

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.56/2025 FILED ON 8TH MAY 2025

BETWEEN
BAY AREA COMPLIANCE LABORATORIES CORP.....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

TIC QUALITY CONTROL

Ms. Esther Munyua

Advocate, Kabau & Associates 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 Kabau & Associates Advocates, filed a Request for Review dated 8th May 2025. The application was accompanied by a Supporting Affidavit sworn on 7th May 2025. In the Request for Review, the Applicant sought the

following orders:

a) A declaration that the Procurement Entity breached the provisions of the Public Procurement and Disposal Act;

b) The decision of the Procuring Entity disqualifying the Applicant be annulled and set aside;

c) The Board be pleased to order to reinstate the Applicant in the tender process and evaluate its tender alongside other tenders that made it past the preliminary evaluation stage;

and in the alternative

d) The Honorable Board be pleased and hereby awards the Applicant the tender in respect to 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;

e) The costs of this Application be awarded to the Applicant in any event.

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 13th May 2025, the 1st and 2nd Respondents, through Ms. Teresa Gachagua, jointly a Memorandum of Response to the Request for Review, dated 12th 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 16th 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 2:00 p.m., via the provided link.
17. On 21st May 2025, the Applicant filed its Written Submissions, dated 21st May 2025.
18. On 22nd May 2025, 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.

19. 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.
20. 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.
21. 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.
22. On 3rd June 2025, the Respondents filed a Notice of Preliminary Objection, dated the same day.
23. On 5th June 2025, the Applicant filed its Grounds of Opposition dated 5th June 2025 together with a List of Authorities dated the same day.
24. When the Board convened for the hearing on 5th June 2025 at 10:00 a.m., the Applicant was represented by Ms. Munyua, 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. However, the Applicant's Counsel had not served its Written Submissions together with the Grounds of Opposition upon the Respondents' Counsel. The Respondents' Counsel indicated that she was ready to proceed despite the non-service. The Applicant's Counsel was directed to serve the said documents. The Board thereafter allocated time to Counsel to highlight their respective submissions.

PARTIES SUBMISSIONS

Respondents' Submissions on the Notice of Preliminary Objection

25. 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

26. Counsel for the Interested Party 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

27. Counsel for the Applicant submitted that justice ought to be administered without undue regard to procedural technicalities. She argued that all bidders were informed of the hearing date, having been served with the Hearing Notice by the Board via email on 30th May 2025. Counsel contended that the successful bidders would not suffer any prejudice and that their right to participate in the proceedings had not been infringed, as they were duly notified and therefore aware of the ongoing proceedings. In support of her submission, Counsel cited ***PPARB Application No. 36 of 2020 XRX Tech v. Teachers Service Commission, PPARB Application No. 116 of 2019 Bare Wings Company Limited v. Accounting Officer, Kenya Pipeline Company Limited, and PPARB Application No. 48 of 2021 Fahimyasın Company Limited v. The Accounting Officer, Kenya Urban Roads Authority.***

28. The Applicant's Counsel submitted that the Applicant's bid was fully compliant with both the tender document and the provisions of the Act. Counsel argued that the Procuring Entity failed to evaluate the bid in line with the Constitution, the Act, and the relevant Regulations, and that this failure rendered the disqualification of the Applicant unlawful.
29. The Applicant's Counsel further submitted that the reasons given by the Procuring Entity to justify the disqualification did not amount to sufficient grounds in law. Counsel contended that the Procuring Entity failed to apply Section 79 of the Act and Regulation 74 in assessing the responsiveness of the Applicant's bid and misinterpreted the bid documents presented.
30. It was submitted for the Applicant that the tender expressly required submission of a full set of audited accounts for five years from 2019 to demonstrate financial strength. Counsel confirmed that the Applicant submitted both the original Chinese versions and duly translated English versions of the audited accounts, which contained consistent, error-free data and accurate financial figures.
31. The Applicant's Counsel argued that the audit documents included key financial statements bearing the Applicant's name, such as the balance sheet, income statement, and others. It was pointed out that the translated documents clearly stated they belonged to "Bacl Group," the Applicant, and any contrary interpretation by the Procuring Entity was incorrect.

32. Counsel submitted that the reference to “Shenzhen Honour Co-create Trade Import and Export Co. Ltd” in the translated version of the audited accounts was a minor, honest error by the translation agency and did not warrant disqualification. It was argued that this typographical mistake did not change the substance of the bid and was curable under Section 79(2) of the Act.
33. The Applicant’s Counsel emphasized that the Applicant and the translation agency provided letters dated 29th April 2025 clarifying the error. It was submitted that these clarifications were not alterations to the bid but merely explanations of an inadvertent error, and that Section 79(2) of the Act required the Procuring Entity to treat the issue as a minor deviation.
34. It was further submitted that the Applicant fully completed all mandatory forms relating to information, historical contract non-performance, pending litigation, and financial performance in the formats provided, with no deviations. Counsel argued that the Procuring Entity erred in failing to evaluate these forms in accordance with the tender requirements.
35. On the issue of notarization, Counsel submitted that all documents requiring notarization were properly notarized, and that the Procuring Entity’s objections were baseless. It was noted that documents notarized by the Shenzhen Notary Office complied with Chinese law and were equivalent to notarization by a magistrate in Kenya, thereby negating the need for a separate notary public certificate.

36. The Applicant's Counsel concluded that the reasons advanced in the regret letter constituted minor informalities that could not affect the bid's responsiveness. Counsel urged that such minor deviations ought to have been addressed through the curative provisions under Section 79 of the Act.
37. In support of the submissions, Counsel relied on the case of ***Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR***, where the court held that minor deviations should not render a bid non-responsive if they do not affect price, quantity, quality, or delivery. Counsel argued that the deviations cited by the Procuring Entity did not meet the threshold of material deviations under Regulation 74(2) of the Regulations 2020.

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

38. Counsel submitted that Section 170 of the Act applies to all Requests for Review, irrespective of the procurement method employed. He 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.

39. The Respondents' Counsel submitted that the letter issued to the Applicant on 29th April 2025 fully complied with Section 87(3) of the Act, as it disclosed the successful tenderers and the reasons for the Applicant's unsuccessful bid.
40. The Respondents' Counsel submitted that the audited financial statements submitted by the Applicant were non-compliant with the tender requirements, as they consistently reflected the financial position of a different entity, Shenzhen Honor Co-create Trade Import and Export Co. Ltd., rather than the bidding entity, Bay Area Compliance Laboratory Corp.
41. The Respondents' Counsel submitted that the Applicant's explanation attributing the discrepancy in names to a translation error was unconvincing, especially given that the error appeared consistently over five years of audited statements, raising serious doubts about the credibility of the financial documentation.
42. The Respondents' Counsel submitted that the Evaluation Committee could not rely on the Chinese versions of the audited financial statements, as Clause 11.1 of the tender required all documents to be in English or accompanied by accurate English translations, with English translations prevailing for interpretation purposes.
43. The Respondents' Counsel submitted that due to the audit opinion referencing a different entity, the financial statements lacked verifiable proof of the Applicant's financial position, thus rendering them unreliable and failing to meet the requirements for demonstrating

financial strength.

44. The Respondents' Counsel submitted that the documents submitted by the Applicant on 29th April 2025 could not be accepted, as they were submitted after the 3rd March 2025 deadline, contrary to Section 76(2) of the Act which prohibits post-deadline alterations or additions to a tender.
45. The Respondents' Counsel submitted that the Applicant's bid failed to meet mandatory requirements in the tender, particularly the submission of duly filled and signed forms for Applicant Information, Historical Contract Non-Performance and Pending Litigation, and Financial Situation and Performance, which were filled but not signed. The Respondents' Counsel submitted that the High Court in ***Vickers Security Services Ltd & 2 others v PPARB & another [2025]*** upheld that a failure to sign mandatory forms rendered a bid non-responsive, and urged the Board to find similarly in this case.
46. The Respondents' Counsel submitted that the notarized documents in the Applicant's bid lacked proof of compliance with the notarization requirements set out in the tender, including failure to attach valid practicing certificates for the notaries used, particularly one Huang Weiqiang, whose notary license was not provided. The Respondents' Counsel submitted that the Applicant neither provided a valid explanation for the absence of the notary's practicing certificate nor sought any clarifications, which was a material omission under the tender requirements.

47. The Respondents' Counsel submitted that the Applicant's disqualification was not unfair or unreasonable, as it was a direct result of non-compliance with mandatory and eligibility requirements under Sections 79 and 80 of the PPADA, which mandate strict adherence to evaluation criteria set in the tender.
48. The Respondents' Counsel submitted that the High Court in ***Republic v PPARB & 2 others ex parte BABS Security Services Ltd*** [2018] held that responsiveness to mandatory requirements is the first hurdle in procurement and any deviation renders a bid non-responsive, warranting rejection without consideration of merit. The Respondents' Counsel submitted that the Court of Appeal in ***Sinopec International Petroleum Service Corporation v PPARB & 3 others*** [2024] affirmed that strict compliance with tender requirements is essential for fairness and equal treatment of bidders, justifying the Applicant's disqualification in the present case.

Interested Party's Rejoinder on the Notice of Preliminary Objection

49. 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.
50. Counsel submitted that Article 159(2)(d) of the Constitution cannot be

invoked to cure an application that contravenes the express provisions of Section 170 of the Act. In support of this position, Counsel referred the Board to ***PPARB Application No. 102 of 2024***.

Applicant's Rejoinder on the Request for Review

51. Counsel submitted that the Respondents erred in concluding that the audited accounts belonged to an entity other than the Applicant. She referred the Board to pages 1025 to 1030 of the Applicant's bid documents and contended that the statement suggesting that the audited accounts did not pertain to the Applicant ought not to have been read in isolation.
52. Counsel argued that the error made by the translation agency should not be attributed to the Applicant, especially given that the Applicant explained the same to the Respondents. She emphasized that the Applicant did not invite the Procuring Entity to rely on the Chinese version of the statement, but rather urged it to assess the accuracy of the financial data presented in English, which accurately reflected the Applicant's financial position.
53. Counsel submitted that all documents requiring notarization were properly notarized, and that the Procuring Entity's objections were baseless. She argued that the documents notarized by the Shenzhen Notary Office complied with Chinese law and were equivalent to notarization by a magistrate in Kenya, thereby negating the need for a separate notary public certificate.

Clarifications

54. The Board sought clarification from the Applicant's Counsel on whether the Applicant had met all the mandatory requirements, specifically regarding the disclosure of its litigation history, the completion of the requisite forms, and whether those forms had been duly signed. In response, Counsel affirmed that the Applicant had complied with all mandatory requirements and specifically asserted that there was no section in the tender documents that required the Applicant to append a signature.
55. The Board sought clarification from the Applicant's Counsel regarding the letters issued by the translator and the Applicant, specifically inquiring who prompted the issuance of the letters and what events followed after the Applicant received the regret letter. In response, Counsel stated that upon receiving the notification letter from the Procuring Entity, the Applicant contacted the translation agency to seek clarification. Upon receipt of the agency's response, the Applicant wrote to the Procuring Entity on 29th April 2025, attaching the clarification letter from the translation agency as well as another set of audited accounts, demonstrating that there was no discrepancy in the data submitted and that the error originated solely from the translation agency. Counsel further stated that the Procuring Entity did not respond to their letter until the Applicant communicated its intention to file a Request for Review, at which point the Procuring Entity reaffirmed its decision to disqualify the Applicant.
56. The Board sought clarification from the Respondents' Counsel regarding the basis for upholding the decision to disqualify the Applicant. In

response, Counsel stated that the Applicant's letter dated 29th April 2025 was submitted after the notification of intention to award had already been issued. Counsel contended that the said letter sought to introduce a new set of documents to replace those originally submitted with the tender. According to Counsel, this action contravenes the provisions of Section 76(1) of the Act, which prohibits any alteration or withdrawal of a tender after the tender submission deadline.

57. The Board sought clarification from the Respondents' Counsel as to why the Evaluation Committee did not consider the fact that the subject tender was an international tender, in which translation issues were foreseeable, and further, why the Applicant was penalized despite the translation agency expressly admitting the error. In response, Counsel submitted that the Evaluation Committee is mandated to assess tender documents strictly based on the face of the documents submitted. Counsel further stated that the Applicant's explanation and supporting documentation were provided after the Evaluation Committee had concluded its work and become *functus officio*.
58. The Board sought clarification from the Respondents' Counsel on whether the tender document allowed for appeals. In response, Counsel answered in the negative.
59. The Board sought clarification from the Respondents' Counsel regarding the requirement for notarization. In response, Counsel stated that bidders were required to attach a copy of a valid practising certificate for the Commissioner for Oaths/Notary Public for documents that were notarized or certified, and that the date of notarization was not to exceed one year prior to the bid submission date. Upon a follow-up

question by the Board on whether this was a mandatory requirement, Counsel answered in the affirmative.

60. The Board sought clarification from the Applicant's Counsel as to why no practising certificate was attached to the notarized documents. In response, Counsel stated that the mandatory requirements only required the documents to be notarized. He argued that the note referenced by the Respondents was merely an addition and did not form part of the mandatory requirements. Accordingly, the Applicant is challenging the interpretation that the said note imposed a mandatory obligation. Counsel further submitted that under Chinese law, documents notarized by recognized notarial offices are valid and duly recognized.
61. The Board sought clarification from the Respondents' Counsel as to whether there was any express indication in the tender document that the notes formed part of the mandatory requirements. In response, Counsel argued that the note appeared immediately below the list of mandatory requirements, and by its placement and context, it formed part and parcel of the said requirements.
62. The Board sought clarification from the Interested Party's Counsel on why he opted to file only a Preliminary Objection, despite the Board's directions issued on 26th May 2025 allowing any party to file documents in opposition to the Request for Review. In response, Counsel stated that the directions did not limit the nature or scope of documents that could be filed, and therefore, filing a Preliminary Objection was within the scope of the directions issued.

63. The Board sought clarification from the Interested Party's Counsel on how the Applicant's right to access justice could be balanced against the right of the successful tenderers to participate in the proceedings, given that the successful tenderers were notified of the proceedings and the Interested Party herein had actively participated. In response, Counsel stated that he was of the view that addressing the application on its merits would suggest that the Board had jurisdiction to entertain the matter as framed, which he did not concede.

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-issue:

- 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 outcome of the first issue:-

B. 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.

C. 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. In responding the preliminary objection, the Applicant's Counsel submitted that justice ought to be administered without undue regard to procedural technicalities. She argued that all bidders were informed of the hearing date, having been served with the Hearing Notice by the Board via email on 30th May 2025. Counsel contended that the successful bidders would not suffer any prejudice and that their right to participate in the proceedings had not been infringed, as they were duly notified and therefore aware of the ongoing proceedings.
67. The effect of the above issue, 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.

68. 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.
69. 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.
70. 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."

71. 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.

72. 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.

73. 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, 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.
74. 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.

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.

75. 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.

76. Counsel for the Applicant submitted that justice ought to be administered without undue regard to procedural technicalities. She argued that all bidders were informed of the hearing date, having been served with the Hearing Notice by the Board via email on 30th May 2025. Counsel contended that the successful bidders would not suffer any prejudice and that their right to participate in the proceedings had not been infringed, as they were duly notified and therefore aware of the ongoing proceedings.
77. 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"

78. 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.

79. 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."

80. 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.

81. 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.

82. Turning to the circumstances of the present case, the Board distinguishes the ***Peesam case***, cited by the Procuring Entity, 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.

83. At the time of determining this matter, the Board notes that the successful bidders herein 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 but opted not to file any pleadings. Accordingly, the circumstances of the present proceedings are distinguishable from those in the ***Peesam Case***.

84. 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.
85. 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."

86. 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 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.
87. 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.
88. 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.

89. 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. Consequently, the Board holds that it has jurisdiction to determine the Request for Review.

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.

90. The Applicant contended that the reasons given by the Procuring Entity to justify the disqualification did not amount to sufficient grounds in law. Counsel contended that the Procuring Entity failed to apply Section 79 of the Act and Regulation 74 in assessing the responsiveness of the Applicant's bid and misinterpreted the bid documents presented.
91. It was submitted for the Applicant that the tender expressly required submission of a full set of audited accounts for five years from 2019 to demonstrate financial strength. Counsel confirmed that the Applicant submitted both the original Chinese versions and duly translated English versions of the audited accounts, which contained consistent, error-free data and accurate financial figures.
92. Counsel submitted that the reference to "Shenzhen Honour Co-create Trade Import and Export Co. Ltd" in the translated version of the audited accounts was a minor, honest error by the translation agency and did not warrant disqualification. It was argued that this

typographical mistake did not change the substance of the bid and was curable under Section 79(2) of the Act.

93. The Applicant's Counsel emphasized that the Applicant and the translation agency provided letters dated 29th April 2025 clarifying the error. It was submitted that these clarifications were not alterations to the bid but merely explanations of an inadvertent error, and that Section 79(2) of the Act required the Procuring Entity to treat the issue as a minor deviation.
94. It was further submitted that the Applicant fully completed all mandatory forms relating to information, historical contract non-performance, pending litigation, and financial performance in the formats provided, with no deviations. Counsel argued that the Procuring Entity erred in failing to evaluate these forms in accordance with the tender requirements.
95. The Applicant's Counsel concluded that the reasons advanced in the regret letter constituted minor informalities that could not affect the bid's responsiveness. Counsel urged that such minor deviations ought to have been addressed through the curative provisions under Section 79 of the Act.
96. In response, the Respondents argued that the audited financial statements submitted by the Applicant were non-compliant with the tender requirements, as they consistently reflected the financial position of a different entity, Shenzhen Honor Co-create Trade Import and Export Co. Ltd., rather than the bidding entity, Bay Area Compliance

Laboratory Corp.

97. The Respondents' Counsel submitted that the Applicant's explanation attributing the discrepancy in names to a translation error was unconvincing, especially given that the error appeared consistently over five years of audited statements, raising serious doubts about the credibility of the financial documentation.
98. The Respondents' Counsel submitted that the Evaluation Committee could not rely on the Chinese versions of the audited financial statements, as Clause 11.1 of the tender required all documents to be in English or accompanied by accurate English translations, with English translations prevailing for interpretation purposes.
99. The Respondents' Counsel submitted that the documents submitted by the Applicant on 29th April 2025 could not be accepted, as they were submitted after the 3rd March 2025 deadline, contrary to Section 76(2) of the Act which prohibits post-deadline alterations or additions to a tender.
100. The Respondents' Counsel submitted that the Applicant's bid failed to meet mandatory requirements in the tender, particularly the submission of duly filled and signed forms for Applicant Information, Historical Contract Non-Performance and Pending Litigation, and Financial Situation and Performance, which were filled but not signed.
101. The Respondents' Counsel submitted that the notarized documents in the Applicant's bid lacked proof of compliance with the notarization

requirements set out in the tender, including failure to attach valid practicing certificates for the notaries used, particularly one Huang Weiqiang, whose notary license was not provided. The Respondents' Counsel submitted that the Applicant neither provided a valid explanation for the absence of the notary's practicing certificate nor sought any clarifications, which was a material omission under the tender requirements.

102. The Board understands the core of the dispute underlying the present Request for Review to be the evaluation of the Applicant's bid. However, embedded within this overarching issue are several sub-issues, which the Board shall address systematically in the course of its determination.

103. The starting point in determining this issue is Article 227 of the Constitution, which outlines the objective of public procurement—ensuring the provision of quality goods and services within a framework that upholds the principles enshrined therein. Article 227 states as follows:

227. Procurement of public goods and services

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

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

a...

b...

c...

d...

104. The above section of the law provides that, inter alia, when a State organ or public entity procures goods or services, the process must adhere to specific standards, one of which is competitive fairness. This fosters integrity, value for money, and public trust in the procurement system.

105. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 80 of the Act provides guidance on the evaluation and comparison of tenders by a Procuring Entity as follows:

80. Evaluation of Tender

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act shall evaluate and compare the responsive tenders other than tenders rejected.

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

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) The criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

106. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document. The Board interprets a fair evaluation system as one that ensures equal treatment of all tenders based on transparently defined criteria in the Tender Document.

107. Regarding the principal issue of whether the Applicant's bid complied with Section 80 of the Act and the evaluation criteria set out in the Tender Document, the Board will adopt a chronological approach in examining the events. This method will facilitate the determination of the various sub-issues arising at each stage of the tendering process.

108. The Board had the opportunity to examine the Applicant's Notification

of Intention to Award and notes that the reasons for the Applicant's disqualification can be categorized into three broad grounds: (i) failure to provide practising certificates for the various Notaries Public who notarized the Applicant's documents; (ii) failure to duly complete and sign certain forms that constituted part of the bid documents; and (iii) submission of audited financial statements belonging to a different entity.

109. With respect to the first sub-issue—whether the Applicant submitted practising certificates for the various Notaries Public who notarized its documents—the Applicant contended that all documents requiring notarization were duly notarized. The Applicant further argued that the Procuring Entity's objections were unfounded. It was the Applicant's position that documents notarized by the Shenzhen Notary Office complied with the applicable laws of the People's Republic of China and were equivalent, in legal effect, to notarization by a magistrate under Kenyan law. As such, the Applicant submitted that no separate practising certificates were necessary in the circumstances.

110. The Board notes that it is not in dispute that the Applicant did not submit practising certificates for the Notaries Public who notarized its documents. The Board further observes that this omission was among the reasons cited by the Procuring Entity as a ground for the Applicant's disqualification.

111. The Board observes that the subject tender was an international tender. As such, the participating bidders originate from different jurisdictions governed by legal frameworks distinct from those applicable in Kenya.

112. Turning to the present case, the Applicant contended that, under Chinese law, documents notarized by the Shenzhen Notary Office are deemed compliant with the applicable legal framework and are equivalent to notarization by a magistrate in Kenya. On this basis, the Applicant argued that there was no requirement to attach separate practising certificates for the Notaries Public. The question for determination, therefore, is whether the Applicant should be excused from submitting such certificates based on this justification.

113. In answering the above question, the Board has considered the justification provided by the Applicant and compared it with the Kenyan legal system. The Board notes that Magistrates in Kenya, while authorized to notarize documents, are generally not required to hold practising certificates. A narrow interpretation of the tender requirement would, therefore, imply that notarizations by Magistrates are defective for lack of practising certificates. The Board is of the view that such an interpretation is unduly restrictive and, therefore, incorrect.

114. The Board further notes that the Applicant's assertion, that documents notarized by the Shenzhen Notary Office complied with Chinese law and were equivalent to notarization by a Magistrate in Kenya, thereby negating the need for a separate notary public practising certificate, was not controverted. Given that this assertion mirrors the legal position in Kenya, where Magistrates are not required to produce practising certificates when notarizing documents, the Board is of the view that

the Procuring Entity ought to have taken into account the fact that the subject procurement was an international tender, and that legal requirements differ from one jurisdiction to another.

115. The Board therefore finds that the Respondents erred in disqualifying the Applicant on the basis of the foregoing reason. At the very least, the Respondents, through the Evaluation Committee, ought to have sought clarification from the Applicant pursuant to Section 81 of the Act, particularly in view of the fact that the subject procurement was an international tender. Accordingly, the Board finds that the Applicant satisfied the requirements under this evaluation criterion.

116. Turning to the next sub-issue regarding the alleged failure to sign certain forms that formed part of the tender document, specifically, the Applicant Information Form, the Historical Contract Non-Performance and Litigation Form, and the Financial Situation and Performance Form, the Applicant contended that it duly completed all the mandatory forms. Counsel further submitted that the said forms, as provided in the tender document, did not contain designated sections for signing.

117. On their part, Counsel for the Respondents submitted that the Applicant failed to complete the requisite forms as prescribed in the tender document and further failed to append the necessary signatures thereto.

118. In view of the diametrically opposed submissions by the parties, the Board examined the confidential documents submitted to it in order to

independently form its own opinion on the issue.

119. Upon perusing the Applicant's bid, the Board observed that while the relevant forms were duly filled, they were not signed.

120. In light of the foregoing findings, the Board examined the Tender Document and noted that Mandatory Requirements Nos. 12, 14, and 15 required the *Applicant Information Form*, *Historical Contract Non-Performance and Litigation Form*, and *Financial Situation and Performance Form* to be duly filled and signed.

121. The Board finds that the Applicant's failure to sign the aforementioned forms constitutes a violation of the mandatory requirements outlined above, thereby rendering the Applicant's bid non-responsive. Further, the Board notes that the Applicant's claim that there was no space provided for signing the forms is inconsequential. The Applicant had ample opportunity to seek clarification on the issue, which could have prompted the issuance of an addendum in accordance with Section 75 of the Act.

122. Accordingly, the Board finds that the Applicant's bid did not satisfy Mandatory Requirements Nos. 12, 14, and 15, and was therefore non-compliant with the mandatory criteria set out in the Tender Document.

123. Turning to the other sub-issue, namely, the disqualification based on the assertion that the audited accounts did not belong to the Applicant, the Board notes the Applicant's submission that it provided both the original Chinese versions and duly translated English versions of the

audited accounts. The Applicant contended that both versions contained consistent, error-free data and accurate financial figures. The Applicant further argued that the reference to a different entity appeared only in the English version and was a minor error attributable to the translation agency.

124. On their part, the Respondents, through Counsel, argued that the audited financial statements submitted by the Applicant were non-compliant with the tender requirements, as they consistently reflected the financial position of a different entity, Shenzhen Honor Co-create Trade Import and Export Co. Ltd. as opposed to the bidding entity, Bay Area Compliance Laboratory Corp.

125. The Respondents' Counsel submitted that the Applicant's explanation attributing the discrepancy in names to a translation error was unconvincing, especially given that the error appeared consistently over five years of audited statements, raising serious doubts about the credibility of the financial documentation.

126. The Respondents' Counsel submitted that the Evaluation Committee could not rely on the Chinese versions of the audited financial statements, as Clause 11.1 of the tender required all documents to be in English or accompanied by accurate English translations, with English translations prevailing for interpretation purposes.

127. The Board observes that it is not in dispute that the English-translated audited financial statements submitted by the Applicant referred to a different entity, Shenzhen Honor Co-create Trade Import and Export

Co. Ltd., instead of the bidding entity, Bay Area Compliance Laboratory Corp. It is on this basis that the Applicant's bid was disqualified.

128. The Board notes that Clause 11.1 of the Tender Document provided as follows:

11.1 The Application as well as all correspondence and documents relating to the prequalification exchanged by the Applicant and the Procuring Entity, shall be written in English Language. Supporting documents and printed literature that are part of the Application may be in another language, provided they are accompanied by an accurate translation of the relevant passages in the English language, in which case, for purposes of interpretation of the Application, the translation shall govern.

129. The Board understands the above clause to mean that all documents, applications, and correspondence submitted by an Applicant in relation to the prequalification process must be in English. However, if the Applicant includes any supporting documents or printed material in a different language, these must be accompanied by an accurate English translation of the relevant sections. In such cases, the English translation will take precedence and be used as the authoritative version for interpreting the content of the Application.

130. In view of the foregoing clause, the Applicant bore the obligation to ensure that all its documents were accurately translated into English, as the English version was expressly stated to prevail over any other

language, including the Chinese version.

131. In light of the foregoing, the Board now narrows the issue to whether the Respondents can be faulted for relying on the information presented by the Applicant in the English version of its audited financial statements. The Board finds that the Respondents cannot be faulted for doing so, as the Applicant had a duty to ensure the accuracy and completeness of the English translation, which was the binding version under the terms of the tender document.

132. Accordingly, the Board finds that, except for the issue relating to the practicing certificates and notarization, the Applicant's bid was evaluated in accordance with Section 80 of the Act and the requirements set out in the tender document.

133. In ***Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR***, the Court held as follows:

Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically

bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

...Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

134. The above decision underscores the importance of mandatory requirements as the initial threshold that bidders must meet. It also affirms the standard practice in public procurement, where bids are first assessed for compliance with responsiveness criteria before being subjected to further evaluation on aspects such as functionality, pricing, empowerment, or post-qualification. Bidders who fail to meet the responsiveness criteria are disqualified from the process, irrespective of the merits of their bids.

135. In view of the foregoing, the Board finds that the Applicant's submission, that the error in the audited financial statements was a minor deviation curable under Section 79(2) of the Act, cannot stand. This is because, under the statutory scheme, a bidder must first meet the threshold of responsiveness to all mandatory requirements as set out under Section 79(1) of the Act, before the consideration of curable minor deviations under Section 79(2) arises.

136. In light of the foregoing, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 9, which required bidders to submit audited financial statements for purposes of assessing their financial strength. The audited financial statements submitted by the Applicant were, by the Applicant's own Counsel's admission, those of a different entity, Shenzhen Honor Co-create Trade Import and Export Co. Ltd., and not those of the Applicant, Bay Area Compliance Laboratory Corp.

137. In summary, the Board finds that, save for the issue relating to notarization and the submission of practicing certificates, the Applicant's bid was evaluated in accordance with Section 80 of the Act and the provisions of the Tender Document.

What orders the Board should issue in the circumstance.

138. 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 does not render the application fatally defective so as to divest the Board of

jurisdiction. This is because the successful bidders were duly notified of the proceedings and afforded an opportunity to participate but chose not to file any documents, thereby suffering no prejudice.

139. The Board also finds that save for the issue of notarization and submission of practicing certificates, the Board finds that the Applicant's bid was evaluated in accordance with Section 80 of the Act and the provisions of the Tender Document, and was lawfully disqualified for failing to meet Mandatory Requirements Nos. 9, 12, 14, and 15.

140. 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 dismissed.

FINAL ORDERS

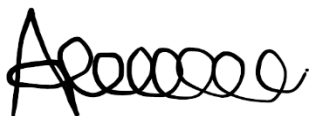
141. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 8th May 2025:

- 1. The Request for Review dated 8th May 2025 is hereby dismissed;**
- 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.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB