

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 60/2025 OF 16TH MAY 2025

BETWEEN

SUPREME FORTITUDE LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER,
COUNTY ASSEMBLY OF KERICHO 1ST RESPONDENT
COUNTY ASSEMBLY OF KERICHO 2ND RESPONDENT
SHANGHAI ENGINEERING CO. (K)
LTD 1ST INTERESTED PARTY
PASSIVE ENGINEERING
LIMITED 2ND INTERESTED PARTY
DUAL DELUXED DEALING
LIMITED 3RD INTERESTED PARTY**

Review against the decision of the Accounting Officer, County Assembly of Kericho in relation to Tender No. KCA/T/003/2024-2025 for Proposed Construction of Kericho County Assembly Chambers and Office Block and subsequent decision to advertise Tender No. KCA/T/004/2024-2025 for Proposed Construction of the County Assembly of Kericho and Office Block (Re-tender).



BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCArb. & IP -Chairperson
2. Eng. Lilian Ogombo -Member
3. Mr. Robert Chelagat -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding brief for Board Secretary
2. Ms. Dokatu Godana - Secretariat
3. Ms. Christabel Kaunda - Secretariat
4. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

SUPREME FORTITUDE LIMITED

- | | |
|------------------------|---------------------------------------|
| 1.Mr. Geoffrey Nyaanga | Advocate, Nyaanga & Mugisha Advocates |
| 2. Mr. Kimutai Rotich | Advocate, Nyaanga & Mugisha Advocates |

RESPONDENTS

THE ACCOUNTING OFFICER, COUNTY ASSEMBLY OF KERICHO, COUNTY ASSEMBLY OF KERICHO

- | | |
|--------------------|--|
| 1. Mr. Kibet Kirui | Advocate, Victor Kirui & Company Advocates |
| 2. Mr. Peter Kibet | Advocate, Victor Kirui & Company Advocates |



BACKGROUND OF THE DECISION

The Tendering Process

1. The County Assembly of Kericho, the Procuring Entity and 2nd Respondent herein invited eligible tenderers to submit sealed tenders in response to Tender No. KCA/T/003/2024-2025 for Proposed Construction of Kericho County Assembly Chambers and Office Block (hereinafter referred to as the "1st Tender") using an open national method of tendering and by way of an advertisement in the Standard Newspaper on 2nd April, 2025, on the County Assembly of Kericho website www.kerichoassembly.go.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the 1st Tender issued to tenderers by the Procuring Entity was available for download.
2. The subject tender's submission deadline was on 15th April 2025 at 10.00 a.m.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a total of four (4) tenders were submitted in response to the 1st Tender. The four



(4) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Shanghai Engineering Company (K) Limited
2.	Passive Engineering Limited
3.	Dual Deluxe Dealing Limited
4.	Supreme Fortitude Limited

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the four (4) tenders as captured in the Tender Evaluation Report for the 1st Tender dated 29th April 2025 in the following stages:
- i Preliminary Evaluation;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Evaluation

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Stage 1. Preliminary Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document.



Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

6. At the end of evaluation at this stage, three (3) tenders were determined non-responsive, while one (1) tender, being the Applicant's tender, was determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

7. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Stage 2: Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to attain a pass mark of 70 Marks so as to progress for Financial Evaluation.
8. At the end of evaluation at this stage, the Applicant's tender was determined responsive and proceeded to Financial Evaluation.

Due Diligence

9. The Evaluation Committee carried out due diligence on the Applicant by visiting three (3) of its submitted projects as captured under Clause 4.0 of the Evaluation Report and the Due Diligence Report dated 29th April 2025.



Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Stage 3 - Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document.
11. At the end of evaluation at this stage, the Evaluation Committee found that the Applicant's tender was the lowest responsive bid at Kshs. 499,194,012.00 which was above the Procuring Entity's budgetary cap of Kshs. 485,000,000. It further found that (a) the Applicant's bid under the Electricals (CCTV and Access Control Section) had an error that if corrected would be a major deviation on the substance of the tender in view of Section 79 (2) of the Act read with Regulation 75(1) & (2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), and (b) there were similarities between the total amounts in the Applicant's tender on the Bills of Quantities of Kshs. 506,062,811.70 with the approved estimates of Kshs. 506,127,799.50.

Evaluation Committee's Recommendation

12. The Evaluation Committee determined that the Applicant's tender was non-responsive to the terms and conditions of the 1st Tender at the Financial Evaluation stage.



Professional Opinion

13. In a Professional Opinion dated 5th May 2025 (hereinafter referred to as "the Professional Opinion"), the Head of Supply Chain, Mr. Raymond Koroï reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended for termination of the 1st Tender and immediate re-advertisement.
14. The Professional Opinion was thereafter approved by Mr. Martin Epus on the same day of 5th May 2025.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the 1st Tender vide letters dated 5th May 2025 as seen from copies of letters submitted among the Confidential Documents to the Board.

Re-tendering

16. Vide Tender Notice dated 9th May 2025 placed on the Standard Newspaper, on the Procuring Entity's website www.kerichoassembly.go.ke and on the Public Procurement Information Portal www.tenders.go.ke, the Respondents invited qualified and interested bidders to submit sealed bid in response to Tender No. KCA/T/004/2024-2025 for Proposed Construction of the County Assembly of Kericho and Office Block (Re-tender) (hereinafter referred to as "the 2nd Tender").



REQUEST FOR REVIEW NO. 60 OF 2025

17. On 16th May 2025, Supreme Fortitude Limited, the Applicant herein, filed a Request for Review dated 16th May 2025 together with a Supporting Affidavit sworn by Winnie Moraa Nyaundi, its Chief Executive Officer (hereinafter referred to as the 'instant Request for Review') through Nyaanga & Mugisha Advocates seeking the following orders from the Board:

a) The 1st and 2nd Respondents' decision to terminate the procurement proceedings in relation to Tender No. KCA/003/2024/2025 for the Proposed Construction of Kericho County Assembly Chambers and Office Block contained in the letter of notification dated 5th May, 2025 be and is hereby nullified, cancelled and/or set aside;

b) The 1st and 2nd Respondents' decisions to the effect that the Applicant's bid in Tender No. KCA/003/2024/2025 for the Proposed Construction of Kericho County Assembly Chambers and Office Block was terminated via the letter of notification dated 5th May, 2025 be and is hereby nullified, cancelled and/or set aside;

c) The 1st and 2nd Respondents' decision to re-advertise the same tender vide Tender No. KCA/004/2024/2025 for the Proposed Construction of Kericho County Assembly Chambers and Office Block contained in the tender



advertisement notice published on its website <https://kerichoassembly.go.ke/tenders> and Standard Newspaper of 9th May, 2025 be and is hereby nullified, cancelled and/or set aside.;

d) The Board be pleased to review all records of the procurement processes relating to the Tender No. KCA/003/2024/2025 for the Proposed Construction of Kericho County Assembly Chambers and Office Block and be pleased to order the 1st and 2nd Respondents to comply with the law by proceeding with the tendering process in to its logical conclusion and to award the tender to the lowest evaluated bidder as provided in the tender document;

e) In the alternative to (d) above, the 1st and 2nd Respondents be ordered to award Tender No. KCA/003/2024/2025 for the Proposed Construction of Kericho County Assembly Chambers and Office Block to the Applicant in case the Applicant was/is determined and/or found to be the lowest evaluated bidder;

f) The 1st and 2nd Respondents be and is hereby ordered to pay the costs of and incidental to these proceedings; and

g) Such other or further relief or reliefs as this board shall deem just and expedient.



18. In a Notification of Appeal and a letter dated 16th May 2025, Mr. James Kilaka, the Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings, while forwarding to the said Respondents 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 matter within five (5) days from 16th May 2025.
19. *Vide* Tender Notice dated 20th May 2025 placed on the Standard Newspaper, the Procuring Entity cancelled advertisement of the 2nd Tender.
20. On 22nd May 2025, the Respondents jointly filed through Victor Kirui & Company Advocates a Memorandum of Appearance dated 20th May 2025, a Notice of Preliminary Objection dated 20th May 2025 and a Statement of Response/ Memorandum of Response sworn on 20th May 2025 by Martin Epus. The Respondents later on submitted confidential documents concerning the matter pursuant to Section 67(3)(e) of the Act on 23rd May 2025.



21. *Vide* a letter dated 26th May 2025, the Acting Board Secretary notified all tenderers in the 1st Tenders via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the 1st Tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
22. *Vide* a Hearing Notice dated 23rd May 2025, the Acting Board Secretary, notified parties and all tenderers in the 1st Tender of an online hearing of the Request for Review slated for 28th May 2025 at 02.00 p.m., through the link availed in the said Hearing Notice.
23. On 28th May 2025, the Applicant filed through its advocates a Reply to Memorandum of Response/Statement of Response dated 28th May 2025, an Applicant's Supplementary Bundle of Documents dated 28th May 2025, Applicant's Submissions on Preliminary Objection dated 28th May 2025, Applicant's Submissions on the Request for Review dated 28th May 2025, and Applicant's List & Bundle of Authorities dated 28th May 2025.
24. On the same day of 28th May 2025, the Respondents filed through their advocate Written Submissions dated 27th May 2025 and a List & Bundle of Authorities dated 27th May 2025.



25. When the matter came up for hearing on 28th May 2025 at 2.00 p.m., the Board proceeded to read out respective pleadings filed by parties in the matter. Having taken note of the Respondents' Preliminary Objection, the Board allocated time for each party to proceed and highlight its case and directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of Regulations 2020 which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

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

PARTIES' SUBMISSIONS

Applicant's case

27. In its submissions, the Applicant placed reliance on its pleadings filed before the Board.

28. With regard to the Respondents' Preliminary Objection, the Applicant submitted that ordinarily, the Board is divested of jurisdiction pursuant to Section 167(4) of the Act where a tender is terminated under Section 63 of the Act.

29. The Applicant contends that in the present matter, the Respondents have not only admitted that the 1st Tender was terminated under



section 63 (1) (b) of the Act, but also raised other factual issues touching on the alleged material errors or discrepancies in the Applicant's financial bid.

30. While relying on the holding in *Mukisa Biscuit Manufacturing vs West End Distributors*, Mr. Rotich submitted that a preliminary objection raised beyond issues of law and touching on factual matters is invalid.

31. Counsel pointed out that the reason provided for termination of the subject tender was contrary to the law and indicated that the Applicant was only notified that the amount quoted in its tender was higher than the budget estimate. He further pointed out that whereas the amount quoted by the Applicant was Kshs. 499,194,012.00, there was no indication in the Tender Document of what the budget estimate was for the subject tender.

32. Counsel submitted that whereas the budget estimate considered by the 2nd Respondent's Evaluation Committee was Kshs. 485,000,000. from the Respondents' pleadings, the approved budget estimate was indicated to be Kshs. 500,000,000 based on a recommendation made by the Standing Committee on Finance and Budget. He referred the Board to paragraph 8 of the Respondents' Memorandum of Response and pointed out that the Principal Secretary, State Department for Public Works had indicated the amount of Kshs. 506,127,800 to be the estimated cost of works.



33. Counsel submitted that upon service of documents by the Respondents, the Applicant noted that the Procuring Entity had erroneously adjusted the Applicant's tender sum to Kshs. 506,000,000 contrary to Section 82 of the Act.
34. Counsel urged the Board to note that the Evaluation Report had not been signed by all committee members contrary to the provisions of Section 80(7) of the Act, which requires the said report to be signed by all members of the evaluation committee, and as such, it was invalid and its contents ought to be disregarded.
35. As regards due diligence, Mr. Rotich submitted that due diligence having been conducted on the Applicant pursuant to Section 83 of the Act created a legitimate expectation that the Applicant was the successful bidder in the 1st Tender. He further submitted that the actions of the Procuring Entity in terminating the 1st Tender after conducting due diligence stood in the face of Articles 10 and 227 of the Constitution as well as Section 3 of the Act.
36. Mr. Rotich submitted that in total disregard of the tendering procedures as provided in law, the Respondents illegally re-advertised the 1st Tender cancelled on 5th May 2025 as the 2nd Tender on 9th May 2025 and thereafter cancelled the re-advertised tender on 20th May 2025 following service of the instant Request for Review and Notification of Appeal suspending the procurement proceedings pursuant to Section 168 of the Act.



37. He urged the Board to allow the instant Request for Review as prayed.

Respondents' case

38. In their submissions, the Respondents placed reliance on the pleadings and confidential documents submitted to the Board.

39. Mr. Kibet referred the Board to Section 63(1) of the Act and indicated that an accounting officer of a procuring entity can at any time prior to award of tender terminate the procurement process on grounds stipulated therein. He further indicated that no award had been issued with regard to the 1st Tender and the 1st Respondent was justified in terminating the procurement proceedings in view of the Evaluation Report and Professional Opinion forwarded to him.

40. He submitted that the budget estimate for the 1st Tender was set at Kshs. 500,000,000.00 but there being a contractor who had initially been awarded a previous tender that was in relation to the same works at Kshs. 15,000,000, the Procuring Entity was limited to spend a maximum of Kshs. 485,000,000 in the 1st Tender as captured in the Professional Opinion noting that the budget ought not to exceed Kshs. 500,000,000.

41. While referring to the Senate Standing Committee's Report, Mr. Kibet submitted that Senate had recommended that in instances where the works procured upwards of Kshs. 800,000,000 the county assemblies



were to required to undertake negotiations so as to ensure that these works did not exceed the limit set at Kshs. 500,000,000.

42. In countering the argument by Mr. Rotich referring to the letter by the Principal Secretary, State Department for Public Works which indicated a budget estimate of Kshs. 506,000,000, Mr. Kibet submitted that the Principal Secretary had stated that since the 1st Tender was an open tender, there was an expectation that the same would be carried out at a much lower price.
43. As to the issue of adjustments of the Applicant's tender sum, counsel submitted that the Evaluation Committee had noted arithmetic errors while carrying out Financial Evaluation. He referred the Board to page 978 of the Applicant's tender and argued that the calculation of the quantities listed together with the listed prices did not amount to the bottom-line figure stated therein. By way of example, he pointed out that where the quantity of items was listed as 200 at a unit price of Kshs. 80,000, the correct total amount is Kshs. 16,000,000 and not the amount of Kshs. 80,000/- indicated by the Applicant.
44. Counsel further argued that based on Regulation 74(2) of Regulations 2020 which is subject to Section 79 of the Act, any errors arising from a miscalculation of a unit price, quantity, sub-total or total bid ought to be considered a major deviation affecting the substance of a tender and would lead to disqualification of the same.



45. On the issue of notification, he pointed out that the letter of notification issued to the Applicant had clearly set out the reason for termination being that its quoted tender price was above the budget estimate.

46. He submitted that it was incorrect for the Applicant to develop legitimate expectation in view of the holding in *Republic vs Kenya Revenue Authority ex parte Shake Distributors* and the fact that its tender was disqualified at the Financial Evaluation stage.

47. Mr. Kibet indicated that as a show of good faith and submission to authority, the Procuring Entity had cancelled the 2nd Tender and urged the Board to dismiss the instant Request for Review with costs.

APPLICANTS REJOINDER

48. In rejoinder, Mr. Rotich submitted that Section 80 (2) of the Act mandates the Procuring Entity to evaluate and compare bids using the procedure and criteria set out in the Tender Document to the exclusion of any extrinsic evidence. He indicated that there was no indication of the budget ceiling set at Kshs. 485,000,000 nor was there any indication of a contract of Kshs. 15,000,000 having been awarded as to have an implication on the 1st Tender.

49. He urged the Board to make a differentiation between disqualification of a tender pursuant to Section 79 of the Act as against termination of a procurement proceedings as provided under Section 63 of the Act.



50. He reiterated that the Applicant's legitimate expectation is founded as due diligence was carried out pursuant to Section 83 of the Act.

51. Counsel submitted that Section 82 of the Act was clear on the tender sum as read out during tender opening being final and binding and pointed out that Regulation 74 cannot supersede the provisions under Section 82 of the Act.

52. On his part, Mr. Nyaanga questioned why the Respondents failed to make an attempt at negotiations with the Applicant in view of the expense incurred with re-advertisement of the 1st Tender.

53. He urged the Board to consider the procurement process in the 1st Tender as active and to award the 1st Tender to the Applicant.

CLARIFICATIONS

54. As to whether the issue of the budget estimates of Kshs. 485,000,000 and award of the Kshs. 15,000,000 was disclosed to bidders at the tendering stage, Mr. Kibet indicated that bidders' representatives had been informed of the same during the site visit and that this was captured in either the Tender Opening Minutes or Professional Opinion.

55. Asked if there were two bill of quantities with respect to the works in the 1st Tender in view of the award of Kshs. 15,000,000 alluded to, Mr. Kibet submitted that there was only one bill of quantities and that the previous works had been terminated and payment made to the concerned contractor. He further submitted that the Tender Document



as floated was complete irrespective of a portion of the works having been undertaken.

56. As to whether the Procuring Entity considered to carry out negotiations with the Applicant in view of the marginal difference in process and provisions under Section 132 (2) of the Act, counsel submitted that the operative word under the Act being 'may' meant that negotiations was an option if there were no outstanding issues. He pointed out that in view of the arithmetic errors, the Procuring Entity was obligated to comply with Regulation 74 of Regulations 2020 since the errors constituted a major deviation and went ahead to confirm that in terms of hierarchy, the Act supersedes Regulations 2020.

57. On his part, Mr. Nyaanga pointed out that provisions under Section 82 of the Act were to the detriment of a bidder who underquotes and is bound to carry out the works within the stipulated limit and that it was not up to the Procuring Entity to determine what advantage a bidder would get. He further pointed out that the Form of Tender is absolute, cannot be changed and that it is what is required to be used instead of the engineer's estimate unless the same was really detrimental.

58. He further submitted that in any event, the provisions of Section 132 of the Act allowed for negotiations once a suitable bidder had been determined thus there was no difficulty in entering into negotiations thus ultimately; Regulations existed to support the Act and not overrun it.



59. The Board sought to know if an approved budget for the 1st Tender had been submitted to the Board and specifically, an extract of the budget estimate of Kshs. 485,000,000. In response, Mr. Kibet indicated that this information was indicated by the Head of Procurement in the Professional Opinion where the approved budget was indicated as Kshs. 485,000,000. He reiterated that the budget estimate for the 1st Tender was Kshs. 485,000,000.

60. Asked if there was a distinction between Section 63(1)(b) of the Act providing for Inadequate Budgetary Provision and Section 63(1) (f) of the Act on all evaluated tenders being non-responsive in view of the circumstances in the instant matter, Mr. Kibet submitted that the two provisions were to be considered holistically and contextually noting that the Applicant's tender fell on account of inadequate budgetary provision which left the Procuring Entity with no responsive bid.

61. Asked if a report on termination of the procurement proceedings in the 1st Tender had been filed with the Director General, Public Procurement Regulatory Authority (PPRA) and if there was any indication of the same in the confidential file, Mr. Kibet indicated that the report had been made and uploaded on the PPIP portal on 5th May 2025.

62. The Board sought counsel's views on how it should treat the Evaluation Report that hadn't been signed by all the members of the Evaluation



Committee in view of the provisions of Section 80(7) of the Act given that the same was stipulated in mandatory terms.

63. Mr. Kibet in response indicated that the two (2) members who had not signed the same were professional Ministry of Public Works officers who had been seconded to the Evaluation Committee and pointed out that the said report had been circulated to all members for their consideration and signing but that the two members seemed to have declined to sign on the basis that they had disagreed with the findings therein.

64. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 16th May 2025 was due to expire on 6th June 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

65. The Board has considered all documents, submissions, and pleadings together with confidential documents submitted to it pursuant to section 67 (3)(e) of the Act and finds the following issues call for determination:

A handwritten signature in black ink, consisting of a stylized 'R' followed by a long horizontal stroke and a vertical stroke crossing it.

A. Whether the 1st Tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act thus ousting the jurisdiction of the Board.

Depending on the outcome of Issue A

B. Whether the Procuring Entity erred in carrying out due diligence on the Applicant's tender submitted in the 1st Tender contrary to Section 83 of the Act.

C. Whether the Evaluation Report in the 1st Tender was prepared in accordance with Section 80(7) of the Act.

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

Whether the 1st Tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act thus ousting the jurisdiction of the Board

66. The Board notes that termination of procurement proceedings is governed by Section 63 of the Act. When a termination of procurement and asset disposal proceedings meets the threshold of Section 63 of the Act, the jurisdiction of this Board is ousted by virtue of Section 167 (4) (b) of the Act which provides as follows: -



"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act.

67. Vide a Notice of Preliminary Objection dated 20th May 2025, the Respondents objected to the hearing and determination of the instant Request for Review by the Board on the ground that it lacks jurisdiction by dint of Section 167(4) of the Act. It is the Respondents case that the procurement proceedings in the 1st Tender were lawfully terminated in line with the provisions of section 63 (1) (b) and (e) of the Act due to material governance issues, inconsistencies and budgetary limitations. On its part, the Applicant contends that the purported termination of the procurement proceedings in the 1st Tender is untenable and contrary to the Act and Constitution.

68. From the foregoing, this Board is invited to interrogate into the circumstances under which the procurement proceedings in the subject tender were terminated, a subject that raises a jurisdictional question on the appropriateness of the Board to hear and determine the instant Request for Review.



69. It is an established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
70. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."



In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to



review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

71. The High Court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

72. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."



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

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...



The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

73. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 53 of 2025; Blits Proof Group Limited v The Accounting Officer Kenya Airports Authority & Another; PPARB Application No. 29 of 2023 Craft Silicon Limited v Accounting Officer Kilifi County Government & another; PPARB Application No. 5 of 2024 Seluk Investments Limited v The Accounting Officer/Chief Officer Department of Urban Development County Government of Machakos & Another; and PPARB Application No. 27 of 2024 Sajucy Company Limited v Kenya Reinsurance Corporation Ltd**



& Another wherein the Board took the position that its jurisdiction can only be ousted if termination of procurement proceedings was done in accordance with Section 63 of the Act.

74. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

75. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;



- (c) no tender was received;*
 - (d) there is evidence that prices of the bids are above market prices;*
 - (e) material governance issues have been detected;*
 - (f) all evaluated tenders are non-responsive;*
 - (g) force majeure;*
 - (h) civil commotion, hostilities or an act of war; or*
 - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.*
- (3) A report under subsection (2) shall include the reasons for the termination.*
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."*

76. Further, Regulation 48 of Regulations 2020 provides:

"(1) Prior to the cancellation or termination of a procurement and asset disposal proceedings under section 63 of the Act, an accounting officer may take into



account the recommendations of the head of procurement function.

(2) The report required under section 63(2) and (3) of the Act shall be made in accordance with the guidelines issued by the Authority.”

77. In essence, whether there are valid substantive reasons for the termination of procurement proceedings prior to award of a tender is a question of fact that must be made out by sufficient evidence, the onus whereof is on the procuring entity which must show that any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender to wit; an accounting officer is required to give PPRA a written report on the termination with reasons and notify all bidders in writing of the termination with reasons within fourteen (14) days of termination.

78. In a nutshell, for termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

As to the substantive requirements for termination of procurement proceedings in the 1st Tender;



79. *Vide* letter dated 5th May 2025, the Applicant was notified that the procurement process in the 1st Tender had been terminated. The said letter reads in part as follows:

"....."

Your Tender Ref: KCA/T/003/2024-2025 in regard to the proposed construction of the Kericho county assembly chambers and office block was evaluated.

This is to inform you that your tender was terminated because of the following reasons:

- The amount quoted was above the budgeted estimates***

We thank you for participating and the tender shall be re-advertised again

....."

80. According to the above notification letter, the Applicant was notified that its tender was terminated because the amount quoted was above the budgeted estimates. By use of the word 'terminated', we opine that the Respondents communication was not clear since the law does not envision an accounting officer of a procuring entity terminating a bidder's tender. Nevertheless, the implication of termination of the procurement proceedings in the 1st Tender was clear to the Applicant as it was informed that the tender would be re-advertised and it learnt of the re-advertisement which it challenges on 9th May 2025.



81. The Board must now determine whether the reasons advanced by the Respondents to justify termination of procurement proceedings in the 1st Tender are in line with Section 63 of the Act.

82. The Respondents at paragraph 34 of their Statement of Response/Memorandum of Response sworn on 20th May 2025 depone that the procurement proceedings in the 1st Tender were terminated under Section 63(1)(b) and (e) of the Act due to material governance issues, inconsistencies and budgetary limits.

83. In contrast, from an Internal Memo dated 5th May 2025 addressed to the 1st Respondent by the Head of Supply Chain Mr. Raymond Koros, he states that the 1st Tender is non-responsive while recommending for termination of the same.

84. It therefore follows that there are three reasons adduced from the Respondents' pleadings and confidential documents leading to termination of the procurement proceedings in the 1st Tender being:

- a) Inadequate budgetary provision
- b) Material Governance Issues
- c) Non-Responsiveness of all evaluated tenders

85. The Board shall now interrogate the above circumstances under which the procurement proceedings in the 1st Tender were terminated.



Inadequate budgetary provision

86. We have heard the Respondents submit that the approved budget for the 1st Tender was Kshs. 485,000,000.00 and that the Applicant's tender sum of Kshs. 499,194,012.00 was above the approved budget, though its tender had arithmetic errors totaling to Kshs. 26,000,000 above its quoted price which taken into consideration would total to Kshs. 525,194,011.
87. It is not in contest that the Applicant was notified that it was not awarded the 1st Tender since its quoted tender sum was above the budgeted estimates.
88. Section 63(1)(b) of the Act recognizes inadequate budgetary provision as a ground an accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, this Board has always held that for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the ground for termination they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist. In the present case, the Respondents shoulder the burden of leading evidence to demonstrate the inadequate budgetary provision.
89. Turning to the circumstances in the instant matter, we note that in an attempt to demonstrate the inadequate budgetary provision for the 1st Tender, the Respondents pointed the Board to a letter dated 28th March



2025 addressed to the 1st Respondent by QS N.M. Mutua for the Principal Secretary, Ministry of Lands, Public Works, Housing and Urban Development – State Department of Public works which was part of the confidential documents submitted to the Board and also produced at paragraph 8 of the Respondents Statement of Response/Memorandum of Response and marked as “ME 2”. This letter while forwarding a copy of the tender document for the procurement process in the 1st Tender indicated that the total estimated cost was at Kshs. 506,127,800.00 though it was expected that submitted bids would be below this estimate, being an open tender.

90. Further, the Respondents at paragraph 21 of their Statement of Response/Memorandum of Response also pointed the Board to a copy of a Report dated November 2018 by the Standing Committee on Finance and Budget on County Governments’ Infrastructure Projects Comprising County Executive Headquarters Offices, Assembly Chambers & Offices and County State Officer’s Residences marked as “ME 5 (a)” and a copy of a letter dated 27th August 2018 from the Principal Secretary Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works State Department for Public Works both speaking to the recommended amount for construction of County Assembly Chambers and MCAs offices set at Kshs. 500,000,000.00

91. It is therefore clear to the Board that at the point of floating the 1st Tender on 2nd April 2025, the Respondents were well aware of the cost implication of the envisioned project given past directives on the same.

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The Public Finance Management Act No. 18 of 2012 provides for procurement by County Government entities and stipulates under Section 121 that:

"For the purposes of this Act, all procurement of goods and services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act"

92. It is imperative to note that Section 44 and 53 of the Act provides for funding of tenders as follows:

44 Responsibilities of the accounting officer

(1) An Accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall –

(a) ensure that procurement of goods, works and services of the public entity are within approved budget of that entity;

(b) constitute all procurement and asset disposal committees within a procuring entity in accordance with the Act;



(c) ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and, subject to subsection (3), submit them to the National Treasury;

.....

.....

53. Procurement and asset disposal planning

(1) ...

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.

(3)

(4)

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

(6)



(7)

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.

.....

93. The import of the above provision is that it is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act. The accounting officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget and he/she ought to first satisfy himself or herself that there are sufficient funds to meet the obligations of any resulting contract reflected in the procuring entity's approved budget estimates prior to commencement of any procurement proceedings. Criminal liability is imposed on an accounting officer who knowingly commences any procurement process without first ascertaining if the goods, works or services have been budgeted for.

94. The Board in **PPARB Application No. 99 of 2023 Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Another** considered a similar issue of



termination of procurement proceedings due to inadequate budgetary provision and held as follows at paragraphs 177 to 179:

"177. Section 63(1)(b) of the Act as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is inadequate budgetary provision.

178. Cambridge Dictionary defines the word 'inadequate' to mean 'too low in quality or too small in amount; not enough' and 'budget' to mean 'the amount of money you have available to spend'. We can therefore deduce that the meaning of inadequate budgetary provision in public procurement to be that the amount of money a procuring entity has to spend is too low or not enough to meet the needs of its user department.

179. Budgetary concerns are a key issue in public procurement. Section 44(1) of the Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. Further 44 (2)(a) of the Act requires the accounting officer in performance of his/her responsibilities to ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity.



95. In essence, the Board found that for a Procuring Entity to allege that procurement proceedings were being terminated due to inadequate budgetary provision, it meant that the amount of money that the procuring entity had to spend on the tender was too low or not enough so as to meet the needs of its user department. This is in view of the fact that the accounting officer of the procuring entity is required to ensure that the procurement of goods, works and services of the public entity is within the approved budget of the said entity.

96. Further, in **PPARB Application No. 75 of 2023, Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Others** the Board held at paragraph 83 of its Decision that the best evidence that a procuring entity ought to provide to demonstrate availability or otherwise of adequacy of budgetary allocation for a procurement process is the approved procurement plan and the approved budget estimates as contemplated under Section 44 (2)(b) and 53 (5) of the Act.

97. In the instant matter, save for the indication of the approved budget for the 1st Tender under the Professional Opinion, this Board has not had sight, from the submitted confidential documents of the Procuring Entity's Procurement Plan or Approved Budget to at the very least demonstrate availability or otherwise of adequacy of the alleged budgetary allocation of Kshs. 485,000,000.00 for the 1st Tender.



98. The Board has also not had sight of any documentation in support of averments made by the Respondents that previous works undertaken at a cost of Kshs. 15,000,000.00 significantly reduced the budget for the 1st Tender.

99. The above notwithstanding, the Board is alive to the provisions of Section 131 to 133 of the Act which permit for competitive negotiations in among instances where the lowest bidder's tender price exceeds the available budget. Section 131 to 133 of the Act provides as follows:

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget;

or

(d) there is an urgent need that can be met by several known suppliers.

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a) identify the tenderers affected by tie;



(b) identify the tenderers that quoted prices above available budget; or

(c) identify the known suppliers as prescribed.

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.

133. Successful best and final offer

(1) The successful best and final offer shall be the best rated tender using evaluation criteria set forth in the tender documents.

(2) Cabinet Secretary may develop further guidelines on the powers and thresholds for tender awards.

100. From the above provisions of the Act, in instances where the lowest evaluated bid bears a tender price that exceeds the budget:

- a) The Accounting Officer should reveal the budget to the bidders.



- b) The Accounting Officer should then invite bidders whose bids bear tender prices that do not exceed the budget by more than 25% to submit their best and final offers.
- c) The successful bid would be that whose best and final offer shall be established as the successful bid under the evaluation criteria in the Tender Document.

101. It is the Board's considered view that the above provisions of the Act find application in the present case noting that the Applicant's quoted tender price had a difference of Kshs. 14,194,012 from the stated approved budget sum of Kshs. 485,000,000.00 and this difference is within the margin of 25% which ought to be factored in consideration of inviting a bidder to submit a best and final offer to a procuring entity. We say this factoring in averments by the Respondents as to the effect of arithmetic errors noted by the Evaluation Committee which the Board shall also address hereinbelow.

102. In the circumstances, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the 1st Tender as required by Section 63(1)(b) of the Act since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the 1st Tender.



Material Governance Issues

103. In their pleadings and submissions, the Respondent also cited material governance issues as a reason for termination of the procurement proceedings in the 1st Tender.

104. Section 63(1)(e) of the Act as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is as a result of detection of material governance issues.

105. The question that arises in what is material governance issues and if the same were present in the procurement proceedings in the 1st Tender to justify its termination.

106. We note that governance and how it relates to public procurement is explained in the book **"Public Procurement: International Cases and Commentary, (2012)** edited by Louise Knight, as follows:

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrated a failure of governance and typically arises from corruption and fraud."

107. In essence, the principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromises the integrity



of a procurement process of a tender. This Board has on numerous occasions addressed the question of what amounts to material governance issues in public procurement proceedings. In **PPARB Application No. 50 of 2020 Danka Africa (K) Ltd v The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Danka Africa Case") the Board deduced the meaning of material governance in public procurement to mean:

"Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean: significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership, and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process."

108. We note that a procuring entity which seeks to terminate a procurement process on account of detection of material governance issues bears the burden of establishing with specificity what the said material governance issues are in the procurement process of the tender and how they affect



its capability to guarantee compliance with principles of Article 227 of the Constitution of Kenya.

109. The onus therefore lies squarely at the Respondents' doorstep to demonstrate to tenderers what these material governance issues were as to leave no room for conjecture in the minds of tenderers why the subject tender was terminated. This reasoning accords with the principles of transparency and accountability which are constitutionally envisaged as essential cogs in any public procurement process in Kenya.

110. Turning to the circumstances in the instant Request for Review, and having in mind the above explanation of detection of material governance issues in public procurement, we find great difficulty in following this line of argument by the Respondents as no evidence was led pointing to any material governance issues being detected in the procurement proceedings in the 1st Tender that could have justified its termination under Section 63(1)(e) of the Act.

111. In the circumstances, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the 1st Tender as required by Section 63(1)(e) of the Act since they have not provided sufficient evidence of detection of material governance issues justifying termination of the 1st Tender.

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Non-Responsiveness of all evaluated tenders

112. We have heard the Respondents submit that the Applicant's tender was non-responsive following Financial Evaluation where the Evaluation Committee noted arithmetic errors reflected in its Bill of Quantities which led its total sum to amount to Kshs. 506,062,811.70 and not the Kshs. 499,194,012.00 stated in its Form of Tender.
113. In support of the decision to disqualify the Applicant's bid at the Financial Evaluation stage, the Respondents submitted that pursuant to Section 79(2) of the Act as read with Regulation 74(2) of Regulations 2020, any error in a tender arising from a miscalculation of unit price, quantity, subtotal and total bid price ought to be considered as a major deviation that affects the substance and ought to lead to disqualification of the tender for being non-responsive.
114. In essence, the Evaluation Committee upon noting the arithmetic errors arising from the Applicant's tender resulted to correct the same and disqualify its tender at the Financial Evaluation stage on account of these arithmetic errors.
115. Subsequently, vide the Professional Opinion and Internal Memo dated 5th May 2025, the Head of Supply Chain informed the 1st Respondent that all evaluated tenders in the 1st Tender were non-responsive and recommended for termination of the said tender.
116. In countering the above, we have heard the Applicant submit that its tender was responsive and that pursuant to Section 82 of the Act, the



tender sum submitted and read out at the tender opening is final and absolute and as such, it is not subject to correction, adjustment, or amendment by any party, including the Procuring Entity.

117. The Applicant contends that the import of Section 82 of the Act is to bind a bidder to its submitted tender sum in its Form of Tender even in instances of underquoting and that this protests the procurement process from post-submission manipulations. It further contends that the Form of Tender is definitive and binding and the Procuring Entity is not permitted to adjust the figure therein based on calculations or assumptions, nor should it prioritize the Engineer's Estimate or internal budget over the submitted tender sum.

118. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides 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)d)”

119. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted 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)***

120. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

121. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

122. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier**



Verification Quality Services (PVQS) Limited (Interested Party)
Ex Parte Tuv Austria Turk [2020] eKLR the High Court stated that:

“In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

123. It is settled law that mandatory requirements are the first hurdle that tenderers must overcome for further consideration in an evaluation process. A bidder found to be non-responsive is excluded from the bid process regardless of the merits of its tender.



124. Section 86 of the Act that provides for the successful tender as follows:

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

(3) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their



total score in the evaluation, provided the entities or contractors have attained the minimum technical score.”

125. Further, 77 of Regulations 2020 provides for Financial Evaluation as follows:

"77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.



126. From the aforementioned provisions, an evaluation committee while evaluating tenders at the financial evaluation stage is required *inter alia* to determine the evaluated price for each tender **by taking the bid price in the form of tender and taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act.** Tenders are then ranked according to their evaluated bid price and the successful tender shall be determined in accordance with the provisions of Section 86 of the Act.

127. We note that Section 79 (2) and (3) of the Act provides as follows:

"(2) A responsive tender shall not be affected by-

(a) minor deviations that do not materially depart from the requirements set out in the tender document; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall-

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders."

128. The import of the above provision is that **a responsive tender** shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and errors or oversights that can be corrected without affecting the substance of a



tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

129. With regard errors touching on the tender price, Regulation 74(2) of Regulations 2020 provides:

"Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."

130. In essence, Regulation 74(2) of Regulations 2020 dictates that any error from a miscalculation of unit price quantity subtotal and total bid price ought to be considered as a major deviation that affects the substance of the tender thus leading to its disqualification for being non-responsive. This provision is however subject to Section 79(2)(b) of the Act and ought to be read together with Section 82 of the Act.

131. Section 82 of the Act provides that:

"The tender sum as submitted and read out during the tender opening shall be absolute and final and



shall not be the subject of correction, adjustment or amendment in any way by any person or entity.”

132. The import of the above provision is that the tender sum as read out at the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

133. In view of the foregoing, we note that there is a clear inconsistency between Section 79(2) of the Act and Regulation 74(2) of Regulations 2020 relied upon by the Respondents in disqualifying the Applicant's tender since Regulation 74(2) of Regulations 2020 states that any error ought to lead to disqualification of a tender yet this regulation should only apply subject to Section 79(2)(b) of the Act which provides that errors and oversights can be corrected without affecting the substance of the responsive tender.

134. Being a subsidiary legislation, Regulation 74(2) of Regulations 2020 cannot override the express provisions of Section 79(2)(b) of the Act which takes precedence.

135. It is the Board's considered view that a tenderer is bound by its tender sum as submitted in the Form of Tender and the tender sum remains the same and cannot be corrected even if errors or oversights are identified or corrected pursuant to Section 79 (2)(b) of the Act.

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136. The Board has consistently held in previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, the Board concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where it stated the importance and the primacy of the Form of Tender in any tender process in the following words:

"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider an either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created. The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."

137. Regulation 74 (2) of Regulations 2020 being subject to Section 79(2)(b) of the Act does not vest an automatic action for the Procuring



Entity to find tenderers non-responsive as a result of arithmetic errors found in their tenders in view of how a tender sum ought to be treated per Section 82 of the Act.

138. In **PPARB Application No. 64 of 2022 Com Twenty One Limited v The Director General Communication Authority of Kenya**, the Board compared the provisions of the repealed Public Procurement and Disposal Act, 2005 and the repealed Public Procurement and Disposal Regulations, 2006 against the provisions of the 2015 Act and the 2020 Regulations and reiterated in its decision that ***"Regulation 74 (2) of the 2020 Regulations which contradicts Section 82 of the Act, does not vest an automatic action for the Procuring Entity to find a tender non-responsive. Where provisions of the 2020 Regulations and by extension, the Tender Document contradict the 2015 Act, the 2015 Act must and will prevail."***

139. The Board further held:

"Our analysis above and having traced the old dispensation under the Repealed 2005 Act and the Repealed 2006 Regulations which is now inapplicable as per the current dispensation, it is the Board's considered finding that the Procuring Entity ought not to have undertaken any correction of arithmetic errors on the



Applicant's List of items for Lot 1 and Lot 2 of the subject tender as part of Financial Evaluation.

What the Procuring Entity ought to have done is to seek the concurrence of the bidder, the Applicant herein, in writing pursuant to Section 64 of the Act as to whether it is still bound by its tender sum noting the arithmetic errors observed in Lot 1 and Lot 2. Any communication in writing to the Applicant would alert the Applicant to the errors noted and a response in writing, would confirm whether or not the Applicant is still willing to be bound by its tender sum.

If the Applicant denies to be bound by its tender sum or abandons its tender sum, then it would be disqualified. If the Applicant agrees to be bound by its tender sum and is found to be the lowest evaluated bidder, based on the Applicant's evaluated price, an award of the subject tender would be made to it at the amount quoted in the Form of Tender which in this case is a sum of KES 161,599,698.80 (One Hundred and Sixty-One Million, Five Hundred and Ninety-Nine Thousand, Six Hundred and Ninety-Eight Kenya Shillings and Eighty Cents) and the Applicant would be required to execute the tender(CA/PROC/OT/99/2021-2022 for Supply, Delivery, Installation and Commissioning of Local Area Network (LAN) for Selected National Police Service



(NPS) Stations) to the expectation of the Procuring Entity.”

140. In view of the foregoing, the Evaluation Committee erred in disqualifying the Applicant’s bid at the Financial Evaluation stage on account of discovery of arithmetic errors.

141. In the circumstances, and in view of the error in evaluation committed by the Procuring Entity as regards the Applicant’s tender, we find that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(f) of the Act since they have not provided sufficient evidence that all evaluated tenders in the subject tender were non-responsive to justify termination of the subject tender.

142. The Board notes that Superior courts in this country have previously warned against the growing trend of procuring entity’s reproducing the grounds of termination under Section 63 of the Act without any further information to bidders. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In



dismissing the judicial review application, the High Court sounded a warning to procuring entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"



143. From the above holding which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. It is our considered opinion that fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination to all tenderers in the letter of notification of termination of procurement proceedings. With this information and evidence, aggrieved tenderers will critically weigh their options on whether or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination

144. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b), (e), and (f) of the Act.

As to procedural requirements for termination of procurement proceedings in the 1st Tender

145. The Board has had sight of letters dated 5th May 2025 from the confidential file, addressed to bidders who participated in the 1st Tender, including the Applicant, notifying them of termination of the



procurement proceedings. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons pertaining to the reason for termination of the 1st Tender.

146. Further, despite the Respondents submitting that they notified PPRA of termination of the 1st Tender, there is no indication of when the Director General PPRA was notified of termination of the 1st Tender as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal addressing the reasons for termination of the 1st tender.

147. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2), (3) & (4) of the Act have not been met by the Respondents.

148. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in the subject tender, the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

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149. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

Whether the Procuring Entity erred in carrying out due diligence on the Applicant's tender submitted in the 1st Tender contrary to Section 83 of the Act.

150. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

"83. Post-qualification

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

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

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

(a) initial each page of the report; and



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

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

"80. Post-qualification

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

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

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

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

152. In essence, an Evaluation Committee may **after** tender evaluation **but prior to award** conduct due diligence and present a Due Diligence Report confirming and verifying the qualifications of the tenderer who submitted the lowest evaluated tender to be awarded the contract.



153. In **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another**, the Board established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.
154. It therefore follows that due diligence is only conducted by an evaluation Committee on a bidder who submitted the lowest evaluated tender.
155. The Board has perused the Tender Document in the subject tender and notes that due diligence was provided for under Post Qualification Criteria at page 37 of the Tender Document as follows:

POST QUALIFICATION CRITERIA

Particulars of post – qualification if applicable. The Client, Kericho County Assembly may inspect the premises and under due diligence to seek further clarification/confirmation, if necessary, to confirm authenticity /compliance of any condition of the tender /qualifications of the tenderer in line with the Public Procurement and Asset Disposal Act, 2015

1. Verification of Physical Address

2. Verify works done (signed contracts, award letters and completion certificates)



3. Verify ongoing projects if any.

4. Verify transport equipment- vehicles logbooks and lease letter 5. Verify any other document as may be deemed necessary

156. From the above provisions of the Tender Document, the Procuring Entity had the discretion to conduct a post qualification/due diligence exercise. By the use of the word 'may', it is clear that that this exercise was discretionally as opposed to being compulsory on the part of the Procuring Entity.

157. According to Clause under Clause 4.0 of the Evaluation Report, the Evaluation Committee conducted due diligence on the Applicant and the same is reported as follows:

***4.0 DUE DELIGENCE FOR THE WORKS DONE BY BIDDER - B4
MS SUPREME FORTITUDE LIMITED***

In view of the foregoing analysis, the bidder submitted nine projects in the tender bid document and the committee sought to undertake due diligence for three projects as follows:

Projects Visited

a. Proposed construction of warehouses and associated external works – Client was JKUAT Industrial Park Limited contract sum Kshs 65,416,020;



b. Proposed erection and completion of twin workshop, classroom and offices block (TWO STOREY) for the proposed Ruiru Technical and Vocational College (Ruiru Constituency) - Client Kabete National Polytechnic;

c. Proposed construction of a tuition complex at Kabete National polytechnic Kiambu County at contract sum of KES 411,847,838 million

158. The Board notes that a Due Diligence Report dated 29th April 2025 was part of the confidential documents submitted by the 1st Respondent and the same confirms that due diligence was conducted on the Applicant and that it is an exercise done before award of a tender.

159. The Respondents aver at paragraph 15 of their response that this due diligence was conducted on the Applicant on 28th April 2025 and deny the Applicant's argument that conduct of the due diligence exercise was a confirmation that the Applicant was to be awarded the 1st Tender as due diligence is conducted on the lowest evaluated bidder. Instead, the Respondents contend that the final stage of evaluation as provided in the Tender Document was recommendation of award.

160. It is evident that the due diligence carried out by the Evaluation Committee was done prior to a recommendation of award was made. Though both the Due Diligence Report and the Evaluation Report are



dated 29th April 2025, we note that the Respondents admit that due diligence was done on 28th April 2025 which is 1 day before the date of the Evaluation Report.

161. Section 83 is clear on due diligence being carried out before the award of the tender. The post-qualification exercise carried out on 28th April cannot be said to be due diligence in the meaning of the provisions of Section 83 of the Act.

162. In view of the foregoing, the Board finds that the Procuring Entity erred in carrying out due diligence on the Applicant's tender submitted in the 1st Tender contrary to Section 83 of the Act.

Whether the Evaluation Report in the 1st Tender was prepared in accordance with Section 80(7) of the Act.

163. A review of the Evaluation Report submitted to the Board by the 1st Respondent as part of the confidential documents reveals that Qs Humphery Mukoma and Eng. Newton Sunda as indicated in the Evaluation Report did not sign the said report. In view of this, the Board sought clarification from the Respondents on the same during the hearing.

164. Mr. Kibet submitted that it was highly likely that the members in question did not sign the report because they disagreed with the

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Committee's decision to declare the Applicant's bid non-responsive.

165. Section 80(7) of the Act reads:

"The evaluation report shall be signed by each member of the evaluation committee."

166. In essence, all members of the evaluation committee are obligated to sign the evaluation report.

167. Further, Regulation 78 of Regulations 2020 provides:

"An evaluation report prepared under section 80(4) of the Act shall include—

(i) any dissenting opinion and the reasons thereof and such other recommendation as may be deemed necessary by the evaluation committee."

168. Evaluation Committee members are therefore obligated to sign the evaluation report even if they hold a dissenting opinion on the evaluation of a tender which dissent ought to be noted in the evaluation report.

169. Section 46 of the Act provides for the establishment of an ad hoc evaluation Committee whose composition is stipulated under Section 46(4) of the Act as:

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"(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.



170. We note that vide letter dated 15th April 2025, the 1st Respondent appointed seven people as part of the Evaluation Committee in the 1st Tender pursuant to Section 46 of the Act. Notably, Qs Humphery Mukoma and Eng. Newton Sunda were not among the seven evaluation members appointed by the 1st Respondent.

171. The Board is therefore left to wonder why Qs Humphery Mukoma and Eng. Newton Sunda were included in the Evaluation Report for the 1st Tender yet they were not members of the Evaluation Committee appointed by the 1st Respondent vide letter dated 15th April 2025. Could it be that these were procured consultants or professionals who were required to advise on the evaluation of bids submitted in the 1st Tender and give a recommendation to the Evaluation Committee within a reasonable time as envisioned under the Act? If this were the case, Qs Humphery Mukoma and Eng. Newton Sunda ought to have been included in the 1st Respondents' appointment letter of the 1st Tender's Evaluation Committee dated 15th April 2025.

172. Absent their inclusion as members of the Evaluation Committee, lack of signing of the Evaluation Report on their part is of no consequence and that the Evaluation Report in the 1st Tender having been signed by the seven evaluators was prepared in accordance with Section 80(7) of the Act.

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What orders should the Board grant in the circumstances?

173. The Board has established that it is clothed with jurisdiction to hear and determine the instant Request for Review noting that the procurement proceedings in the 1st Tender were not terminated in accordance with the provisions of the Act.

174. The Board has also established that the Evaluation Report in the 1st Tender having been signed by the seven evaluators was prepared in accordance with Section 80(7) of the Act.

175. The Board has found that the Evaluation Committee erred in disqualifying the Applicant's bid at the Financial Evaluation stage on account of discovery of arithmetic errors.

176. The Board has further found that the Procuring Entity erred in carrying out due diligence on the Applicant's tender submitted in the 1st Tender contrary to Section 83 of the Act.

177. It is not lost to us that *vide* Tender Notice dated 20th May 2025 placed on the Standard Newspaper, the Procuring Entity cancelled advertisement of the 2nd Tender. This position has been admitted in the Respondents Written Submissions. However, we note that cancellation of the 2nd Tender was done during the pendency of the instant Request for Review and suspension of the procurement proceedings pursuant to Section 168 of the Act which states:



"Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."

178. In **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** the Board held that:

"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."

179. The cancellation of the 2nd Tender by the Respondents is therefore tainted with an illegality since any action taken by the Respondents in furtherance of the procurement proceedings before the instant Request for Review has been heard and the Board renders its decision is null and void.

180. In determining the appropriate orders to grant in the circumstances, the Board observes that Section 173(b) of the Act gives the Board a discretionary power to *"give directions to the accounting officer of a*



procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings.”

181. As such, the Board hereby expunges Clause 5.0 Financial Evaluation, Clause 6.0 Evaluation Committee Observation and Clause 7.0 Recommendation as contained in the Evaluation Report dated 29th April 2025. The Board also deems it just and fair to direct that a fresh Financial Evaluation be conducted in the 1st Tender in strict compliance with Section 86(1) of the Act as read with Regulation 77 of Regulations 2020.

182. The upshot of our findings is that the instant Request for Review succeeds and is allowed in the following specific terms, subject to the right of any person aggrieved with this decision to seek judicial review by the High Court within fourteen days as provided for under Section 175 of the Act.

183. At this point, we wish to point out that at the close of the hearing of the instant Request for Review, parties were informed by the Board that it would communicate its decision on 6th June 2025 noting that the instant Request for Review was filed on 16th May 2025. This was in line with the statutory requirement of twenty-one (21) days within which the Board is to complete its review after receiving the instant Request for Review.



184. However, vide Gazette Notice No. 7317 dated 3rd June 2025, the Cabinet Secretary for Interior and National Administration, Hon. Kipchumba Murkomen, declared Friday 6th June 2025 a public holiday to mark Eid-ul-Adha. What this meant is that the twenty first (21st) day which was the last day when the Board was required to complete its review and communicate its decision herein was no longer a working day.

185. In computing time for purposes of the statutory twenty one (21) days within which the Board was required to complete this review and subsequently communicate its decision to parties, we are guided by Section 57 (a) and (b) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya in which we excluded the 16th May 2025 (being the day when the instant Request for Review was filed before the Board), 6th June 2025 (being the last day when the instant review ought to have been completed and being a public holiday), 7th June 2025 (being an official non-working day) and 8th June 2025 (being a Sunday).

186. In essence, in computing the twenty- one (21) days within which the Board is required to complete this review, the 16th May 2025 and the excluded days (6th June 2025, 7th June 2025 and 8th June 2025) were not reckoned, leaving us with 9th June 2025 as the last day within which this Board is required to complete this review.



FINAL ORDERS

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

- A. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. KCA/T/003/2024-2025 for Proposed Construction of Kericho County Assembly Chambers and Office Block and subsequent decision to advertise Tender No. KCA/T/004/2024-2025 for Proposed Construction of the County Assembly of Kericho and Office Block (Re-tender) be and is hereby annuled and set aside.**
- B. The Procuring Entity's letters dated 5th May 2025 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. KCA/T/003/2024-2025 for Proposed Construction of Kericho County Assembly Chambers and Office Block be and is hereby nullified and set aside.**
- C. The 1st Respondent is hereby ordered to reconvene the tender evaluation committee in the 1st Tender and direct it to evaluate afresh bids that progressed to the Financial Evaluation stage in line with the evaluation criteria contained in the Tender**




Document as read with the Act and Regulations 2020 while taking into account the Board's findings herein.

D. The 1st Respondent is directed to complete the procurement process, including the making of an award, with respect to Tender No. KCA/T/003/2024-2025 for Proposed Construction of Kericho County Assembly Chambers and Office Block within 30 days of this decision taking into consideration the findings of the Board herein.

E. Considering that the procurement process is not complete each party shall bear its own costs in this Request for Review.

Dated at NAIROBI this 6th Day of June 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB