

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 62/2025 OF 21st MAY 2025

BETWEEN
SINTECNICA ENGINEERING S.R.L IN JOINT VENTURE WITH
STEAM S.R.L APPLICANT

AND
THE ACCOUNTING OFFICER,
KENYA ELECTRICITY GENERATING COMPANY
PLC (KENGEN) 1ST RESPONDENT
KENYA ELECTRICITY GENERATING COMPANY
PLC (KENGEN) 2ND RESPONDENT
ELC ELECTROCONSULT S.P.A INTERESTED PARTY

Review against the decision of the Accounting Officer Kenya Electricity Generating Company in relation to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------|
| 1. Ms. Alice Oeri | - Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | - Member |
| 3. Mr. Joshua Kiptoo | - Member |

IN ATTENDANCE

- | | |
|------------------------|------------------------------------|
| 1. Sarah Ayoo | -Holding brief for Board Secretary |
| 2. Mr. Philemon Kiprop | - Secretariat |
| 3. Ms. Sarah Ayoo | - Secretariat |
| 4. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT SINTECNICA ENGINEERING S.R.L IN JOINT
VENTURE WITH STEAM S.R.L

- | | |
|---------------------|---|
| 1. Mr. Herman Omiti | - Advocate, Ngeri, Omiti & Bush Advocates LLP |
| 2. Mr. Tom Ngeri | - Advocate, Ngeri, Omiti & Bush Advocates LLP |

- 3. Ms. Langat - Advocate, Ngeri, Omiti & Bush Advocates LLP
- 4. Mr. Tonkei - Advocate, Ngeri, Omiti & Bush Advocates LLP
- 4. Mr. Matteo Quaia - Director & CEO Steam S.R.L

RESPONDENTS

THE ACCOUNTING OFFICER, KENYA

ELECTRICITY GENERATING COMPANY

PLC (KENGEN) & KENYA ELECTRICITY

GENERATING COMPANY PLC (KENGEN)

- 1. Mr. Mogaka - Advocate, Mogaka Omwenga and Mabeya Advocates
- 2. Mr. Abiud Ambehi - Advocate, Mogaka Omwenga and Mabeya Advocates
- 3. Ms. Elizabeth Njenga - Kengen
- 4. Ms. Emma S. Tuya - Kengen
- 5. Mr. Isaac K Maina - Kengen
- 6. Mr. George Drammeh - Kengen
- 7. Mr. Thaddeus Kwoba - Kengen
- 7. Mr. Reuben - Kengen

INTERESTED PARTY

ELC ELECTROCONSULT S.P.A

Mr. Uladimir Mikhalevich

-

Director

BACKGROUND OF THE DECISION

The Tendering Process

- 1. Kenya Electricity Generating Company Plc, the Procuring Entity and 2nd Respondent herein, being in the process of receiving financing from European Investment Bank (EIB), invited sealed tenders in response to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project (hereinafter, “the subject tender”) which was carried out in a single stage, three envelopes (Prequalification, Technical and Financial) International Competitive Bidding. The invitation was by way of an advertisement dated 24th September 2024 on *My Gov* Publication, the Procuring Entity’s website www.kengen.co.ke and on the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for

the subject tender (hereinafter referred to as the Tender Document') was available for download.

2. The Tender Document was classified in two parts being (a) Part 1 containing the prequalification bidding documents, and (b) Part 2 containing the Request for Proposal bidding documents.
3. Bidders were required to duly complete and submit, on the same day, the application for part 1 in a sealed envelope marked "*PREQUALIFICATION FOR OLKARIA VII CONSULTANCY SERVICES*" and the application for part 2 marked "*TECHNICAL PROPOSAL FOR OLKARIA VII CONSULTANCY SERVICES- DO NOT OPEN WITH THE PREQUALIFICATION DOCUMENTS*" and "*FINANCIAL PROPOSAL FOR OLKARIA VII CONSULTANCY SERVICES- DO NOT OPEN WITH THE TECHNICAL PROPOSAL*". Bidders who downloaded the Tender Document were required to immediately notify the Procuring Entity via email to the available contacts. The initial tender submission deadline was scheduled on 27th November 2024.

Addenda

4. The Procuring Entity subsequently issued, on various dates, four (4) Addenda which sought to vary, to some extent, certain information provided in the blank Tender Document while extending the submission deadline to 11th December 2024.

Submission of Tenders and Tender Opening

5. According to the Tender Opening Minutes for the subject tender dated 11th December 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board' pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the outer envelopes of the bids were opened in the presence of bidders present confirming existence of three separate envelopes in line with provisions of ITC 19.2 of the Tender Document.

6. According to the Tender Opening details for prequalification three (3) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm/JV
1.	JV of Exergy International Srl & Pozitif Enerji
2.	JV of Sintecnica Engineering S.R.L & Steam S.R.L
3.	ELC Electroconsult S.p.A

Evaluation of Tenders

7. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in an Evaluation Report dated 6th January 2025 in two parts namely:
- i Part I: Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project
 - ii Part II: RFP (Technical Proposal) for Consultancy Services for Olkaria VII Geothermal Power Project

Part I: Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project

8. The Evaluation Committee was required to evaluate tenders using the criteria provided under Part I Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project of the Tender Document which entailed checking for eligibility and responsiveness. At the end of evaluation at this stage, one (1) bidder was found to be non-responsive while two (2) bidders, being the Applicant and Interested Party herein, were found to be responsive and progressed to the RFP – Technical Proposal Evaluation stage.

Part II: RFP (Technical Proposal) for Consultancy Services for Olkaria VII Geothermal Power Project

Opening of Technical Proposals

9. According to the Tender Opening Minutes dated 20th December 2024, the Technical Proposals for the two prequalified bidders (i.e. the Applicant and

Interested Party herein) were opened on 20th December 2024 at 11.00 a.m. and recorded as follows:

NO.	NAMES OF THE FIRM/JOINT VENTURE
1	JV of Sintecnica Engineering S.R.L & Steam S.R.L
2	ELC Electroconsult S.p.A

Evaluation of the Technical Proposals

10. The Evaluation Committee was required to subject the two tenders to the evaluation criteria provided in the Tender Document as read with the Addenda. At the end of evaluation at this stage, both tenders were found to have met the minimum technical score of 70 % and qualified to proceed for further evaluation at the Financial Evaluation stage. The summary of the technical score was recorded by the Evaluation Committee as follows:

Table 9: summary of Technical Scores

No.	Firm	Technical Score
1	JV of Sintecnica Engineering S.R.L & Steam S.R.L	73.04
2	ELC Electroconsult S.p.A	92.06

11. Subsequently, the Evaluation Committee recommended approval for the two (2) bidders to proceed to the tender opening of their financial proposals. The 1st Respondent was requested to:

- i Approve the evaluation results for Prequalification and the Technical Proposals for the subject tender.
- ii Authorize seeking of Financier’s No Objection of the evaluation results for Prequalification and the Technical Proposals bids.
- iii Authorize the opening of the Applicant’s and Interested Party’s bids.

First Professional Opinion

12. In a Professional Opinion Ref No: PPADA2015-275/01/2025 dated 8th January 2025, (hereinafter referred to as “the First Professional Opinion”), the Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed the manner in which the procurement process was undertaken including

evaluation of tenders and recommendation by the Evaluation Committee and concurred with the Evaluation Committee’s recommendations for approval of the opening of the Applicant’s and Interested Party’s financial proposals subject to No Objection from the Financier.

13. Thereafter the First Professional Opinion was approved by the 1st Respondent on 8th January 2025.

Invitation for Financial Proposal Opening

14. *Vide* letters dated 17th February 2025, the Applicant and Interested Party were invited for financial opening of their bids scheduled to take place on 20th February 2025 at 1030 hrs E.A.T at the Procuring Entity’s premises.

Financial Proposal Opening

15. The Applicant’s and Interested Party’s Financial Proposals were opened by the Tender Opening Committee on 20th February 2025 and recorded as follows:

<i>NO.</i>	<i>NAME OF THE FIRM</i>	<i>AMOUNT OF QUOTED PRICE ON THE FINANCIAL PROPOSAL SUBMISSION FORM</i>
<i>1</i>	<i>JV of Sintecnica Engineering S.R.L & Steam S.R.L</i>	<i>EUR: 16,792,425.00 Estimated amount of applicable taxes: 2,693,985.00</i>
<i>2</i>	<i>ELC Electroconsult S.p.A</i>	<i>EUR: 18,162,835.78 Estimated amount of applicable taxes: 4,113,148.63</i>

Evaluation of the Financial Proposals

16. The Evaluation Committee was required to examine the financial proposals of the Applicant and the Interested Party in accordance with the evaluation criteria contained in the Tender Document as read with the Addenda.

17. The Evaluation Committee after reviewing the financial proposals identified a number of clarification items that were compiled and sent to the respective parties for appropriate responses.

18. According to the Financial Evaluation Report dated 3rd March 2025, the Evaluation Committee at the end of evaluation at this stage found as follows:

3.4 Results of the Financial Evaluation

3.4.1 Evaluated Financial Price

The Evaluation criteria was subjected to the read-out prices exclusive of taxes in line with ITC 24 of the RFP document.

Based on the foregoing, and as demonstrated in table 4 above after application of financial evaluation criteria, the firms' evaluated financial price is as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: EUR 14,098,440.00*
- ii. ELC Electroconsult S.p.A: EUR 16,068,187.15*

3.4.2 Technical Evaluation Score

From the Technical Evaluation report, the technical scores for the two firms are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 73.04*
- ii. ELC Electroconsult S.p.A: 92.06*

3.4.3 Financial Evaluation Score

From table 4 above, the Financial Scores for the two firms are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 20.00*
- ii. ELC Electroconsult S.p.A: 17.55*

3.4.4 Combined Technical and Financial Evaluation

The combined Technical Scores and Financial Scores for each bidder as per table 5 above are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 78.43*
- ii. ELC Electroconsult S.p.A: 91.20*

3.4.5 Overall Ranking of the bidders after combined Technical and Financial Score

Rank 1: ELC Electroconsult S.p.A with a combined Technical and Financial Score of 91.20

Rank 2: JV of Sintecnica Engineering S.R.L & Steam S.R.L with a combined Technical and

Financial Score of 78.43

Evaluation Committee's Recommendation

19. The Evaluation Committee recommended award of the tender to the Interested Party as follows:

Subject to successful negotiation, the Evaluation Committee recommends that the tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project be awarded to ELC Electroconsult S.p.A at their quoted total price of EUR 18,162,835.78 equivalent to KES 2,494,009,816.01 (Kenya Shillings Two Billion, Four Hundred and Ninety Four Million, Nine Thousand, Eight Hundred and Sixteen and One Cent Only) inclusive of all applicable taxes. The estimated tax amount is EUR 4,113,148.63.

Note: The date of the exchange rate (base date) as per ITC 25.1 in the RFP document is 28 days prior to the date of submission of proposals. The submission deadline for the proposals was 11th December 2024. Therefore, the base date is 13th November 2024. The exchange rate based on Central Bank of Kenya.as at 13th November 2024 was 1 EUR = KES 137.3139

Second Professional Opinion

20. In a Professional Opinion Ref No: PPADA2015-362/03/2025 dated 10th March 2025, (hereinafter referred to as "the Second Professional Opinion"), the Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed the manner in which the procurement process was undertaken including evaluation of financial proposals and recommendation by the Evaluation Committee to award the subject tender to the Interested Party and concurred with the Evaluation Committee's recommendations for award of the subject tender to the Interested Party.

21. Thereafter the Second Professional Opinion was approved by the 1st Respondent on 10th March 2025.

Notification to Tenderers

22. *Vide* letters dated 21st March 2025 bidders were notified of the outcome of evaluation of the tender.

REQUEST FOR REVIEW NO. 38 OF 2025

23. On 3rd April 2025, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the Applicant herein, filed Request for Review No. 38 of 2025 dated 3rd April 2025 together with a Supporting Affidavit sworn by Matteo Quaia on 3rd April 2025 (hereinafter, "Request for Review No. 38 of 2025") through the firm of Ngeri, Omiti & Bush seeking the following orders from the Board:

- a) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity have breached the provisions of Articles 10, 27, 201, 227 and 232 of the Constitution of Kenya and Sections 3, 80 and 86 of the Public Procurement and Asset Disposal Act as read with Regulation 76 and 77 of the Public Procurement and Asset Disposal Regulations, 2020.***
- b) This Board do issue an Order that the Interested Party failed to satisfy all the mandatory requirements and qualification criteria and did not conform to the Technical Evaluation Criteria outlined in the Tender Documents and, therefore, the Accounting Officer and the Procuring Entity erred in their decision to award the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project wrongly, irregularly and illegally to the Interested Party.***
- c) This Board do issue an Order annulling and/or cancelling the Notification of Award issued to the Interested Party in the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project.***
- d) This Board do issue an Order directing the Accounting Officer and the Procuring Entity to award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest evaluated responsive bidders.***

e) In the alternative and without prejudice to Prayer Number (d) above, this Board do issue an Order directing the procuring entity to re-do the technical evaluation of the bids submitted under Tender Reference No. KGN-BDD-016-2024.

f) This Board do grant the Applicants damages for loss of business amounting to a sum of Euros Sixteen Million Seven Hundred and Ninety-Two Thousand Four Hundred and Twenty-Five (EUR 16,792,425.00).

g) The Respondents be ordered to pay costs of and incidental to these proceedings.

h) Any other or further reliefs and/or orders as this Board may deem just, equitable and fit to grant in the circumstances.

24. On 24th April 2025, the Board in exercise of the powers conferred upon it under the Act issued the following orders with respect to Request for Review No. 38 of 2025:

A. The Applicant's Request for Review dated 3rd April, 2025 and filed on even date in respect of Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project be and is hereby allowed.

B. The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 21st March 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.

C. The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and direct it to re-evaluate tenders that progressed to the Technical Evaluation stage

in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020.

D. The 1st Respondent is directed to complete the procurement process, including the making of an award, in the subject tender within 21 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.

RE-EVALUATION

25. According to a Re-Evaluation Report dated 2nd May 2025, the Evaluation Committee reconvened and proceeded to re-evaluate both the Applicant’s and Interested Party’s tenders at the Technical Evaluation stage.
26. Following the technical evaluation, both the Applicant and the Interested Party were found to have met the minimum technical score and qualified to proceed to the Financial Evaluation stage. The summary of the Technical Scores was recorded as follows:

Table 3: Summary of Technical Scores

<i>No.</i>	<i>Firm</i>	<i>Technical Score</i>
<i>1</i>	<i>JV of Sintecnica Engineering S.r.l & Steam S.r.l</i>	<i>77.95</i>
<i>2</i>	<i>ELC Electroconsult S.p.A</i>	<i>92.06</i>

27. At the Financial Evaluation stage, the Evaluation Committee identified a clarification item on applicable taxes from the Applicant and proceeded to record the combined financial re-evaluation as follows:

Table 4: Compiled Financial Re-Evaluation Sheet

<i>COMBINED FINANCIAL RE-EVALUATION</i>			
		<i>NAME OF FIRM (BIDDER)</i>	
	<i>EVALUATION CRITERIA ITEMS</i>	<i>JV of Sintecnica Engineering S.r.l & Steam S.r.l (IN EUR)</i>	<i>ELC Electroconsult S.p.A (IN EUR)</i>

1	PART 1 - PROPOSAL PRICE AMOUNT		
1.1	Financial Proposal Price (as Read out at Tender)	16,792,425.00	18,162,835.78
1.2	Total Amount, inclusive of Taxes (ITC 16.3 b of Section II-Data sheet)	16,792,425.00	18,162,835.78
1.3	Taxes	2,693,985.00	4,113,148.63
2	PART 2 - FINANCIAL BREAKDOWN		
2.1	Time Based portion Amount of Proposal Price - F_1	13,469,925.00	13,825,380.66
2.2	Lumpsum portion Amount of Proposal Price - F_1	4,153,125.00	4,337,455.12
3	PART 3 - SPECIFIC CONSIDERATIONS (ITC 14 OF DATA SHEET)		
A	Part A. Time based amount		
3.1	RFP Time Input (Person Months) - T_0	450.00	450.00
3.2	Proposal Time Input (if different) - T_1	450.00	358.25
3.4	Highest Remuneration Rate for a Key Expert in Financial Proposal - R_{max}	20,240.00	22,000.00
3.5	Time based portion Amount (Adjusted) - $F_2 = F_1 + (T_0 - T_1) * R_{max}$	13,469,925.00	15,843,880.66
B	Part B. Lump Sum amount		
3.6	RFP Arbitrary length of large bore pipes (KMS) - L_0	30.00	30.00
3.7	Proposal length of Large bore pipes (if different) - L_1	30.00	30.00
3.8	Lumpsum portion Amount (Adjusted) - $F_2 = F_1 * L_0 / L_1$	4,153,125.00	4,337,455.12
C	Part C. Total Evaluated Price (A + B)	17,623,050.00	20,181,335.78
4	COMBINED EVALUATION (ITC 26.1)		
4.1	Technical Score- T	77.95	92.06
4.2	Weighted Technical Score, $P_T = W_T \times T$ ($W_T = 80\%$)	62.36	73.65
4.3	Weighted Financial Score, $P_F = W_F \times C_0 / C$ ($W_F = 20$)	20.00	17.46
4.4	Overall Combined Score, $P = P_T + P_F$	82.36	91.11
	Overall Rank (Position/Remark) ***	2	1

28. The Evaluation Committee proceeded to recommend award of the subject tender to the Interested Party as follows:

Subject to successful negotiation, the Evaluation Committee recommends that the tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project be awarded to ELC Electroconsult S.p.A at their quoted total price of EUR 18,162,835.78 equivalent to KES 2,494,009,816.01 (Kenya Shillings Two Billion, Four Hundred and Ninety-Four Million, Nine Thousand, Eight Hundred and Sixteen and One Cent Only) inclusive of all applicable taxes. The estimated tax amount is EUR 4,113,148.63.

29. In a Professional Opinion Ref No: PPADA2015-485/05/2025 dated 2nd May 2025, (hereinafter referred to as "the Third Professional Opinion"), the Ag. Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed

the manner in which the procurement process was undertaken including re-evaluation of bids and recommendation by the Evaluation Committee to award the subject tender to the Interested Party and concurred with the Evaluation Committee's recommendations for award of the subject tender to the Interested Party.

30. Thereafter the Third Professional Opinion was approved by the 1st Respondent on 2nd May 2025.
31. *Vide* letters dated 7th May 2025 bidders were notified of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW NO. 62 OF 2025

32. On 21st May 2025, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the Applicant herein, filed Request for Review No. 62 of 2025 dated 20th May 2025 together with a Supporting Affidavit sworn by Matteo Quaia on 16th May 2025 (hereinafter, "the instant Request for Review") through the firm of Ngeri, Omiti & Bush seeking the following orders from the Board:

a) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity have breached the provisions of Articles 10, 27, 201, 227 and 232 of the Constitution of Kenya and Sections 3, 55, 80, 83 and 86 of the Public Procurement and Asset Disposal Act as read with Regulation 30 (a), (b) and (e), 76, 77 and 80 of the Public Procurement and Asset Disposal Regulations, 2020 as well as Sections 18, 22, 23 and 32 of the Engineers Act and the Regulations made thereunder.

b) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity did not comply with the Decision of this Honorable Board in PPARB Application No. 38 of 2025 Sintecnica Engineering S.R.L in Joint Venture with Steam S.r.l vs The Accounting Officer, Kenya Electricity

Generating Company PLC (KenGen) & 2 Others on 24th April, 2025.

c) A Declaration be and is hereby issued that the Interested Party's bid did not conform to the Technical and Financial Evaluation Criteria outlined in the Tender Documents and, therefore, the Accounting Officer and the Procuring Entity erred in their decision to award and wrongly, irregularly and illegally awarded the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Interested Party.

d) This Board do issue an Order annulling and/or cancelling the Notification of Award issued to the Interested Party after the re-evaluation exercise in the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project.

e) This Board do issue an Order directing the Accounting Officer and the Procuring Entity to award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest responsive evaluated bidders.

f) In the alternative and without prejudice to Prayer Number (v) above, this Board do award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest responsive evaluated bidders.

g) This Board do grant the Applicants damages for loss of business amounting to a sum of Euros Sixteen Million Seven

Hundred and Ninety-Two Thousand Four Hundred and Twenty-Five (EUR 16,792,425.00).

h) The Respondents be ordered to pay costs of and incidental to these proceedings.

i) Any other or further reliefs and/or orders as this Board may deem just, equitable and fit to grant in the circumstances.

33. In a Notification of Appeal and a letter dated 21st May 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st May 2025.

34. On 26th May 2025, the Respondents jointly filed through Mogaka Omwenga & Mabeya Advocates a Notice of Appointment of Advocates dated 24th May 2025, a Respondent's Notice of Preliminary Objection to the Request for Review dated 25th May 2025, a 1st and 2nd Respondents' Memorandum of Response dated 25th May 2025, a Replying Affidavit sworn on 25th May 2025 by Vincent Mamboleo together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

35. *Vide* a Hearing Notice dated 30th May 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 3rd June 2025 at 11.00 a.m. through the link availed in the said Hearing Notice.

36. The Applicant filed on 30th May 2025 a Further Affidavit sworn on 30th May 2025 by Matteo Quaia and an Applicant's Grounds of Objection to the Respondent's Notice of Preliminary Objection dated 30th May 2025.
37. On 3rd June 2025, the Applicant filed Written Submissions dated 2nd June 2025 and a List of Authorities dated 2nd June 2025.
38. On the same day of 3rd June 2025, the Respondents filed Written Submissions dated 3rd June 2025 and a List & Summary of Authorities dated 3rd June 2025.
39. At the hearing of the matter on 3rd June 2025, the Board read out 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. Thus, the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

40. In his submissions Mr. Omiti for the Applicant placed reliance on the Applicant's documents filed before the Board.
41. It is the Applicant's case that the Respondents have fundamentally breached the provisions of Articles 10, 47, 201, 227, and 232 of the Constitution, Sections 3, 55, 58, 60, 67, 79, 80, 83 and 86 of the Act and Regulations 30, 74, 76, 77, 78, 126 (1), (2), (3), (4), & (6) and 127 of Regulations 2020 by failing to conduct the procurement process in a manner that promotes integrity and public confidence and failing to issue satisfactory and justifiable reasons for rejection of its tender.

42. The Applicant contends that the 1st Respondent failed to comply with the Board's orders issued in Request for Review No. 38 of 2025 directing the Respondent to reconvene the Evaluation Committee and re-evaluate both its tender and that of the Interested Party in line with the Board's findings, the evaluation criterion in the Tender Document as read with the Constitution, the Act and Regulations 2020.
43. The Applicant further contends that the 1st Respondent conducted the re-evaluation process in a manner that was neither fair, equitable, transparent, competitive nor cost-effective thus undermining the constitutional safeguards meant to ensure accountability, transparency, and public trust in the procurement processes.
44. Mr. Omiti submitted that the Applicant was notified vide letter dated 7th May 2025 that its tender was unsuccessful as it did not attain the highest combined technical and financial score following which the Applicant sought clarifications which were responded to vide letter dated 14th May 2025 attaching a summary sheet of general scores awarded to the Applicant's Technical Proposal. Counsel indicated that the clarifications by the Respondents were insufficient to the extent that the scores awarded to the Applicant on each of the sub-categories provided could not be ascertained.
45. With regard to the Respondents' Preliminary Objection, Mr. Omiti objected to the same indicating that it was invalid as it does not disclose any point of law or contest anything apart from vaguely claiming that the Board has no jurisdiction and not providing any legal justification or grounds upon which the objection is based. In support of his argument, referred the Board to the holding in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 and *Attorney General & Another v Andrew Mwaura Githinji & Another* (2016) eKLR and provisions under Regulation 209(2) of Regulations 2020 and urged the Board to strike out the Respondents' Notice of Preliminary Objection for being fatally defective.
46. As to contention that the instant Request for Review as filed was time barred, counsel while placing reliance on the holding in *The Owners of Motor*

Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989 and Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011 Republic v Public Procurement Administrative Review Board & 2 Others Precision Experts Limited (Ex parte Applicants) (2025) eKLR, Aprim Consultants v Parliamentary Service Commission & Another CA No. E039 of 2021, Article 259 (5)(a) of the Constitution, Section 57 of the Interpretation and General Provisions Act, Order 50 Rule 8 of the Civil Procedure Rules and Section 167(1) of the Act submitted that the review application was filed within 14 days from the date of notification thus the Board has jurisdiction to hear and determine the same.

47. As to the allegation that the instant Request for Review relitigates over matters raised in Application No. 38 of 2025, counsel submitted that the issues raised in the instant matter are substantively different from those raised in PPARB Application No. 38 of 2025 and as such, this allegation is only meant to mislead the Board. He pointed out that instant matter arises from the decision of the Respondents following re-evaluation of the subject tender and relied on the holding in *Shah v County Government of Trans Nzoia & Another (2024) eKLR*.
48. As to whether the Respondents complied with the orders of the Board issued on 24th April 2025 in PPARB Application No. 38 of 2025, counsel submitted that the Respondents undertook a re-evaluation with a criteria that was extraneous and not within the ambit of the Tender Document and the findings of the Board in PPARB Application No. 38 of 2025.
49. The Applicant contends that contrary to the express orders of the Board, the Evaluation Committee failed to comply with the point system in scoring the tenders as outlined in the Data Sheet Item 21.1 and failed to demonstrate the objectivity of the assessment measures employed by the Evaluation Committee in assessing the technical capacity, methodology, personnel, and experience of the two tenderers.

50. Counsel indicated that the Board in PPARB Application No. 38 of 2025 directed the Respondents not to use proportional scoring methodology as this conflicted with the evaluation criteria as contained in the Data Sheet and affirmed that due diligence is a fundamental element of a procurement process and as such, required the Respondents to comply with the law when conducting re-evaluation of the two tenderers including but not limited to exercising due diligence.
51. He argued that award of the subject tender to the Interested Party is evidence of the Respondents' non-compliance as there are lingering questions over the Interested Party's financial probity and professional qualifications.
52. While referring to provisions under Section 173 of the Act and the holdings in *Republic v Public Procurement Administrative Review Board & 2 Others; CPF Financial Services Limited (Ex parte) (2022) eKLR* and *Republic v Public Procurement Administrative Review Board & 3 Others Ex parte Applicant Korea Expressway Corporation (KEC) (2022) eKLR*, counsel emphasized on the importance of adherence to the orders of the Board as far as re-evaluation of the subject tender is concerned. He submitted that had the Respondents' adhered to the Board's decision and exercised due diligence at the Technical Evaluation stage, the Interested Party should not have proceeded beyond the Technical Evaluation stage to the Financial Evaluation stage.
53. Counsel further referred the Board to Section 83 of the Act and the holding in *PPARB Application No. 158 of 2020 On the Mark Security Limited v The Accounting Officer Kenya Revenue Authority & another* and submitted that the Respondents did not comply with the requirement for due diligence as a prerequisite basis applicable in the evaluation criteria.
54. As to whether the procurement process in the subject tender was conducted in accordance with the provisions of the Act and orders of the Board in PPARB Application No. 38 of 2025, counsel referred the Board to Section 80 of the Act and submitted that the Respondents only lumped up

the scores on each sub-criterion specifically the Project Experience criterion which is a clear violation of the Tender Document and provisions of the Act since scoring was supposed to be done per individual sub-criterion before summing them up to give the final score per criterion.

55. The Applicant contends that the scoring adopted by the Respondents at the Technical Evaluation stage reveals an arbitrary suppression of scores where points were unjustly withheld from the Applicants, thus deviating from transparent evaluation standards required by law.
56. On scoring the key personnel competencies at the Technical Evaluation stage, counsel submitted that the Respondents noted that some key personnel proposed by the Interested Party lacked the mandatory statutory registration as required under the Engineers Board of Kenya (EBK) Act, 2011 and specified by the Tender Documents that key personnel proposed for the project be registered by their professional bodies in either Kenya or the country of domicile but proceeded to assess the same as qualified contrary to the law.
57. Counsel argued that the mandatory registration requirement is a gateway for scoring key personnel proposed for the assignment and lack of registration renders the nominated personnel statutorily disqualified as their credentials are legally invalid warranting zero point in scoring.
58. As to Financial Evaluation, the Applicant contends that contrary to Regulation 77 of Regulations 2020 and the holding in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk (2020) eKLR* and *Republic v Public procurement Administrative Review Board & 2 Others Ex parte International Research and Development Actions Ltd (2017) KEHC 8088 KLR*, the Respondents failed to evaluate the subject tender in accordance with a cost-effective system having disregarded the fact that the Applicant's tender was lower than that of the Interested Party.

59. The Applicant submits that the Respondents having determined its tender as technically responsive and being technically capable of doing the work envisaged in the tender, ought to have correctly evaluated its financial proposal and awarded it the subject tender in line with Section 86 (1) (a) of the Act.

60. On whether the Interested Party met the eligibility criteria set out in the Tender Document as to render its tender responsive, counsel submitted that that the Interested Party did not meet the evaluation criteria and ought not to have progressed beyond the Technical Evaluation stage for reasons that:

- a) It submitted credentials for unregistered professionals including the Process Design Lead, Mechanical Design Lead, Site Steamfield/Steamfield Commissioning Engineers and proposed trainers suitable for the transfer of knowledge (training) program contrary to the provisions of the Tender Document.
- b) The requirement to have professional qualifications for key personnel as contained in the Tender Document is essential with a basis in statute including the Engineers Act and can't be overlooked on the evaluation process to the detriment of a specific tenderer.
- c) As at the tender closing date, the Interested Party submitted details for its key staff/personnel which details showed that the said staff were not duly registered professionals with the relevant regulatory bodies as required in the Tender Document.
- d) Failure to adhere to a[sic] non-discretionary statutory provision and submitting details of unregistered personnel renders the Interested Party's credential invalid and automatically disqualified it at the Technical Evaluation stage noting that the Procuring Entity did not seek any clarification from the Interested Party regarding this shortfall.

61. Counsel further submitted that according to records available in public, the Interested Party:

- a) Has very limited experience within an EPC Contractor's scope or as the Owner's Engineer and also for contract management, site administration, design review, supervision of construction, commissioning and management of warranty period. It argued that the sole project of similar nature and complexity realized in the last 20 years was the Owner's Engineer services for the Indonesian Geothermal Power Plant at Lumut Balai.
- b) Did not demonstrate that in the last 20 years, it has gained experience in the above services in the geothermal sector neither in Kenya nor in its home country, Italy.
- c) Failed to have registered professionals which is a violation of the provisions of Part III of the Engineers Act and renders it ineligible to carry out the contract task.

62. Counsel urged the Board to take note of provisions under Section 55(1)(c) of the Act which dictates that a person is eligible to bid for a contract in procurement or an asset being disposed only if the person satisfies that if it is a member of a regulated profession, it has satisfied all the professional requirements. He argued that the Interested Party should not have been assessed whatsoever let alone being accorded points as having met the qualifications threshold or being progressed to the Financial Evaluation stage and in buttressing his argument, referred to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) 2019 eKLR* where the court established that mandatory requirements cannot be waived.

63. The Applicant urged the Board to allow the instant Request for Review with costs as prayed.

Respondents' case

64. In his submissions Mr. Mogaka for the Respondents placed reliance on the Respondents' documents filed before the Board.
65. With regard to the Respondents' Preliminary Objection, counsel submitted that the instant review application having been filed on 21st May 2025 was filed outside the 14 days statutory timelines provided under Section 167(1) of the Act noting that the Applicant was notified on 7th May 2025 of the outcome of re-evaluation of the subject tender. In support of his argument, counsel relied on the holding by Justice Mativo J as he then was in *Republic v Engineers Board of Kenya Exparte Godfrey Ajourung Okumu 2018 KEHC9604(KLR)*.
66. It is the Respondents' case that numerous paragraphs of the Applicant's supporting affidavit in the instant Request for Review being 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 49 (e) (i) & (ii) and 50 are a replica of Request for Review No. 38 of 2025 which were adjudicated and determined. Counsel submitted that the Applicant's attempt to relitigate these issues contravene the doctrine of finality in litigation which demands that parties shall not be permitted to reopen/relitigate concluded issues under the guise of fresh complaints and urged the Board to strike out the said paragraphs.
67. Counsel submitted that the Board in PPARB Application No. 38 of 2025 at paragraphs 121, 122, 125, 127, 128, 129 and 133 of its Decision fully addressed itself on the question of the Interested Party's Financial Capacity Statements and this issue cannot therefore be reopened in view of the fact that the instant review is raised on account of compliance with the Board's Orders as issued in PPARB Application No. 38 of 2025.
68. The Respondents contend that it is common ground that the subject tender is a bilateral initiative between the Government of Kenya and the European Investment Bank to meet the country's electricity demand which aligns with the national goal of achieving 100% renewable energy generation by the year 2030 to which the Board is not vested with any powers by dint of Section 4 (2) (f) of the Act.

69. With regard to the substantive issues raised in the instant request for review, Mr. Mogaka submitted that pursuant to the Board's Decision in PPARB Application No. 38 of 2025, the Evaluation Committee conducted re-evaluation of the subject tender in strict adherence with the prescribed criteria in the Tender Document.
70. He indicated that the Board in its Decision at paragraphs 161 to 162 faulted the Respondent's use of the percentages in addition to the evaluation criterion and sub-criterion provided under Clause 21.2 of Section I – Instructions to Consultants at pages 17 to 18 of Part II – Request for Proposals of the Tender Document wherein it stated that the same were extraneous measures and the Respondents should have strictly adhered to use of the Evaluation Criteria in the Data Sheet.
71. Mr. Mogaka argued that the re-evaluation was undertaken based on a quantifiable point system as directed by the Board using the Evaluation Criteria contained in ITC Clause 21.1 of Section II – Data Sheet at pages 29-31 of Part II – Request for Proposals Tender Documents (RFP) as further modified by Addendum No. 2 under item 2 following which a Re-Evaluation Report was prepared. The Respondents averred that the Applicant's technical score was 77.95 points as shared in the Clarification letter dated 12th May 2025 and that the Interested Party's tender was also re-evaluated in a similar manner.
72. They contend that the Applicant's allegation that the Evaluation Committee just lumped up sums to arrive at the final technical scores is unfounded, unjustifiable and misleading and pointed to the scoring as captured in the Re-Evaluation Report which clearly demonstrates that for each evaluation criterion head, the applicable sub-criteria were individually assessed and scored, after which the total score under each criterion was summed up through an addition of those sub-criteria scores and subsequently, the final scores at the technical evaluation stage were realized by summing up the totals under each criterion head.

73. As to the qualifications of the Interested Party's key personnel, counsel referred the Board to the Terms of Reference at pages 102 to 111 of the Request for Proposal which sets out the requirements for assessing the competency and suitability of the proposed staff on the project roles/assignments.
74. He pointed out that for the role of project manager, the Terms of Reference set out three different categories with 9 distinct requirements/parameters to be used in assessing the suitability of the proposed project manager to appropriately undertake the assignment. He further pointed out that the role of the project manager attracts a maximum of 5 points to be awarded based on how well the proposed manager met each of the 9 listed parameters.
75. Counsel indicated that the Terms of Reference did not state any individual requirement or parameter as mandatory or dominant to the extent that if not met, it would invalidate and erase all other requirements as it envisaged individual contributions for the 9 parameters on the overall score such that failure to meet one or some of the parameters would lead to a partial deduction of points from the possible 5 maximum points allocated. He further indicated that the Terms of Reference did not provide that if a bidder failed on one of the 9 parameters, it would be scored 0 out of the 5 points.
76. Counsel refuted the Applicant's assertion that the Interested Party's failure to meet a single parameter being its personnel allegedly lacking appropriate registration ought to have automatically resulted in a 0 score under the key staff competence criterion. He argued that this criterion was not provided anywhere in the Request for Proposal and introduction of the extraneous standard amounts to an illegality.
77. Mr. Mogaka submitted that the subject tender was an international tender and that the Tender Document clearly provided that engineers that were evaluated include persons who are registered or certified as engineers in their home country and this was evident from the confidential documents

submitted to the Board. He further submitted that the project manager for the overall project was a duly certified engineer in Italy and having been successful in the tendering process, the said engineer would be registered in Kenya as contemplated under the Tender Document. He reiterated that the Tender Document did not require that engineers must be those registered with the Kenya Engineering Board. Counsel urged the Board to note that a wholistic reading of the Engineers Act recognizes graduate trainees and graduate engineers who are yet to be registered but can work under supervision of a registered engineer.

78. While making reference to Section 49 (3) of the Engineers Act, counsel submitted that the import of the said provision was that it is not illegal/unlawful to engage graduate engineers for professional engineering services even those not registered with the Engineers Board of Kenya so long as they strictly operate under the supervision of a registered professional or consulting engineer.

79. Counsel submitted that during contract execution, the Procuring Entity has the obligation to ensure that projects are properly superintended by appropriate personnel registered with the Engineer's Board of Kenya. He indicated that if at any time graduate engineers who lack professional registration are employed on the project, the Procuring Entity would ensure that they are appropriately supervised by the registered professional or consulting engineers working on the project. Counsel reiterated that there is no law that disallows engagement of graduate engineers for professional services working under superintendence of other registered professional engineers.

80. As to the financial re-evaluation, counsel submitted that the Evaluation Committee undertook computations required for financial evaluation in line with Items 14.1.3, 14.1.4, 26.1 of the Data Sheet at pages 24, 25, 31 and 32 of the Request for Proposal and following computation of the combined technical and financial scores, the Interested Party's tender emerged as the highest ranked bidder having gained the highest combined technical and financial score and the Applicant was ranked second.

81. The Respondents contend that the Tender Document had clearly established a detailed criterion-based evaluation methodology that the Procuring Entity was legally bound to in award of the subject tender and it could thus not award the tender solely based on price consideration as it would be contrary to Section 80(2) of the Act. In support of his argument, he referred the Board to the holding in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Coast Water Services Board & another*.
82. Counsel while relying on the holding in *Republic v Public Procurement Administrative Review Board 2 others Raystima Services Limited (Exparte) (Application E092of2022) 2022KEHC18102(KLR)* pointed out that the Board at paragraphs 130, 131 and 132 of its Decision addressed the issue of due diligence contemplated under Section 83 of the Act as read with Regulation 80 of Regulations 2020 and indicated that it did not direct that after re-evaluation, due diligence on the successful tender must be carried out before award is made.
83. Mr. Mogaka submitted that the Respondents had demonstrated full compliance with the Board's orders issued in PPARB Application No. 38 of 2025 and urged the Board to dismiss the instant Request for Review with costs to the Respondents.

Applicant's Rejoinder

84. In a rejoinder, Mr. Omiti reiterated that the instant Request for Review was filed within the stipulated statutory timelines and that the Board has jurisdiction to hear and determine the matter.
85. With regard to the objection by the Respondents' to the Board's jurisdiction to hear and determine the matter by dint of Section 4 (2) (f) of the Act, counsel submitted that the procurement proceeding in the subject

tender were subject to the Act noting that the Respondents had confirmed that the project was not entirely funded by an international organization but jointly by the Government of Kenya using public funds.

86. While making reference to Section 83 of the Act and the Board's finding on due diligence at paragraph 132 of its Decision in PPARB Application No. 38 of 2025, counsel submitted that the circumstances in the instant matter have shown that there was need to conduct proper due diligence both at the technical and financial evaluation stage.

87. On the issue of qualification of key personnel, counsel referred the Board to Sections 16, 18 and 22 of the Engineer's Act on qualification for registration of a graduate engineer and restrictions on registration of foreigners and submitted that the Respondents had not indicated if the foreign engineers referred to are actually residents and can practice as engineers in Kenya.

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

89. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 21st May 2025 was due to expire on 11th June 2025 and that the Board would communicate its decision to all parties in the Request for Review via email.

BOARD'S DECISION

90. The Board has considered each of the parties' submissions and documents placed before it and finds that the following issues call for determination:

A. Whether the Preliminary Objection as raised by the Respondents is valid.

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

In determining the second issue, the Board will make a determination on:

- i. Whether the instant Request for Review is time barred.*
- ii. Whether the instant Request for Review as filed is res judicata.*
- iii. Whether the Board's jurisdiction to hear and determine the instant Request for Review is divested by dint of Section 4(2)(f) of the Act.*

Depending on the determination of the second issue:

- C. Whether the Procuring Entity's Evaluation Committee failed to evaluate the Applicant's tender at the Technical Evaluation stage in accordance with the Tender Document contrary to the provisions of Section 80(2) of the Act as read with Article 227 of the Constitution.**
- D. Whether the Procuring Entity failed to carry out due diligence on the Interested Party's tender thereby offending the provisions of Section 83 of the Act.**
- E. Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party's tender failed to meet minimum technical requirements specifically with regard to its proposed Key Personnel.**
- F. Whether the Procuring Entity failed to comply with the orders of the Board issued in PPARB Application No. 38 of 2025.**
- G. What orders should the Board issue in the circumstances?**

As to whether the Preliminary Objection as raised by the Respondents is valid.

91. *Vide* Notice of Preliminary Objection dated 25th May 2025, the Respondents objected to hearing and determination of the instant Request for Review on the ground that the Board lacks jurisdiction to entertain the review application.
92. In opposition to the Preliminary Objection, the Applicant filed Grounds of Objection to the Respondents' Notice of Preliminary Objection dated 30th May 2025. The Applicant contends that the Notice of Preliminary Objection is fatally defective as it fails to expressly plead the statute and law relied upon and instead contains contested factual issues. The Applicant further contends that the said objection necessitates the Board to engage in an inquiry to ascertain facts and specific legal basis of the objection.
93. During the Hearing, Counsel for the Applicant submitted that the Preliminary Objection as filed is fatally defective based on the fact that on its face, it only states that the board lacks jurisdiction but fails to particularize the grounds upon which it is based. He relied on Regulation 209 (2) of the Regulations 2020 which provides that a preliminary objection shall set out the grounds upon which it is based and contended that if it is argued then it will be violating the Applicant's right to a fair hearing as the Applicant will not have an opportunity to respond to the grounds that are not reflected in it.
94. Having carefully considered parties' pleadings and submissions herein, the Board is called upon to determine if the Preliminary Objection raised by Respondent is valid. In doing so we will analyse it from the point of view of its form as well as its substance. With regards to its form, two issues fall for the Boards' determination, firstly whether the Notice of Preliminary Objection is fatally defective as it fails to expressly plead the statute and law relied upon and secondly on whether the grounds upon which it is based are particularized.

On the first issue with regards to its form, parameters of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits

or otherwise of the Preliminary Objections by the Procuring Entity and the Interested Party were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

95. At page 701 Sir Charles Newbold, P added that:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."

96. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

97. Turning to the circumstances in the instant Request for Review, we note that the Respondents contend that the Board lacks jurisdiction to entertain the matter and submitted during the hearing that this is on account of (a) the review application being time barred contrary to Section 167(1) of the Act, (b) issues raised in the review application by the Applicant being res judicata, and (c) the subject tender being bilateral initiative between the Government of Kenya and the European Investment Bank thus divesting the Board of its jurisdiction in the matter by dint of Section 4(2)(f) of the Act.

98. We note that though the sections relied upon by the Respondents in their preliminary objection are not expressly captured in the Notice of Preliminary Objection dated 25th May 2025, the Respondents objections as raised and submitted on during the hearing are based purely on points of law which emerge from clear implications of pleadings filed by the Applicant and basically touch on the competency of the Request for Review as filed by the Applicant.

99. In the circumstances, we find that the Respondents' Preliminary Objection is indeed based on pure points of law.

100. On the second issue on the form of the preliminary objection, Regulation 209 (2) of the Regulations 2020 provides as follows:

"A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing."

101. Ideally, a preliminary objection ought to state the grounds upon which it is based since the language used in the Regulation is in fact couched in mandatory terms. Turning to the circumstances in the instant Request for Review we note that the Notice of Preliminary objection filed by the Respondents dated 25th May, 2025 only stated that the Respondents shall at the hearing of the Request for Review therein raise a preliminary objection on a point of law to wit; that the Honorable Board lacks jurisdiction to entertain this Request for Review.

102. Indeed, the grounds that the Respondent relied on, in arguing the preliminary objection, only came out in its Replying Affidavit and at the hearing. This is contrary to the provisions of the Regulation which requires that the grounds be specifically set out in the preliminary objection at the point of filing. Having noted that Regulation 209 (2) as argued by the Applicant is couched in mandatory terms, this Board is left with no option but to find that the Notice of Preliminary Objection dated 25th May, 2025 is

fatally defective for failing to set out the grounds upon which it is based contrary to Regulations 209 (2) of the Regulations 2020.

103. Be that as it may, this Board can not ignore the fact that its jurisdiction has been challenged as noted in the replying affidavit and being a responsible Board its shall proceed to determine the Preliminary objection based on the points of law raised in the Respondent's Replying Affidavit and submissions at the hearing as follows:

104. It is trite law that courts and decision-making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

105. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

106. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs

tools in respect of the matter before it the moment it holds that it is without jurisdiction."

107. The Supreme Court added its voice on the source of jurisdiction of a court or other decision-making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

108. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

109. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

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

110. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

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

111. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

112. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board. Section 167 (1) of the Act provides:

167. Request for a review

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

113. In essence, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or

Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

114. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

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

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

115. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

116. A reading of Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

117. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity

shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

118. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

119. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. The Board has in a plethora of cases held that

procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

120. The Board now turns to look at the three limbs of the preliminary objections raised in the instant Request for Review.

As to whether the instant Request for Review is time barred

121. The Respondents submitted that the instant Request for Review as filed is time barred. It is the Respondent's case that the Applicant was notified of the outcome of re-evaluation of the subject tender on 7th May 2025 and that filing of the instant review application on 21st May 2025 was outside the 14 days stipulated in Section 167(1) of the Act. In response, the Applicant submitted that the review application was filed within the stipulated statutory timelines pursuant to Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020.

122. Having considered parties pleadings and submissions, we note that the Applicant being aggrieved with the decision of the 1st Respondent in awarding the subject tender to the Interested Party as communicated on 7th May 2025 ought to have challenged the same within the 14 days statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

123. In computing time when the Applicant should have sought administrative review before the Board, we are guided by the provisions of Section 57 of the Interpretation and General Provisions Act (hereinafter referred to as "the IGPA") which provides for computation of time as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

124. In computing time when the Applicant ought to have filed the instant Request for Review, the 7th May 2025 is excluded pursuant to Section 57(a) of the IGPA being the day that the Applicant received its notification letter. As such, the 14 days statutory period started running on 8th May 2025 and lapsed on 21st May 2025. In essence, the Applicant had between 8th May 2025 and 21st May 2025 to seek administrative review before the Board.

125. In the circumstance, we find that the instant Request for Review was filed within the stipulated statutory period of 14 days as provided under Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020. Accordingly, this limb of preliminary objection fails.

As to whether the instant Request for Review as filed is res judicata.

126. The Respondents submitted that numerous paragraphs of the Applicant's Supporting Affidavit in the instant Request for Review being 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 49(e)(i) & (ii) and 50 are a replica of Request for Review No. 38 of 2025 which were adjudicated and determined. The Respondents further submitted that the Applicant's attempt to relitigate these issues contravene the doctrine of finality in litigation which demands that parties shall not be permitted to reopen/relitigate concluded issues under the guise of fresh complaints and urged the Board to strike out the said paragraphs.
127. In response, the Applicant submitted that the claim herein emanates from the decision of the 1st Respondent to award the subject tender to the Interested Party following re-evaluation as ordered by the Board in PPARB Application No. 38 of 2025. It further submitted that its grievance arises from new issues that arose following actions of the Respondents during re-evaluation and as communicated vide letter dated 7th may 2025 which informed it on the outcome of the re-evaluation process.
128. It is the understanding of the Board that the Respondents and the Interested Party have invoked the doctrine of *res judicata* in their arguments that the Applicant ought to be barred from prosecuting the instant Request for Review. Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, defines the doctrine of *Res Judicata* as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has

been subsequently raised, and has been heard and finally decided by such Court.”

129. This provision stipulates that a court, tribunal, or any board adjudicating a dispute is precluded from hearing a case or issue that has already been conclusively determined in a prior case involving the same parties, or their representatives, and relating to the same subject matter, provided the earlier case was heard by a court or body with the legal authority to make such a determination.

130. In the case of **Attorney General & Another v. ET (2012) eKLR**, the High Court held that:

"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

131. The above decision underscores the importance of courts being vigilant against attempts by litigants to circumvent the doctrine of *res judicata* by presenting previously decided issues as new claims or by introducing

additional parties or slightly modified causes of action. It emphasizes that the true test is whether the applicant is, in essence, seeking the same remedy for a matter that has already been adjudicated by the court or the Board.

132. The question arising in the instant Request for Review is whether the Applicant is merely attempting to apply a cosmetic modification to what the Board determined in PPARB Application No. 38 of 2025.

133. The Board observes that the instant Request for Review stems from the tender proceedings resulting from the orders issued by the Board in PPARB Application No. 38 of 2025 in which the Board had directed that the Evaluation Committee re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020 and for the procurement process proceed to its logical conclusion. Phrased differently, the issues in question in this request for review are based on the re-evaluation conducted by the tender committee of the Respondent carried out on 2nd May, 2025 pursuant to the orders of this Board issued in PPARB Application No. 38 of 2025 as contradistinguished with issues raised in PPARB Application No. 38 of 2025 which related to the impugned evaluation process carried out on 6th January, 2025 for the technical and 3rd March, 2025 for the financial evaluations respectively.

134. In view of the foregoing, the Board finds that the issues raised in the instant Request for Review are distinct from those addressed in PPARB Application No. 38 of 2025. The instant Request for Review is therefore not *res judicata*, as it raises new issues that have not previously been determined by the Board. Accordingly, this limb of preliminary objection fails.

As to whether the Board's jurisdiction to hear and determine the instant Request for Review is divested by dint of Section

4(2)(f) of the Act.

135. The Board heard the Respondents’ argument that the Board lacks jurisdiction to hear and entertain the instant Request for Review by dint of Section 4 (2) (f) of the Act since the subject tender is a bilateral initiative between the Government of Kenya and the European Investment Bank aimed at meeting the country’s electricity demand which aligns with the national goal of achieving 100% renewable energy generation by the year 2030.

136. In response, the Applicant in opposing this objection submitted that the Board is clothed with jurisdiction to hear and determine the issues raised in the instant Request for Review and pointed out that the Respondents had confirmed that the project was not entirely funded by the European Investment Bank but jointly with the Government of Kenya using public funds.

137. The Board having considered the parties’ submissions deems it necessary to interrogate the ouster clause set out in Section 4(2)(f) of the Act cited by parties, its import and interpretation of the same in judicial authorities.

138. Section 4(2)(f) of the Act reads:
"(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies –
(a);
(b);
(c);
(d);
(e); and
(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or

multilateral agency unless as otherwise prescribed in the Regulations.”[Emphasis Board]

139. Further, Regulation 5(1) of Regulations 2020 reads:

“(1) Where any bilateral or multilateral agreements are financed through negotiated loans for the procurement of goods, works or services, the Act shall not apply where the agreement specifies the procurement and asset disposal procedures to be followed.” [Emphasis Board]

140. The import of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 is that the Act is not applicable in procurement and asset disposals under bilateral or multilateral agreements between the Government of Kenya and any other foreign government agency, entity or multilateral agency. Additionally, where any such bilateral or multilateral agreement is financed through negotiated loans for the procurement of goods, works or services, the Act is not applicable where such aforementioned agreements specify the procurement and asset disposal procedures to be followed. It is imperative to note that for Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 to apply, one of the parties must be the Government of Kenya.

141. We are cognizant of the fact that the High Court of Kenya has on numerous occasions while considering judicial review matters emanating from the decisions of the Board addressed the import of provisions of Section 4(2)(f) of the Act.

142. Justice Odunga in **Miscellaneous Application No. 402 of 2016 (Consolidated with Misc. Application No. 405 of 2016) Republic v Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR** (hereinafter referred to as “the Athi Water Case”) at paragraphs 152 to 154 pronounced himself on the import of Section 4(2)(f) of the Act as follows:

“[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya. The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement.

[153] In this case, the Procuring Entity, Athi Water Services Board, is a Parastatal created under section 51 of the Water Act 2002 with perpetual succession and a common seal, with power, in and by its corporate name, to sue and be sued. It’s not the Government of Kenya. In the instant procurement, the Government of Kenya was not a party to the procurement and accordingly the Procurement is not exempted under section 4(2) (f).

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. On this limb also the procurement is not exempted.

143. Justice Odunga in the Athi Water Case took the view that jurisdiction of this Board would be ousted by Section 4(2)(f) of the Act where parties to

a procurement are (i) the Government of Kenya, and (ii) the other party being a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency.

144. Justice Nyamweya took a different approach in addressing the import of Section 4(2)(f) in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** (hereinafter referred to as “the KPLC Case”) cited by the Respondents, and held at paragraphs 61 to 65 as follows:

"61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4(2) (f), and in particular abdicated its discretion and duty to make a finding as to whether the subject procurement process was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and a foreign international entity, which was what was in issue and was specifically raised and canvassed by the parties as shown in the foregoing.

62. This Court also notes that the Applicant in this regard annexed a copy of the agreement that was entered into between the Government of Kenya and the Nordic Development Fund that it relied upon. The agreement was annexed to a supplementary affidavit that it filed with the Respondent on 16th April 2018.

63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign

government or agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act...

64. It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2) (f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding that the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity.

65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency. [Emphasis by the Board]

145. In her holding in the KPLC Case, Justice Nyamweya faulted the Board for failure to consider the applicability of the bilateral agreement which was the subject of the proceedings before the Board, in order for it to make a determination on the import of Section 4(2)(f) of the Act. The Learned Judge took the view that Section 4(2)(f) of the Act ousts the jurisdiction of this

Board where a procurement is undertaken as provided for or in accordance with the terms of a bilateral agreement or multilateral agreement that is entered into between (i) the Government of Kenya and (ii) the other party being a foreign government, agency, entity or multilateral agency.

146. From the foregoing, the Board in considering the circumstances in the instant Request for Review must address its mind to the operative words in Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 being (a) "procurement under" a bilateral agreement and (b) inapplicability of the Act where the bilateral Agreement is financed through negotiated loans and specifies the procurement procedure to be followed.

147. Turning to the instant Request for Review, we note from the Tender Document that the Procuring Entity in floating the subject tender and inviting sealed bids indicated that it was in the process of receiving financing from European Investment Bank (EIB). The Preface reads:

The Kenya Electricity Generating Company PLC (KenGen, referred hereafter as "Employer") and The European Investment Bank (EIB), the financier for the Consultancy Services Contract for the Olkaria VII Geothermal Power Project have agreed to use EIB procurement guidelines and adapt the format of The KfW Standard Procurement Document "Standard Bidding Documents for Consulting Services", customized to suit the Olkaria VII Geothermal Power Project procurement process

148. Further the Preamble to the Tender informed bidders that the procurement process would be carried out in a single stage, three envelope (prequalification, technical and financial) International Competitive Bidding.

149. We note that despite the Tender Document indicating that the European Investment Bank (EIB) was financing the subject tender and that both EIB and the Procuring Entity had agreed to use EIB procurement guidelines, no financing agreement was supplied to the Board with regard to

the subject tender. This financing agreement would have been of much assistance for the Board to understand the legal relationship between the borrower and the financier and the terms governing the said agreement with respect to the resultant procurement in the subject tender.

150. As held by Justice Nyamweya in the KPLC Case (Supra), section 4(2)(f) of the Act is an evidential ouster clause and one of the responsibilities of the Board in this regard is to satisfy itself of the existence (in fact) of a financing agreement and its provisions to ensure strict compliance with the ouster provisions. Indeed, in the KPLC Case (supra) it was on the basis of the actual bilateral agreement exhibited by the procuring entity that the court was able to satisfy itself of the applicability of section 4(2)(f) of the Act.

151. In the circumstances, where no bilateral agreement has been provided, the Board is unable to satisfy itself of its provisions and cannot therefore be convinced that the instant procurement in the subject tender falls under the ouster clause of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020. Accordingly, this limb of preliminary objection fails.

152. The upshot of our finding on the first issue for determination therefore is that this Board has jurisdiction to hear and determine the instant Request for Review.

As to whether the Procuring Entity's Evaluation Committee failed to evaluate the Applicant's tender at the Technical Evaluation stage in accordance with the Tender Document contrary to the provisions of Section 80(2) of the Act as read with Article 227 of the Constitution.

153. We understand the crux of the Applicant's case to be that its tender was unfairly and unlawfully evaluated and scored at the Technical Evaluation stage following re-evaluation of the subject tender by the Evaluation Committee as ordered by the Board in PPARB Application No. 38 of 2025. The Applicant contends that the scoring adopted by the Respondents at the

Technical Evaluation stage reveals an arbitrary suppression of scores where points were unjustly withheld from its tender, thus deviating from transparent evaluation standards required by law. While referring to Section 80 of the Act, the Applicant submitted that the Respondents only lumped up the scores on each sub-criterion specifically the Project Experience criterion which is a clear violation of the Tender Document and provisions of the Act since scoring was supposed to be done per individual sub-criterion before summing them up to give the final score per criterion.

154. On the other hand, we understand the Respondents' case on this issue to be that re-evaluation of the subject tender was undertaken at the Technical Evaluation stage based on a quantifiable point system as directed by the Board using the Evaluation Criteria contained in ITC Clause 21.1 of Section II – Data Sheet at pages 29-31 of Part II – Request for Proposals Tender Documents (RFP) as further modified by Addendum No. 2 under item 2 following which a Re-Evaluation Report was prepared.

155. The Respondents submitted that the Evaluation Committee in its re-evaluation demonstrated full compliance with the Board's orders issued in PPARB Application No. 38 of 2025 and adhered to the provisions of the Tender Document in scoring both the Applicant's and Interested Party's tenders.

156. The issue that has arisen for the Board's determination is whether the Procuring Entity's Evaluation Committee adhered to the provisions of the Tender Document in re-evaluating the subject tender as ordered in PPARB Application No. 38 of 2025.

157. The Board observes 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)”

158. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80(1) and (2) 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)”

159. 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. A system that is fair is one that considers equal treatment of all tenders against a criterion of evaluation known by all tenderers having been well laid out in the tender document. 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.

160. It is instructive that the Applicant was notified vide letter dated 7th May 2025 that its tender was unsuccessful for the reason that:

"Your firm did not attain the highest combined technical and financial score."

161. The Tender Document provided for Technical Evaluation Criteria at ITC Clause 21.1 of Section II – Data Sheet at pages 29 to 31 of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 dated 24th October 2024 at page 3 of 6 to page 5 of 6 as follows:

Section II. Data Sheet

["Notes to Employer" shown in brackets throughout the text are provided for guidance to prepare the Data Sheet; they shall be deleted from the final RFP to be sent to the shortlisted Consultants]

.....											
21.1	<p><i>The technical evaluation shall be carried based on the following criteria and point system. No additional criteria or sub-criterion than those indicated in the RFP shall be used for the evaluation of the Technical Proposal.</i></p> <table><tr><th rowspan="2"><i>Qualification Criteria ***</i></th><th colspan="2"><i>Scoring</i></th></tr><tr><th><i>Score</i></th><th><i>Overall Score</i></th></tr><tr><td><i>1.Project Experience</i></td><td></td><td><i>33</i></td></tr><tr><td><i>1.6 A track record of relevant experience in consulting services in the Geothermal Energy sector</i></td><td><i>4</i></td><td></td></tr></table>	<i>Qualification Criteria ***</i>	<i>Scoring</i>		<i>Score</i>	<i>Overall Score</i>	<i>1.Project Experience</i>		<i>33</i>	<i>1.6 A track record of relevant experience in consulting services in the Geothermal Energy sector</i>	<i>4</i>	
<i>Qualification Criteria ***</i>	<i>Scoring</i>											
	<i>Score</i>	<i>Overall Score</i>										
<i>1.Project Experience</i>		<i>33</i>										
<i>1.6 A track record of relevant experience in consulting services in the Geothermal Energy sector</i>	<i>4</i>											

	<i>for more than 15 years of practice.</i>		
	<i>1.7 Demonstrated experience in the design and engineering of geothermal Power Plants of similar nature and complexity, either as a subcontractor or a joint venture member for Power Plant Design within an EPC Contractor's scope or as the Owner's Engineer for Engineering services on the Power Plant scope in the last 20 years. Completed Projects for Geothermal Power Plants, each of similar nature and complexity.</i>	8	
	<i>1.8 Demonstrated experience in the design and engineering of a geothermal Steam gathering System of a similar nature and complexity, either as a design subcontractor/Sub-Consultant or Owner's Engineer in the last 20 years. Completed Projects for a steam gathering System, each of similar nature and complexity</i>	10	
	<i>1.9 Demonstrated experience in the design and engineering of Electrical substation and Transmission lines of similar nature in the last 20 years. Completed Projects each with a substation and Transmission line of similar nature and complexity.</i>	4	

	1.10 Contract management, site administration, Design Review, Supervision of construction, commissioning and management of warranty period for completed Projects involving a Geothermal steam gathering system, Geothermal Power plant and substation/Transmission works , each of similar nature and complexity	4	
	1.11 Demonstrated experience in the design and engineering of Roads of similar nature in the last 20 years. Completed Projects, each with scope of roads of similar nature and complexity ****		
	2. Key Staff Competence		50
	2.1 Project manager	5	
	2.2. Design Team		
	2.2.1. Process Design Lead	3	
	2.2.2.Mechanical Design Lead	3	
	2.2.3. Electrical Design lead,	3	
	2.2.4.Control & Instrumentation Design Lead	2	
	2.2.5.Civil & Structural Design lead	2	
	2.2.6.Contract/Commercial Lead	2	
	2.2.7.Quality Assurance and Quality Control Lead	1	
	2.3. Site Team		
	2.3.1. Site Manager/Engineer to Contract	5	

	2.3.2. Site Power Plant Lead/Commissioning Engineer	3	
	2.3.3.Site Steamfield/Steamfield Commissioning lead	3	
	2.3.4. Site Civil & Structural lead	3	
	2.3.5. Site Electrical, Control and Instrumentation team lead	3	
	2.3.6. Site HV Substation and Transmission Line lead	3	
	2.3.7. Site Contract/Commercial Lead	2	
	2.3.8. Site Environment, Social, Health & safety (ESHS) Lead	2	
	2.4. Proportion of proposed key expert with Experience on the specific Projects listed/evaluated in Data Sheet 21.1 item 1-Project Experience (% Proportionality)	3	
	2.5. Proportion of Permanent staff among proposed key expert (% Proportionality)	2	
	3. Adequacy to TOR		12
	3.1. Technical Approach and Methodology	4	
	3.2. Quality of Workplan	4	
	3.3. Organization and Staffing	4	
	4. Suitability of the transfer of knowledge (training) program:		5
	Total Points		100
	** In case of a Joint Venture/Consortium: IV. The lead Consultant, must as a minimum meet the requirements for item 1.1 together with either 1.2 or 1.3 or both, on his own (as a single entity).		

	<p><i>V. The following Key staff must be Employees of the Firm that meets the minimum requirement for item 1.1 together with either 1.2 or 1.3 or both: item 2.1 (Project Manager), item 2.3.1 (Site Manager/Engineer to Contract) and majority of staff within item 2.2 (Design Team), as a minimum requirement.</i></p> <p><i>VI. Each member of the consortium must as a minimum meet the requirements for item 1.2 or 1.3 or 1.4 or all, on his own (as a single entity).</i></p> <p><i>VII. The combined JV/Consortium must meet minimum requirements detailed in the Qualification Criteria.</i></p> <p><i>*** For the referenced projects, extracts of contracts showing name of the Project, Parties to contract, date of signature and the Signed page, shall be provided by Applicants. Evidence of project completion (Project completion certificates) shall also be provided by the Applicants. Referenced projects without this information will not be considered for evaluation.</i></p> <p><i>**** Attach copies of previous Contract extracts, showing design scope of roads in cases where the roads were included in the larger scope of either the Geothermal Power Plant or Steamfield works. Alternatively, attach sub-consulting agreement in cases where it is intended to subcontract the roads design services, in which case the experience of the sub consultant will be evaluated for this item.</i></p>
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162. From the above, submitted technical proposals would be evaluated and scored using the point system as set out in the Data Sheet where scores are indicated as points with the overall score totaling to 100 points.

163. From the Re-evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that the Evaluation Committee resulted to scoring both the Applicant’s and Interested Party’s technical proposals as follows:

Table 2: Compiled Technical Proposal Re-Evaluation Sheet

PART A: PROJECT EXPERIENCE (33 MARKS)				
Qualification criteria	Marks	Sub-Criteria	sub-scoring	Main Scoring

1. Project Experience**	33		JV of Sintecnica Engineering S.r.l & Steam S.r.l	ELC Electroconsult S.p.A	JV of Sintecnica Engineering S.r.l & Steam S.r.l	ELC Electroconsult S.p.A
<i>The number of points to be assigned on each Sub-criterion shall be based on the actual number of projects the Bidder has provided which qualify for evaluation criteria under project experience. One qualifying project equals one (1) point up to a maximum of the points provided for each sub-criterion.</i>						
1.6 A track record of relevant experience in consulting services in the Geothermal Energy sector for more than 15 years of practice.	4	No of Years of Consulting in Geothermal Energy Sector	15	20		
		Score			3.00	4.00
1.7 Demonstrated experience in the design and engineering of geothermal Power Plants of similar nature and complexity, either as a subcontractor or a joint venture member for Power Plant Design within an EPC Contractor's scope in the last 20 years. Completed Projects for Geothermal Power Plants, each of similar nature and complexity.	8	No. of completed Projects that meet criteria (with supporting Documents as per Note ***	6 Projects (2,3,4,6,7 &8)	12 projects (1,11,17,19,21,22,23,24,25,27,32,34)		
		Score			6.00	8.00
1.8 Demonstrated experience in the design and engineering of a geothermal Steam gathering System of a similar nature and complexity, either as a design subcontractor/Sub-Consultant or Owner's Engineer in the last 20 years. Completed Projects for a steam gathering System, each of similar nature and complexity	10	No. of completed Projects that meet criteria (with supporting Documents as per Note ***	5 projects (2,3,4,6&8)	10 projects (1,11,17,21,23,24,25,27,32,34)		
		Score			5.00	10.00
1.9 Demonstrated experience in the design and engineering of Electrical substation and Transmission lines of similar nature in the last 20 years. Completed Projects each with a substation and Transmission line of similar nature and complexity.	4	No. of completed Projects that meet criteria (with supporting Documents as per Note ***	3 projects (6,7&8)	6 projects (1,17,23,36,37,38)		
		Score			3.00	4.00
1.10 Contract management, site administration, Design Review, Supervision of construction, commissioning and management of warranty period for completed Projects involving a Geothermal steam gathering system, Geothermal Power plant and substation/Transmission works, each of similar nature and complexity	4	No. of completed Projects that meet criteria (with supporting Documents as per Note ***	3 projects (6,7&8)	11 projects (9,10,11,12,14,15,23,27,34,35,38)		
		Score			3.00	4.00
1.11 Demonstrated experience in the design and engineering of Roads of similar nature in the last 20 years. Completed Projects, each	3	No. of completed Projects that meet criteria	0 projects	0 projects	0.00	0.00

with scope of roads of similar nature and complexity ****		(with supporting Documents as per Note ***				
		Score			0.00	0.00
PART A: PROJECT EXPERIENCE					20.00	30.00
TOTAL SCORES						

PART B: KEY STAFF AND WORK METHODOLOGY (67 MARKS)			
2. Key Staff Competence (Points were based on the information provided in CVs of the key staff) Refer to <i>Annex 2: Detailed point system scoring for the key staff competence</i>	50	JV of Sintecnica Engineering S.r.l & Steam S.r.l	ELC Electroconsult S.p.A
2.1 Project Manager	5	4.95	5.00

2.2 Design Team

2.2.1. Process Design Lead	3	2.75	2.85
2.2.2. Mechanical Design Lead	3	2.75	2.85
2.2.3. Electrical Design lead,	3	2.80	3.00
2.2.4. Control & Instrumentation Design Lead	2	1.80	1.90
2.2.5. Civil & Structural Design lead	2	2.00	2.00
2.2.6. Contract/Commercial Lead	2	1.40	2.00
2.2.7. Quality Assurance and Quality Control Lead	1	0.80	1.00

2.3 Site Team (Phase IVa and V)

2.3.1. Site Manager/Engineer to Contract	5	5.00	4.70
2.3.2. Site Power Plant Lead/Comissioning Engineer	3	2.80	2.80
2.3.3. Site (Process) Steamfield/Steamfield Comissioning lead	3	2.80	2.85
2.3.4. Site Civil & Structural lead	3	3.00	3.00

2.3.5. Site Electrical, Control and Instrumentation team lead	3	1.80	2.80
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2.3.6. Site HV Substation & Transmission Line lead	3	2.00	3.00
2.3.7. Site Contract/Commercial Lead	2	1.40	1.80

2.3.8. Site Environment, Social, Health & safety (ESHS) Lead	2	0.70	2.00
2.4 Proportion of proposed key expert with Experience on the specific Projects listed/evaluated in Data Sheet 21.1 item 1-Project Experience (% Proportionality)	3	1.88	2.06
2.5 Proportion of Permanent staff among proposed key expert (% Proportionality)	2	1.12	1.50

3.0 Adequacy to TOR (Points awarded based on the TOR and Methodology in the bids)	12		
3.1. Technical Approach and Methodology	4	4.00	4.00

3.2. Quality of Workplan	4	3.20	3.20
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3.3. Organization and Staffing	4	4.00	4.00
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4.0 Suitability of the transfer of knowledge (training) program:	5	5.00	3.75
Sub-Total for Part B		57.95	62.06
Sub-Total carried from Part A		20.00	30.00
Total Points	100	77.95	92.06

164. From the above Re-Evaluation Report, we note that the Evaluation Committee scored the Applicant 77.95 points while the Interested Party was scored 92.06 points.

165. The Applicant contends at paragraphs 37, 38, 39, 40, 41 and 42 of its Supporting Affidavit sworn by Matteo Quaia that had it been correctly scored at the Technical Evaluation stage, it would have attained a total score of 96.195%.

166. Having carefully examined both the Applicant's and the Interested Party's original bid documents, the Board makes the following observations regarding the scoring of the Applicant's tender, as set out in its analysis of the technical re-evaluation

Qualification criteria	Marks	Sub-Criteria	Qualification criteria			Boards observation ELC
1. Project Experience**	33		Sintecnica/Steam JV:	Board Observation and finding on JV	ELC Electroconsult S.p.A	
1.6 A track record of relevant experience in consulting services in the Geothermal Energy sector for more than 15 years of practice.	4	No of Years of Consulting in Geothermal		The Applicant demonstrated extensive experience, having undertaken six geothermal projects over more than 15 years. The Committee's award of 3.00 marks was unjustified.		Complied and exceeded in terms of the Requirement

		Energy Sector		Full marks (4.00) ought to have been awarded.		
		Score	Scored 3.00 marks	Ought to have scored 4.00 marks	Scored 4.00 marks	Correctly scored 4.00 marks
1.7 Demonstrated experience in the design and engineering of geothermal Power Plants of similar nature and complexity, either as a subcontractor or a joint venture member for Power Plant Design within an EPC Contractor's scope in the last 20 years. Completed Projects for Geothermal Power Plants, each of similar nature and complexity.	8	No. of completed Projects that meet criteria (with supporting Documents as per Note ***		Evaluation under this criterion must be based on the Applicant's compliance with the stated requirements, and not on a comparative basis with other bidders, as clearly emphasized in the Addendum. Accordingly, the Applicant should have been awarded full marks (8.00) under this parameter, as all submitted projects satisfy the evaluation requirements.		Complied and exceeded in terms of the Requirement
		Score	Scored 6.00 marks	Ought to have scored 8.00marks	Scored 8.00	Correctly scored 8.00 marks
1.8 Demonstrated experience in the design and engineering of a geothermal Steam gathering System of a similar nature and complexity, either as a design subcontractor/Sub-Consultant or Owner's Engineer in the last 20 years. Completed	10	No. of completed Projects that meet criteria (with supporting		-The Applicant submitted five completed projects (Projects 2, 3, 4, 6, and 8) under the parameter. -Each of the projects provided is supported by the requisite		Complied and exceeded in terms of the Requirement by submitting 12 projects

Projects for a steam gathering System, each of similar nature and complexity		Documents as per Note ***		documentation and demonstrates relevance in terms of scope, complexity, and technical alignment with the requirements set out in the Tender Document and accompanying Addendum. --- The Evaluation Committee confirms that the Applicant’s experience is directly aligned with the stated criteria. considering that evaluation should be based on fulfillment of objective requirements rather than relative performance against other bidders, the Applicant should have been awarded full marks (10.00) under this parameter.		
		Score	Scored 5.00 marks	Ought to have scored 10.00marks	10.00	Correctly 10 marks
1.9 Demonstrated experience in the design and engineering of Electrical substation and Transmission lines of similar nature in the last 20 years. Completed Projects each with a substation and Transmission line of similar nature and complexity.	4	No. of completed Projects that meet criteria (with supporting Documents		the Applicant submitted three projects (Projects 6, 7, and 8). - Evaluation under this criterion must be based on the Applicant’s compliance with the stated requirements, and not on a comparative basis with		Complied

		as per Note ***		other bidders, as clearly emphasized in the Addendum.so he merited full marks		
		Score	3.00	Ought to have scored 4.00 marks	Scored 4.00marks	4.00
1.10 Contract management, site administration, Design Review, Supervision of construction, commissioning and management of warranty period for completed Projects involving a Geothermal steam gathering system, Geothermal Power plant and substation/Transmission works, each of similar nature and complexity	4	No. of completed Projects that meet criteria (with supporting Documents as per Note ***		the Applicant submitted projects. - Evaluation under this criterion must be based on the Applicant's compliance with the stated requirements, and not on a comparative basis with other bidders, as clearly emphasized in the Addendum.Applicant merited full marks		
		Score	3.00	4.00	4.00	4.00
1.11 Demonstrated experience in the design and engineering of Roads of similar nature in the last 20 years. Completed Projects, each with scope of roads of similar nature and complexity ****	3	No. of completed Projects that meet criteria (with supporting Documents as per Note ***	0.00	The Applicant did not provide evidence with respect to this criterion and therefore properly evaluated by being awarded zero marks		The Interested Party did not provide evidence with respect to this criterion and therefore properly evaluated 0.00
		Score	0.00	0.000	0.00	0.00

PART A: PROJECT EXPERIENCE TOTAL SCORES			20.00	30	30.00	30.00
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Correct Total – Part A (Project Experience)

Sintecnica/Steam JV: 30.00/33.00 (revised from 20.00)

ELC: 30.00/33.00 (no change)

Part B: Key Personnel and Methodology – 50 Marks

- I. The Board notes from the evaluation report and the accompanying *Annex 2: Detailed Point System Scoring for the Key Staff Competence*, that the Evaluation Committee applied disaggregated scoring sub-criteria (e.g., 40/30/30 split—i.e., General Qualifications – 15%, General Professional Experience – 25%, Specific Relevant Professional Experience – 60%). However, no corresponding sub-allocation or justification was provided for how marks were awarded within each component. Moreover, such sub-criteria were neither prescribed in the

Tender Document nor introduced through the Addendum. This approach is inconsistent with the Board's findings in Application No. 38 of 2025.

- II. In the absence of lawful sub-weighting, and where the key expert qualifications fully satisfied the specified requirements, **full marks ought** to have been awarded.
- III. In any event, the Tender Document expressly provided the following with respect to Team Composition and Qualification Requirements for Key Experts at pages 102 of the Blank tender document which provided as follows:-
- IV. ***"For references to specific Projects, the CV to clearly indicate the Project name/details and contact persons/references. The Employer may conduct due diligence during evaluation on provided references."***
- V. This provision provided the Evaluation Committee with a lawful mechanism to verify project experience and could have cured any omission or commission in the CVs, if necessary.

VI. Bearing the above observations in mind, the Board proceeds to assess whether the re-evaluation applied a uniform standard to both the Applicant and the Interested Party, particularly because only two bidders expressed interest in the tender. It is imperative to determine whether the evaluation criteria were applied evenly and objectively, and whether the observed inconsistencies affected the fairness of the outcome.

PART B: KEY STAFF AND WORK METHODOLOGY (67 MARKS)					
2. Key Staff Competence (Points were based on the information provided in CVs of the key staff) Refer to <i>Annex 2: Detailed point system scoring for the key staff competence</i>	50	JV of Sintecnica Engineering S.r.l & Steam S.r.l Re-evaluation score	Boards observation and recommendation	ELC Electroconsult S.p.A Re-evaluation score	Boards observation
2.1 Project Manager	5	Scored 4.95 Marks	Loss of 0.05 on "good communicator" not measurable from CV; applicant met all Project Manager criteria at pp.102 of blank tender document Applicant should give full .	Scored 5.00 Marks	Correct score awarded. scored 5 marks

			In addition, no proration or sub-allocation of marks was provided under the general heading of " Specific Relevant Experience, ought to have scored 5 marks		
2.2 Design Team					
2.2.1. Process Design Lead	3	2.75	<p>The Board notes that the loss of 0.25 marks for the Process Design Lead was unjustified. The Tender Document required a university degree in a relevant field. The Applicant's expert, Riccardo Corsi, holds a Doctorate in Chemical Engineering from the University of Pisa (1973)—a qualification that exceeds the stated requirement.</p> <p>No lawful proration or sub-allocation was provided in the Tender Document or Addendum to justify such a deduction. In line with Application No. 38 of 2025, full 3 marks ought to have been awarded.</p>	2.85	<p>K-1 – Project Manager (Ugo Barbon, p. 119): Lost 0.15 marks under criterion ii. Registered Professional. The expert holds an MSc in Mechanical Engineering; although the undergraduate degree is not explicitly stated, it is reasonably implied by the postgraduate qualification. Notably, the same basis was used to deny marks to another expert, indicating inconsistent application of the criterion. The Tender Document and its Addendum do not provide for proration or sub-allocation of marks under this criterion. The Applicant ought to have been awarded the full 3 marks.</p>
2.2.2. Mechanical Design Lead	3	2.75	<p>The loss of 0.25 marks for the Mechanical Lead, Roberto Parri (pp. 107–113), was unwarranted. The Tender Document required a university degree in a relevant field. The expert holds an MSc in Mechanical Engineering (University of Pisa, 1978) and also completed an</p>	2.85	<p>K3, Mechanical Design Lead Name of Key Expert Riza Ozgur EROL</p> <p>Pp 144 merited full marks as per requirement at pages 102</p> <p>He has Membership in Professional Association: - Professional, with Protocol No. 9781.(lost marks on this account not justified)</p>

			<p>Advanced Management Programme at INSEAD (1980).</p> <p>There was no basis for mark deduction, as the academic qualification meets the requirement. Additionally, no proration or sub-allocation of marks was provided in the Tender Document or Addendum. The Applicant therefore merited the full 3 marks.</p>		<p>In addition, no proration or sub-allocation of marks was provided in the tender document nor in the addendum</p> <p>ought to have scored 3 marks</p>
2.2.3. Electrical Design lead,	3	2.80	<p>The loss of 0.20 marks for K-4, Electrical Design Lead, Renato Bonaccorso, was attributed to the absence of "other training." However, the Tender Document did not prescribe sub-allocation or proration of marks for such elements, nor was this introduced in the Addendum. The expert met the primary qualification requirement and the deduction is therefore unjustified.</p> <p>The Applicant ought to have scored the full 3 marks</p>	3.00	<p>Correct score awarded.</p> <p>K4 - Electrical Engineer Name of Expert: Gabriele Oggioni,</p> <p>scored 3 marks</p>
2.2.4. Control & Instrumentation Design Lead	2	1.80	<p>The loss of 0.20 marks for Matteo Ferrari (pp. 121–126) was attributed to the lack of registration as a Professional or Specialized Engineer. While 1.80 marks</p>	1.90	<p>The Evaluation Committee awarded 1.90/2.00 marks, deducting 0.10 marks for lack of specialized training which is fair score . However, the expert—Ugo Rije—holds an</p>

			<p>may appear fair, the Tender Document did not provide for proration or sub-allocation of marks, nor was such guidance introduced through an Addendum.</p> <p>Accordingly, the Applicant ought to have scored the full 2 marks.</p>		<p>M.Sc. in Electrical Engineering from the Polytechnic University of Turin, Italy (1996) (pp. 162). This mirrors the Applicant's Mechanical Design Lead, who similarly lost marks despite holding a Master's degree. The deduction appears inconsistent and merits review.</p> <p>ought to have scored 2 marks</p>
2.2.5. Civil & Structural Design lead	2	2.00	<p>The expert, Luca Nardini, was rightly awarded 2.00 marks, supported by his M.Sc. in Civil Engineering (2001) and Ph.D. in Structural Engineering (2005) from the University of Pisa, along with relevant advanced training.</p> <p>However, this contrasts with other experts (e.g., Process and Mechanical Design Leads) who were penalized despite possessing comparable or higher qualifications. This inconsistency underscores a lack of uniformity in the application of evaluation criteria.</p> <p>Moreover, no proration or sub-allocation of marks was provided in the Tender Document or Addendum.</p> <p>Accordingly, the Applicant ought to have scored full 2 marks across similarly qualified experts.</p>	2.00	<p>The expert, Michele Toniolli, was awarded the full score of 2.00 marks despite not possessing <u>a university undergraduate degree</u>. This treatment appears inconsistent with the deductions applied to Applicant other experts (e.g., Mechanical Design Lead) who were penalized despite holding Master's degrees. The evaluation outcome is therefore not uniform and warrants harmonization.</p> <p><u>Though , no proration or sub-allocation of marks was provided in the tender document nor in the addendum</u></p> <p>ought to have scored 2 marks</p>

2.2.6. Contract/Commercial Lead	2	1.40	<p>The deduction of 0.6 marks for the expert Enrique Manuel Lima Lobato appears unjustified. His CV (page 140 of the Bid) demonstrates extensive experience as a Project Manager, Team Lead, and Chief Reservoir Engineer on multiple geothermal projects in developing countries, including Kenya and Indonesia. He also has substantial experience in the preparation and administration of FIDIC and EPC contracts, and has worked with multilateral development banks (e.g., World Bank, JBIC, IDB).</p> <p>Furthermore, no proration or sub-allocation of marks was stipulated in the Tender Document or the Addendum.</p> <p>Accordingly, the Applicant ought to have scored full 2 marks.</p>	2.00	<p>Correct score awarded.</p> <p>Though , no proration or sub-allocation of marks was provided in the tender document nor in the addendum</p> <p>ought to have scored 2 marks</p>
2.2.7. Quality Assurance and Quality Control Lead	1	0.80	<p>The loss of 0.2 marks for K-8, QA/QC Lead – Pierluigi Chiesa is justified. While he holds a Master’s in Nuclear Engineering, his CV lacks evidence of specialized QA/QC training or certifications.</p> <p>However, it is noted that no proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</p> <p>Accordingly, the Applicant ought to have scored 1.00 mark.</p>	1.00	<p>Compliant.: Though no proration or sub-allocation of marks was provided in the Tender Document or the Addendum,.</p> <p>scored 1 marks</p>

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2.3 Site Team (Phase IVa and V)

2.3.1. Site Manager/Engineer to Contract	5	5.00	<p>Correct score awarded.</p> <p>However, no proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</p> <p>scored 5 marks</p>	4.70	<p>Loss of 0.3 marks for lack of specialized training is not justified for K-8 QA/QC Specialist Giorgio Bertorelli, who holds relevant post-graduate qualifications in QS, TQM, safety, and site coordination.</p> <p>Nonetheless, no proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</p> <p>ought to have scored 2 marks</p>
2.3.2. Site Power Plant Lead/Commissioning Engineer	3	2.80	<p>Loss of 0.2 marks is attributed to lack of specialized training. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum. The expert ought to have scored 3 marks.</p>	2.80	<p>Loss of 0.2 marks is attributed to lack of specialized training. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum. The expert ought to have scored 3 marks.</p>
2.3.3. Site (Process) Steam field/Steamfield Commissioning lead	3	2.80	<p>Loss of 0.2 marks is attributed to lack of specialized training. However, no proration or sub-allocation of marks was provided in the Tender Document or the Addendum. The expert ought to have scored the full 3 marks.</p>	2.85	<p>Loss of 0.15 marks for lack of professional registration is not justified for K-11, Site Steam Field Commissioning Lead, Baran Kaypakoglu, who holds authorization from Dokuz Eylul University and is a member of</p>

					<p>the International Geothermal Association (IGA).</p> <p>Moreover, no proration or sub-allocation of marks was provided in the Tender Document or the Addendum. The expert ought to have scored the full 3 marks.</p>
2.3.4. Site Civil & Structural lead	3	3.00	<p>Compliant. The expert met all the specified requirements and was correctly awarded 3 marks. However, it is noted that no proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</p> <p>scored 3 marks</p>	3.00	<p>Awarding marks for an MSc in the case of K-12 Site Civil & Structural Lead, Giovanni Loddo, appears inconsistent, given that marks were denied elsewhere for lack of an undergraduate degree. Nonetheless, no proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</p> <p>scored 3 marks</p>
2.3.5. Site Electrical, Control and Instrumentation team lead	3	1.80	<p>Loss of 1.2 marks – Michael Maiyo (K-13, Site Electrical, Control & Instrumentation Lead): The deduction appears marginally justified based on a strict interpretation of timelines and nature of experience. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum.</p>	2.80	<p>K-12: Site Electrical, Control & Instrumentation Lead – Giordano Merati</p> <p>The loss of 0.2 marks is justified due to lack of evidence of specialized training, beyond the provided M.Sc. in Electrical Engineering.</p>

			Applicant ought to have scored 3 marks.		<p><i>However, no proration or sub-allocation of marks was outlined in the Tender Document or the Addendum.</i></p> <p>The Applicant ought to have scored 3 marks.</p>
2.3.6. Site HV Substation & Transmission Line lead	3	2.00	<p>Loss of 1.0 mark – Cleophas Wekesa (Section 2.3.6): The deduction is unjustified. Mr. Wekesa possesses over 30 years of relevant experience in electrical engineering, including extensive work on HV substations and transmission lines. His role as Resident Electrical Engineer on the Kibos 220/132/33kV Substation (Olkaria-Lessos-Kisumu project) directly aligns with the requirements. He clearly meets and exceeds the 8-year threshold.</p> <p>Applicant ought to have scored 3 marks.</p>	3.00	<p>The expert is compliant with the stated requirements. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum.</p> <p>scored 2 marks</p>
2.3.7. Site Contract/Commercial Lead	2	1.40	<p>Loss of 0.6 marks – Phillip Oduor (Contract/Commercial Expert):</p> <p>The deductions of 0.4 marks for experience in design-build/EPC contracts and 0.2 marks for FIDIC/MDB contract experience are not justified. Mr. Oduor has over 15 years of demonstrated experience in contract administration and delay analysis, including major EPC</p>	1.80	<p>Management of Disputes, Dispute Boards and Arbitration – Expert: Irakli Tsintsadze</p> <p>The loss of 0.2 marks (awarded 1.8 out of 2) appears to stem from an insufficient demonstration of specific experience or qualifications in dispute resolution mechanisms such as Dispute Boards or Arbitration. While the awarded 1.8 marks</p>

			<p>projects such as the Olkaria I Additional Unit 6 (~Kshs 5B) and the Kwale Mineral Sands Project. He has also handled FIDIC-based contracts across multiple Olkaria Lots (1–3).</p> <p>Applicant ought to have scored 2 marks.</p>		<p>may appear fair, it is important to note that:</p> <p><i>No proration or sub-allocation of marks was provided in the Tender Document or the Addendum.</i></p> <p>The Applicant ought to have scored 2 marks</p>
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2.3.8. Site Environment, Social, Health & safety (ESHS) Lead	2	0.70	<p>Loss of Marks – Wenslaus Adambo (Environmental/Social Safeguards Expert):</p> <p>The deduction is justified due to notable gaps in the CV, including lack of direct involvement in power projects, no explicit reference to World Bank ESS, IFC Performance Standards, or other IFI frameworks, and insufficient detail on key social aspects such as stakeholder engagement, grievance redress mechanisms (GRM), or RAP implementation.</p> <p>Though no proration or sub-allocation of marks was provided in the tender document nor in the addendum, the expert ought to have scored 2 marks.</p>	2.00	<p>The expert is compliant with the stated requirements. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum.</p> <p>The Applicant ought to have scored 2 marks.</p>
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2.4 Proportion of proposed key expert with Experience on the specific Projects listed/evaluated in Data Sheet 21.1 item 1-Project Experience (% Proportionality)	3	1.88	The score of 1.88 marks appears unjustified, considering the high proportion of proposed experts with direct experience on the listed projects. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum. The Applicant substantially met the stated requirements and ought to have scored 3 marks.	2.06	The award of 2.06 marks appears unjustified, considering the high proportion of proposed experts with direct experience on the listed projects. However, no proration or sub-allocation of marks was provided in the Tender Document or Addendum. The Applicant ought to have scored 3 marks. .
2.5 Proportion of Permanent staff among proposed key expert (% Proportionality)	2	1.12	The award of 1.12 marks is not justified considering the expansive list of proposed permanent staff and proportionality indicated. Moreover, no proration or sub-allocation of marks was provided in the Tender Document or through any Addendum. The Applicant ought to have scored 2 marks.	1.50	The award of 1.50 marks is not justified considering the expansive list of proposed permanent staff and proportionality indicated. Moreover, no proration or sub-allocation of marks was provided in the Tender Document or through any Addendum. The Applicant ought to have scored 2 marks.
3.0 Adequacy to TOR (Points awarded based on the TOR and Methodology in the bids)	12				
3.1. Technical Approach and Methodology	4	4.00	Full marks properly awarded. scored 4 marks	4.00	Full marks properly awarded. scored 4 marks

3.2. Quality of Workplan	4	3.20	Work Plan Evaluation pp. 72–: The Applicant provided a detailed and realistic work plan aligned with the Terms of Reference (TORs) and the proposed methodology. Though no proration or sub-allocation of marks was provided in the Tender Document or Addendum, the Applicant ought to have scored 4 marks	3.20	Work Plan Evaluation (pp. 30–111): The Applicant submitted a detailed and realistic work plan that aligns with the Terms of Reference (TORs) and proposed methodology. Though no proration or sub-allocation of marks was provided in the Tender Document or Addendum, the Applicant ought to have scored 4 marks
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3.3. Organization and Staffing	4	4.00	Full Marks Justified – Work Plan: The Applicant’s submission meets the requirements in full, with a comprehensive and realistic work plan aligned to the Terms of Reference. Full marks were properly awarded – 4 marks.	4.00	Full Marks Justified – Work Plan: The Applicant’s submission meets the requirements in full, with a comprehensive and realistic work plan aligned to the Terms of Reference. Full marks were properly awarded – 4 marks.
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4.0 Suitability of the transfer of knowledge (training) program:	5	5.00	Full marks properly awarded. scored 5 marks	3.75	The qualifications of the proposed Trainers were adequately demonstrated and aligned with the requirements. Though no proration or sub-allocation of marks was provided in the Tender

					Document or Addendum, full marks were merited – 5 marks.
Sub-Total for Part B	67	57.95	67	62.06	67
Total Points	100	77.95	ought to have scored 97 marks	92.06	ought to have scored 97 marks

167. From above tabulation and upon reviewing the re-evaluation documentation and accompanying tabulation, the Board finds that the Evaluation Committee improperly introduced extrinsic and undisclosed sub-criteria and adopted a comparative methodology not contemplated in the Tender Document or the Addendum. This action is contrary to Section 80(2) of the Public Procurement and Asset Disposal Act, 2015 and in direct violation of the Board's directions in Application No. 38 of 2025.

168. The Board is alive to the fact that in its Decision in PPARB Application No. 38 of 2025, it found that the provisions under the Data Sheet prevail over provisions under the Instructions to Consultants and as such, there being no prorated scoring under ITC Clause 21.1 of Section II – Data Sheet of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 dated 24th October 2024, a bidder's overall score as computed in points would then be converted into a percentage to establish its technical score using the using the maximum points of 100 (overall score) as a baseline.

169. Paragraphs 158, 159, 161, and 162 of its Decision dated 24th April 2025 read:

“158. In such an instance, the provisions under the Data Sheet prevail over provisions under the Instructions to Consultants. Noting that no prorated scoring has been set out in ITC Clause 21.1 of Section II – Data Sheet of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 dated 24th October 2024, and that the minimum technical score is set out in percentage form under Clause 21.1 of Section I – Instructions to Consultants at page 17 of Part II – Request for Proposals of the Tender Document, a bidder's overall score as computed in points would then be converted into a percentage to establish its technical score using the using the maximum points of 100 (overall score) as a baseline.

159. This therefore means that for a bidder to be considered as responsive at the Technical Evaluation stage, it ought to attain a

minimum technical score of 70 points being 70 % of the overall score of 100 points

.....
161. From the contents of the Evaluation Report, we note that the Evaluation Committee in scoring both the Applicant’s and Interested Party’s Technical Proposals resulted to apply the percentages in addition to the evaluation criterion and sub-criterion provided under Clause 21.2 of Section I – Instructions to Consultants at pages 17 to 18 of Part II – Request for Proposals of the Tender Document as against the point system and evaluation criterion stipulated in ITC Clause 21.1 of Section II – Data Sheet of Part II – Request for Proposals of the Tender Document amended by Addendum No. 2 dated 24th October 2024.

162. This in the Board’s considered view was an incorrect approach in evaluating and scoring the said Technical Proposals having established hereinabove that the evaluation criterion provided under the Data Sheet prevailed and ought to have been the one used in scoring the Technical Proposal at the Technical Evaluation stage so as to arrive at an objective and quantifiable technical score as laid out in the Tender Document as read with Section 80(2) of the Act.

170. As such, absent a detailed allocation of marks to specific sub-criteria—such as academic qualifications, professional registration, and specialized training—the scoring framework should not be a basis of subjectively denying a bidder marks by sub-portioning the scores allocated under each sub-criteria and prorating the score allocated.

171. Moreover, the Evaluation Committee failed to award full marks to the Applicant in several key evaluation areas, despite the Applicant having fully met or even exceeded the specified requirements. This unjustified reduction in technical score similarly affected the Interested Party and resulted in an inaccurate and unfair assessment. The noted inconsistencies in scoring—

particularly under the *Key Personnel* criterion—reflect a lack of objectivity, transparency, and consistency in the application of the evaluation criteria.

172. The Board therefore finds that the re-evaluation of the Applicant's and the Interested Party technical proposal was non-compliant with:

- a) The provisions of the Tender Document;
- b) The applicable sections of the Public Procurement and Asset Disposal Act, 2015; and
- c) The mandatory directives issued by the Board in **Application No. 38 of 2025**.

173. Upon proper consideration of the evidence presented, the Board determines that both the Applicant and the Interested Party fully satisfied the requirements under the technical evaluation criteria and ought to have been awarded the following maximum scores:

- a. **30 out of 33 marks** under *Project Experience* (Part A); and
- b. **67 out of 67 marks** under *Key Personnel and Methodology* (Part B).

174. Accordingly, the Board revises the technical scores and awards both the Applicant and the Interested Party a total technical score of 77.6 marks out of 80 Marks, which accurately reflects full compliance with the technical evaluation requirements. This revision is based on the technical weighting (WT) of 80% as prescribed in the Tender Document.

175. The Board notes from the financial re-evaluation report that the Respondents correctly applied the finding of the Board in PPARB Application No. 38 of 2025 by evaluating the tender prices of both the Applicant and the Interested Party inclusive of all applicable taxes and not net of taxes. Taking this into consideration and Part C of the Financial Evaluation Report noted above, the Respondents correctly noted that the total valuated prices of the Applicant and the Respondent were as follows:

Applicant: Total Bid Price inclusive of taxes in **EUR 17,623, 050.00**

Interested Party: Total Bid Price inclusive of taxes in **EUR 20,181.335.78**

176. The We note further that the financial evaluation was guided by the formula stipulated in the Tender Document and the Request for Proposals'. The financial evaluation was guided by the formula stipulated in the Tender Document and the Request for Proposals:

i. $PF = WF \times (Co / C)$

b. Where:

c. PF = Weighted Financial Score

d. WF = Weight of Financial Proposal (in percent)

e. Co = Lowest Evaluated Price

f. C = Evaluated Price of Proposal under consideration (per ITC 14.1.4)

The overall proposal score (P) is to be determined using the combined formula:

P = PT + PF and the firm achieving the highest combined technical and financial score will be invited for negotiations.

177. In light of the Board's revision of and findings with respect to the technical scores of both the Applicant and the Interested Party, arising from the observed lack of objectivity and the Evaluation Committee's application of extrinsic sub-proration, a fresh financial evaluation shall be conducted using the corrected technical scores and evaluated prices as reflected in the financial re-evaluation dated 2nd May 2025 and restated above.

As to whether the Procuring Entity failed to carry out due diligence on the Interested Party's tender thereby offending the provisions of Section 83 of the Act.

178. We have heard the Applicant submit that the Respondents did not comply with the requirement for due diligence as a prerequisite basis applicable in the evaluation criteria. The Applicant contends that had the Respondents' adhered to the Board's decision in PPARB Application No. 38 of 2025 and exercised due diligence at the Technical Evaluation stage, the Interested Party should not have proceeded beyond the Technical Evaluation stage to the Financial Evaluation stage.

179. In response, we have heard the Respondents submit that the Board at paragraphs 130, 131, and 132 of its Decision in PPARB Application No. 38 of 2025 addressed the issue of due diligence contemplated under Section 83 of the Act as read with Regulation 80 of Regulations 2020. The Respondents contend that the Board did not direct that after re-evaluation in the subject tender, due diligence on the successful tender must be carried out before award is made.

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

a. "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.”

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

a. "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.”

182. The import of the above provisions is that 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.

183. It therefore follows that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct a post qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. We say so because, a reading of Section 83 of the Act makes reference to the word 'may' as opposed to the word 'shall'. In our considered view where a tender document has not provided for post qualification evaluation or due

diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation. Put differently, a procuring entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender document does not provide for such due diligence exercise or post qualification evaluation.

184. We note that the Board in its Decision in PPARB Application 38 of 2025 addressed the issue of due diligence and held at paragraphs 130, 131 and 132 that nothing prevented the Procuring Entity from carrying out due diligence before award of the subject tender to the successful bidder for purposes of verification of documentation and information submitted such as the Financial Statements that were in contest in the said matter.

185. Turning to the circumstances in the instant Request for Review, we note that the Applicant's submits that the Evaluation Committee ought to have carried out due diligence at the Technical Evaluation stage on the Interested Party's tender and argues that if this had been done, the Interested Party would not have progressed to the Financial Evaluation stage.

186. It is imperative to note that due diligence can only be carried out after tender evaluation and before an award is made. This therefore means that the Procuring entity could not have carried out due diligence on the Interested Party at the Technical Evaluation stage since the evaluation process was still ongoing and the successful bidder in the subject tender had not been established. We are therefore not

convinced that the 1st Respondent breached Section 83 of the Act noting that the wording of Section 83 of the Act grants a procuring entity the discretion to conduct or not to conduct a due diligence exercise/post qualification evaluation.

187. In the circumstances, we find that the Procuring Entity did not breach Section 83 of the Act read with Regulation 80 of Regulations 2020.

188. As to whether the Applicant has substantiated its case with respect to the allegation that the Interested Party's tender failed to meet minimum technical requirements specifically with regard to its proposed Key Personnel

189. The Applicant contends at ground 10 of the Request for Review that the Respondents breached Sections 18, 22, 23 and 32 of the Engineers Act, Cap 530 Laws of Kenya and Regulations thereunder by assessing and evaluating unqualified key personnel who do not possess the requisite professional credentials as was required in the Tender Document.

190. At paragraphs 43, 44, 45, 46, 47, 48 and 49 of the Applicant's Supporting Affidavit sworn by Matteo Quaia, the Applicant deposes that the Respondents moved the Interested Party to the Financial Evaluation stage despite it not having met the minimum technical requirements under the law and the Tender Document. It pointed out that key personnel presented by the Interested Party such as Process Design Lead, Mechanical Design Lead, Control & Instrumentation

Design Lead and Site (Process) Steamfield/ Steamfield Commissioning Lead were not registered professionals and lack of registration rendered the nominated personnel statutorily disqualified and their credentials warranted zero points in scoring.

191. The Applicant argued that failure by the Respondents to comply with the law unlawfully inflated the Interested party's score by 11 points and that there was no explanation as to how the Respondents arrived at these scores or the criteria used in scoring for each category.

192. On their part, the Respondents referred the Board to the Terms of Reference at pages 102 to 111 of the Tender Document which set out the requirements for assessing the competency and suitability of the proposed staff on the project roles/assignments.

193. The Respondents submitted that for the role of project manager, the Terms of Reference set out three different categories with 9 distinct parameters to be used in assessing the suitability of a bidder's proposed project manager. They pointed out that the role of project manager attracts a maximum of 5 points to be awarded based on how well the proposed project manager meets each of the 9 parameters.

194. The Respondents further submitted that the Terms of Reference did not state any individual parameter as mandatory or dominant to the extent that if not met, it would invalidate all other requirements justifying a zero score. They argued that taking this approach would amount to introduction of extraneous evaluation criterion not provided for in the Tender Document.

195. As to the issue of registration of professional engineers, the Respondents while making reference to Section 49(3) of the Engineers Act submitted that it is not unlawful to engage graduate engineers not registered with the Engineers Board of Kenya for professional engineering services so long as they were strictly operating under the supervision of a registered professional or consulting engineer.
196. Having considered parties pleadings and submissions, we note that the issue in contest pertains to the qualification status of the Interested Party's proposed key personnel whom the Applicant alleges that they fail to possess the requisite professional credentials as was required in the Tender Document.
197. We note that the Tender Document under ITC Clause 21.1 of Section II – Data Sheet at pages 29 to 31 of Part II – Request for Proposals of the Tender Document as amended by Addendum No. 2 dated 24th October 2024 at page 3 of 6 to page 5 of 6 provides for the technical evaluation of tenders.
198. Further, Clause 4 Team Composition & Qualification Requirement for the Key Experts of Section VII – Terms of Reference of the Tender Document required the CV of the various key experts to clearly indicate the project name/details and contact persons/references. For the various key experts, there was a general qualification requiring the said expert to be a registered professional engineer with a professional body in home country.

199. As for the (i) Site Project Manager/Engineer to the Contract, (ii) Lead Steamfield/ Steamfield Commissioning Engineer, (iii) Power Plant Lead/ Commissioning Engineer, (iv) Electrical, Control & Instrumental Lead, (v) Civil Structural Lead there was a general qualification requiring the expert to be a registered professional engineer in home country and to meet registration requirements by Engineers Board of Kenya (for foreign key expert). The HV Substation and Transmission Line Lead (Substation Commissioning Engineer) was required to be a registered Professional Engineer with the Engineers Board of Kenya.

200. In view of the above provisions of the Tender Document, we note that the Applicant has not substantiated which of the Interested Party's proposed key experts was not a registered professional engineer. Absent such specific identifying information, such assertions by the Applicant remain speculative.

201. It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

a. "107. Burden of proof

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

b. 108. Incidence of burden

c. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

d. 109. Proof of particular fact

e. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

f. 111.....

g. 112. Proof of special knowledge in civil proceedings

h. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

202. Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies on the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

203. In our considered view, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such

proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

204. We are also guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

a. "The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

205. From the foregoing, the Applicant has adduced no evidence before the Board to support its allegation that the Interested Party's key experts were not registered professional engineers. As such, we are of the considered view that having failed to adduce any evidence in

support of its allegations, the Board cannot assess whether or not the evidential burden of proof has shifted to the Respondent and Interested Party for them to disprove the Applicant's allegation. In any case, advancing such a claim without clarity may be construed as an improper inference drawn from confidential information, contrary to Section 67 of the Act which prohibits unauthorized access to or use of confidential procurement-related information.

206. In the circumstances, we find that the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party's tender failed to meet minimum technical requirements specifically with regard to its proposed Key Personnel.

207. As to whether the Procuring Entity failed to comply with the orders of the Board issued in PPARB Application No. 38 of 2025.

208. It is the Applicant's argument that the Respondents' in disqualifying its tender failed to comply with the findings of the Board in PPARB Application No. 38 of 2025. The Applicant took issue with the decision of the Procuring Entity to disqualify its tender at the Financial Evaluation stage and awarding the same to the Interested Party.

209. In response, the Respondents submitted that there was compliance with the Board's orders issued in PPARB Application No. 38 of 2025 that the Applicant was properly disqualified.

210. The Board is cognizant of the holding by the Court of Appeal in **A.B. & Another v. R.B., Civil Application No. 4 of 2016 [2016] eKLR**, which cited with approval, the Constitutional Court of South Africa's decision in **Burchell v. Burchell, Case No. 364 of 2005**, where it was held:

- a. ***"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."***

211. Basically, compliance with court or tribunal orders is fundamental to upholding the rule of law which is a core constitutional principle and is not merely a legal obligation; it is a cornerstone of justice and a testament to the integrity of the rule of law.

212. In its Decision dated 24th April 2025 in PPARB Application No. 38 of 2025 the Board while allowing the request for review issued several orders. Order B reads:

a. "The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 21st March 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside."

213. The import of the above order was to set aside the notification letters issued to both the successful and unsuccessful tenderer in the subject tender. There has been no specific allegation of violation in regard to this order and it is noted, from the confidential documents submitted to the Board, that the said notification letters were set aside. Order C reads:

"The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and direct it to re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020."

Further, Order D reads:

"The 1st Respondent is directed to complete the procurement process, including the making of an award, in the subject tender within 21 days of this decision taking into consideration the findings of the Board herein."

214. The purpose of the above order was to ensure that the Applicant's tender was brought back into the procurement proceedings and

evaluated from the Technical evaluation stage together with all other tenders that progressed to the technical evaluation stage. From the proceedings in the instant Request for Review, the Board has hereinabove established that the Applicant's and Interested Party's tenders were admitted back into the procurement process at the Technical Evaluation stage.

215. In an effort to comply with these orders, the Respondents carried out re-evaluation of both the Applicant's and Interested Party's tenders as recorded in the Re-Evaluation Report dated 2nd May 2025. In terms of the stipulated timelines for compliance provided under Order D, it is noted that the 1st Respondent having issued the notification letter following re-evaluation on 7th May 2025 was outside the 21 days' timelines stipulated by the Board. We say so because the Respondents were required to complete the entire procurement process including making an award within the stipulated 21days.

216. Further, the Board finds that the Respondents while completing the procurement process in the subject tender misapplied its orders under C & D having established hereinabove that the Procuring Entity failed to re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020.

217. In view of all of the foregoing, the Board finds and holds that the Respondents partially complied with its orders issued in PPARB Application No. 38 of 2025.

As to what orders the Board should issue in the circumstances

218. The Board has established that it has jurisdiction to hear and determine the instant Request for Review on the following grounds;

(i)The request for review was filed within fourteen (14) days

(ii)The issues raised in the request for review are not Resjudicata

(iii)The evidential ouster of the Board's jurisdiction under Section 4 (2) (f) was not met as no evidence was produced in support of the bilateral agreement alluded to as determined in Justice Nyamweya, in the KPLC Case cited under Paragraph 145 above.

219. The Board has also established that the Respondents partially complied with its orders issued in PPARB Application No. 38 of 2025.

220. The Board has found that the Applicant has failed to substantiate its case with respect to the allegation that the Interested Party's tender failed to meet minimum technical requirements specifically with regard to its proposed Key Personnel.

221. The Board has also found that the Procuring Entity did not breach Section 83 of the Act read with Regulation 80 of Regulations 2020.

222. It is also a finding of the Board that the Procuring Entity's Evaluation Committee failed to evaluate the Applicant's tender at the Technical Evaluation stage in accordance with the Tender Document contrary to

the provisions of Section 80(2) of the Act as read with Article 227 of the Constitution.

223. In determining the appropriate orders to grant in the circumstances of the instant Request for Review, 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."*

224. As such, the Board deems it fair to re-admit both the Applicant's and the Interested Party's tender in the procurement process and to proceed with its evaluation at the financial Evaluation stage while taking into consideration the findings in the instant Request for Review.

225. The Board notes that the tender validity period would have lapsed during the pendency of the instant Request for Review. The subject tender was opened on 11th December 2024 and, in accordance with ITC 12.1 of the RFP Document, the proposals were to remain valid for 180 days, lapsing on 9th June 2025.

226. However, the Board observes that time ceased to run upon the filing of Request for Review No. 62 of 2025 on 21st May 2025, in line with established legal principles. Further, in view of the Board's findings in this decision—which require time for compliance—and pursuant to Section 88 of the Public Procurement and Asset Disposal Act, 2015, it is necessary to extend the tender validity period accordingly, with

effect from 27th June 2025, to allow for implementation of the Board's orders.

227. The upshot of the 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:

FINAL ORDERS

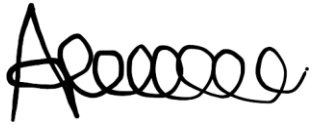
228. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

229. **The Applicant's Request for Review dated 20th May, 2025 and filed on 21st May 2025 in respect of Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project be and is hereby allowed in the following specific terms: -**

a) The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 7th May 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.

- b) The 1st Respondent is hereby ordered to reconvene the Tender Evaluation Committee in respect of the subject tender and to direct it to re-evaluate the Applicant's and Interested Party's tenders at the financial evaluation stage, taking into account the conclusive findings of the Board on the technical evaluation and the total evaluated prices in accordance with the financial evaluation criteria set out in Section II – Data Sheet, Clause 26.1 of the Tender Document, as read with the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020.**
- c) The 1st Respondent is directed to complete the procurement process, including the making of an award, in the subject tender within 21 days of this decision taking into consideration the findings of the Board herein.**
- d) Given that the tender validity period is due to expire on 27th June 2025, the Accounting Officer is hereby directed, pursuant to Section 88 of the Public Procurement and Asset Disposal Act, 2015, to extend the tender validity period once, by a further thirty (30) days from the said date noted hereinabove.**
- 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 11th Day of June 2025



.....
PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB