforded an opportunity to make submissions. In fact, the Interested Party filed a Notice of Preliminary Objection.
87. At the time of determining this matter, the Board notes that the successful bidders herein, save for the Interested Party, had not filed any pleadings before the Board. Unlike the successful bidder in the ***Peesam Case***, the successful bidders in the present matter were duly notified of the review proceedings on 16th May 2025 and again on 30th May 2025. One of them, the Interested Party, appeared before the

Board on 26th May 2025 and again on 5th June 2025 and even filed a Notice of Preliminary Objection. Accordingly, the circumstances of the present proceedings are distinguishable from those in the ***Peesam Case***.

88. Upon examining Section 170(c) of the Act, the Board observes that the mischief the provision seeks to address is the risk of a request for review being heard and determined in the absence of a successful bidder who was neither joined as a party nor notified of the proceedings. In such circumstances, the Board's decision may adversely affect the successful bidder without affording them an opportunity to be heard, thus offending the rules of natural justice.
89. Consequently, an Applicant's failure to either join a successful bidder or notify them of the hearing infringes on the successful bidder's right to a fair hearing, particularly where the bidder only becomes aware of the proceedings after a decision is made affecting the award in their favour. The right to a fair hearing is a fundamental principle of natural justice enshrined under Article 50 (1) of the Constitution, 2010, which provides as follows: —

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

90. The Board therefore finds that the successful bidders' right to a fair hearing has not been violated in the present proceedings, as they were

duly notified of the existence of the Request for Review. This is evidenced by the appearance of one of the successful bidders, the Interested Party, who appeared before the Board and filed a Notice of Preliminary Objection and was afforded an opportunity to make submissions. This participation confirms that the successful bidders were aware of the proceedings but nevertheless opted not to file any pleadings.

91. In arriving at the above findings, the Board has carefully balanced the Applicant's right of access to justice against the successful bidders' right to a fair hearing. The Board observes that the successful bidders were duly notified of the proceedings, and notably, one of them, the Interested Party, appeared before the Board. This is sufficient to demonstrate that their right to a fair hearing was taken into account. Accordingly, the Board finds that the Applicant's failure to formally join the successful bidders as parties to the Request for Review did not occasion them any prejudice.
92. The Board notes that Counsel for the Interested Party relied on the Court of Appeal decision in ***Keller Kustoms Kenya Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal E001 of 2025) [2025] KECA 243 (KLR) (17 February 2025)***. Upon considering the said decision, the Board finds it distinguishable from the present matter. In this case, the Board carefully balanced the right of access to justice against the right to a fair hearing and notes that the successful bidders were aware of the proceedings and were afforded an opportunity to file documents, a circumstance that was absent in the ***Keller Kustoms*** case.

93. In totality, the Board finds that the Applicant's failure to join the successful bidders to the present Request for Review does not render the application fatally defective. Accordingly, the Board now turns to consider the second ground of the Preliminary Objection, namely the issue of the Applicant's locus standi.

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

94. 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 present administrative proceedings. Counsel contended that the Applicant had neither pleaded nor demonstrated that it had suffered, or was likely to suffer, any loss or damage arising from an alleged breach of a duty imposed on the Procuring Entity under the Act.

95. In response, it was the Applicant's position that contrary to the assertions made by the Interested Party, the harm or injury suffered by the Applicant had been clearly disclosed, specifically that the disqualification from the tender process denied the Applicant an opportunity to contract for the subject services, thereby affecting its livelihood.

96. 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.

97. 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.
98. Superior courts have consistently addressed the requirement to plead loss or damage under Section 167(1) of the Act. This Board takes cognizance of the Court of Appeal's decision in ***James Ayodi t/a Betooyo Contractors & Another v Elroba Enterprises Ltd & Another* [2019] eKLR, Mombasa Civil Appeal No. 131 of 2018** (hereinafter "the *James Ayodi* case"). In that matter, the Court considered an appeal challenging the High Court's finding that the Review Board ought to have held the appellants lacked locus standi, having failed to demonstrate that they had suffered, or were likely to

suffer, loss. The Court of Appeal offered clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

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

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

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

99. In essence, the Court of Appeal held that for a candidate or tenderer to seek an administrative review before the Board, they must, at the very least, claim to have suffered or to be at risk of suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations 2020.

100. In the present Request for Review, the central issue for determination by this Board is whether the Applicant, through its pleadings, has at least asserted that it has suffered, or is at risk of suffering, loss or damage due to a breach of duty imposed on the Procuring Entity by the Act or the Public Procurement and Asset Disposal Regulations, 2020. This determination is pivotal in ascertaining whether the Applicant possesses the requisite locus standi to bring the matter before the Board.

101. 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.

102. 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.

103. 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.

104. During the hearing, the Board specifically inquired whether the Applicant had expressly pleaded the risk of suffering loss, to which Counsel responded in the negative, stating that such risk was implied. Counsel referred the Board to paragraphs 6, 8, 11, and 12, but did not clarify whether these paragraphs were drawn from the Request for Review or the Statement in Support.

105. The Board perused the Applicant's Request for Review and noted that the final paragraph in the Request for Review is paragraph 9, while the Statement in Support concludes at paragraph 14. Given that Counsel did not specify whether the referenced paragraphs (6, 8, 11, and 12) were from the Request for Review or the Statement in Support, the Board considered both documents holistically, with particular attention to the aforementioned paragraphs.

106. The Board examined the Statement in Support and observed that paragraphs 6, 8, 11, and 12 provide the following assertions:

6. The fact that the Respondents disqualified the Applicant's bid on the basis of its (the Applicant's) submitting audited financial accounts for only three years rather than five years of its operations is further proof that this deviation was never taken into account in the evaluation and comparison of the tenders, which was in violation of the procurement law.

7...

8. The disqualification was equally draconian considering that the Respondent had the option under S. 81(1) PPADA 2015 without altering the tender, but it failed to do so and therefore arrived at an erroneous decision that disqualified the Applicant's bid.

9...

10...

11. The Applicant avers that its bid had merit and it would have become evident had it been evaluated and compared by the Respondents and annexes hereto documents in support of this Application for Review.

12. The Applicant therefore craves this Board's intervention to ensure that its bid is evaluated and that the tender to be awarded to it.

107. The Board observes that the referenced paragraphs do not expressly or impliedly mention any risk of suffering loss. Moreover, upon review of the entire Request for Review, the Board finds that it similarly fails to plead whether expressly or by necessary implication that the Applicant risks suffering loss as a result of the Respondents' actions.

108. In view of the foregoing, the Board finds that the Applicant neither pleaded nor demonstrated that it has suffered or is likely to suffer any loss as a result of the Respondents' breach. Consequently, relying on

the reasoning in the Court of Appeal decision in ***James Ayodi***, the Board concludes that the Applicant lacks *locus standi*. Accordingly, the Board is divested of jurisdiction to determine this matter.

109. Therefore, the Board is satisfied that the Applicant has not met the requirements under Section 167(1) of the Act with respect to pleading loss or damage. Consequently, the Board finds that the Applicant lacks *locus standi*, which results in the Board lacking the requisite jurisdiction to hear and determine this matter.

110. Before concluding this decision, the Board notes that the Applicant filed an application on 10th June 2025. However, the fate of that application falls by the wayside, given that the Board lacks jurisdiction to hear and determine the substantive Request for Review.

111. In view of the Applicant having filed its application barely five (5) days before the expiry of the statutory twenty-one (21) day period within which the Board is required to render its decision, the Board takes this opportunity to remind parties that its proceedings are strictly time-bound. Parties cannot file applications at their convenience without regard to statutory timelines, as doing so may impede the Board's ability to issue a reasoned decision within the prescribed timeframe. Parties are therefore urged to plan their cases and litigation strategies in a timely and diligent manner, and to avoid filing applications after the conclusion of the hearing, particularly so close to the lapse of the Board's decision-making period.

What orders the Board should issue in the circumstance.

112. Having considered the parties' submissions and evaluated all the evidence presented, the Board finds that the Applicant's failure to join the successful bidders as parties to the Request for Review is not fatal so as to divest the Board of jurisdiction. This is because no prejudice was occasioned to the successful bidders, who were duly notified of the proceedings and afforded an opportunity to participate but elected not to file any documents.

113. The Board also finds that the Applicant lacks *locus standi* for failing to plead that it has suffered, or is at risk of suffering, any loss as a result of the alleged breach by the Respondents, in accordance with Section 167(1) of the Act. Consequently, the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review.

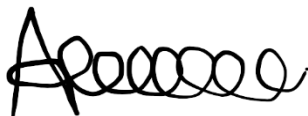
114. Consequently, the Request for Review dated 7th May 2025, concerning TENDER NO. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) TO STANDARDS SERVICES THE YEAR 2025-2028, is hereby struck out on the following specific grounds:

FINAL ORDERS

115. 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 7th May 2025:

1. **The Request for Review dated 7th May 2025 is hereby struck out;**
2. **The Accounting Officer of the Kenya Bureau of Standards is hereby directed to oversee the tender proceedings for TENDER NO. KEBS/PRE-Q/T006/2025/2028 – Pre-Qualifications for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services the Year 2025-2028 to their logical and lawful conclusion; and**
3. **Each party shall bear its own costs of the proceedings.**

Dated at NAIROBI, this 16th day of June 2025.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB