REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 63/2025 FILED ON 21ST MAY 2025

BETWEEN

PEESAM LIMITED...APPLICANT

AND

THE ACCOUNTING OFFICER,
KENYA POWER & LIGHTING COMPANY PLC......1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY PLC......2ND RESPONDENT

BABS FACILITIES LIMITED.....................1ST INTERESTED PARTY

JEXTREEM LOGISTICS CO. LIMITED.......2ND INTERESTED PARTY

ZUZUMZ LIMITED.................................3RD INTERESTED PARTY

BUTTERFLY FACILITIES AND HYGIENE ...4TH INTERESTED PARTY

JOYMACX ENTERPRISES........................5TH INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Power & Lighting Company PLC, in relation to Tender No. KP1/9A.2/OT/063/ADM/24-25 – For Provision of Cleaning Services to Northeastern Region (YWPWD).

BOARD MEMBERS PRESENT

Ms. Njeri Onyango	Panel Chairperson
Eng. Lilian Ogombo	Member
Dr. Susan Mambo	Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT	**PEESAM LIMITED**
Mr. Karugu Mbugua	Advocate, Karugu Mbugua & Company Advocates
RESPONDENTS	**ACCOUNTING OFFICER, KENYA POWER & LIGHTING PLC**
	KENYA POWER & LIGHTING PLC
Ms. Lynn Owano	Advocate, Kenya Power & Lighting Company PLC

1ST INTERESTED PARTY	**BABS FACILITIES LIMITED**
Mr. Jinu	Advocate, Odera Were Advocates
Mr. Oyugi Stephen	Advocate,
4th INTERESTED PARTY	**BUTTERFLY FACILITIES AND HYGIENE**
Mr. Dan Odhiambo	Advocate, Kwaje & Associates Advocates
5th INTERESTED PARTY	**JOYMACX ENTERPRISES**
Mr. J.B. Macharia	Advocate, Mukele Moni & Company Advocates
Ms. Elizabeth Karanja	Advocate, Mukele Moni & Company Advocates
Ms. Elizabeth Onyango	Advocate, Mukele Moni & Company Advocates

OTHER BIDDERS

Jepco Services and Renovators Ltd	Mr. Simeon, Operations Manager

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The Kenya Power & Lighting Company PLC (hereinafter the "Procuring Entity") invited tenders under Tender No. KP1/9A.2/OT/063/ADM/24-25 for the Provision of Cleaning Services to the Northeastern Region (YWPWD) (hereinafter the "subject tender"). In accordance with the Tender Document, bidders were required to submit their tender documents to the designated address on or before 5th March 2025 at 10:00 a.m.

Addenda/Clarifications

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter the "Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter the "Act"), the Procuring Entity issued several addenda to provide clarification on the subject tender. In particular, Addendum No. 2 dated 3rd March 2025 extended the tender submission deadline from 5th March 2025 to 7th March 2025 at 10:00 a.m.

Submission of Bids and Tender Opening

3. According to the Evaluation Report dated 25th April 2025, submitted as part of the confidential documents, a total of forty-eight (48) tenders were received in response to the subject tender.

Evaluation of Bids

4. According to the Evaluation Report, the Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') convened to assess the tenders. The evaluation process was conducted in three stages, as outlined below:

   a. Preliminary Evaluation
   b. Technical Evaluation
   c. Financial Evaluation

Preliminary Evaluation

5. The Evaluation Committee was mandated to assess the tenders for responsiveness in accordance with the evaluation criteria set out on page 33 of the Tender Document, under the section titled *Preliminary Evaluation for Determination of Responsiveness*. Only tenders that met the requirements at this stage, as specified in the Tender Document, were deemed eligible to proceed to the Technical Evaluation stage.

6. At the conclusion of the Preliminary Evaluation stage, twenty-nine (29) tenders were found to be non-responsive. Nineteen (19) tenders, including those submitted by the Applicant and the Interested Parties herein, met the required criteria and were accordingly declared responsive. Only these responsive tenders proceeded to the Technical Evaluation stage.

Technical Evaluation

7. The Evaluation Committee proceeded to assess the tenders for

technical responsiveness in accordance with the criteria set out on page 5 of the Tender Document. As indicated in the Evaluation Report, bidders were required to attain a minimum score of eighty-five percent (85%) in order to proceed to the next stage of evaluation.

8. At the conclusion of the Technical Evaluation stage, four (4) bidders were found to be non-responsive, having scored below the required threshold of eighty-five percent (85%). Fifteen (15) bidders, including the Applicant and the Interested Parties, were found to be responsive and accordingly proceeded to the Financial Evaluation stage.

Financial Evaluation

9. The Evaluation Committee conducted the Financial Evaluation in accordance with the criteria set out on page 35 of the Tender Document. As part of this process, the Committee first assessed the responsiveness of the financial bids before undertaking a price comparison.

10. Upon completion of the financial responsiveness check, six (6) bids were found to be non-responsive and did not proceed to the price comparison stage. The remaining nine (9) bids, including those submitted by the Applicant and the Interested Parties, were found to be responsive, and their prices were subsequently subjected to comparison.

11. At the conclusion of the Financial Evaluation stage, the Interested Parties were identified as the lowest evaluated bidders. According to the Evaluation Report, the Applicant's bid was not among the five (5) lowest evaluated bids.

Due diligence/Post Qualification

12. The Evaluation Committee conducted due diligence on the 1st and 4th Interested Parties. No due diligence was undertaken on the 2nd, 3rd, and 5th Interested Parties, as they were already performing satisfactorily under existing contracts with the Procuring Entity.

13. The Evaluation Committee's findings following the due diligence conducted on the 1st and 4th Interested Parties were positive.

Evaluation Committee's Recommendation

14. The Evaluation Committee recommended that the subject tender be awarded to the 1st, 2nd, 3rd, 4th, and 5th Interested Parties at the following total contract values for a period of two (2) years:

    1st Interested Party – KES 7,456,952.10

    2nd Interested Party – KES 47,930,460.03

    3rd Interested Party – KES 63,275,754.24

    4th Interested Party – KES 16,099,097.48

    5th Interested Party – KES 16,911,964.80

1st Professional Opinion

15. In a Professional Opinion dated 25th April 2025 (hereinafter the *1st Professional Opinion*), the General Manager, Supply Chain & Logistics,

Mr. John Ngeno, reviewed the procurement process, including the tender evaluation, and concurred with the Evaluation Committee's recommendation to award the subject tender to the Interested Parties at a total cost of KES 137,337,630.96, inclusive of VAT.

16. The 1st Professional Opinion was approved by the 1st Respondent on 28th April 2025.

2nd Professional Opinion

17. In a Professional Opinion dated 13th May 2025 (hereinafter the *2nd Professional Opinion*), the General Manager, Supply Chain & Logistics, Mr. John Ngeno, reviewed the procurement process afresh, including the tender evaluation, and once again concurred with the Evaluation Committee's recommendation to award the subject tender to the Interested Parties. However, Mr. Ngeno observed that the *1st Professional Opinion* had erroneously omitted four premises, which affected the total contract value. Consequently, the *2nd Professional Opinion* recommended that the award be made to the Interested Parties at a revised total cost of KES 151,674,228.65, inclusive of VAT.

18. The *2nd Professional Opinion* was approved by the 1st Respondent on 15th May 2025.

Notification to Tenderers

19. Tenderers were notified of the outcome of the evaluation of the subject tender through letters dated 30th April 2025.

REQUEST FOR REVIEW

20. On 21st May 2025, the Applicant, through the firm of Karugu Mbugua & Company Advocates, filed a Request for Review dated 21st May 2025. The application was accompanied by a Supporting Affidavit sworn by Samuel Mburu Nganga, the Director of the Applicant, on 21st May 2025. The Applicant sought the following orders:

    a) ***The Letters of Award addressed to M/S Babs Facilities Ltd, M/S Jextreem Logistics Co. Limited, M/S Butterfly Facilities And Hygiene Ltd and M/S Joymacx Enterprises with respect to the tender for Provision of cleaning services companywide for all bidders – Tender No. KPI/9A.2/0T/027/ADM/24-25 (hereinafter the "tender") by the First respondent be annulled in their entirety;***

    b) ***The Procuring Entity be directed to re-evaluate the tender in it's entirety from the technical stage/mandatory evaluation;***

    c) ***The Procuring Entity be directed to eliminate the First and Fourth Interested Parties from further tender evaluation on the basis that the aforesaid firms are affiliated;***

    d) ***The Procuring Entity be directed to re-evaluate the tenders at the financial evaluation stage and consider only tenders which have met the financial thresh hold as par the tender evaluation criteria;***

e) Any other orders that the Honourable Board may deem just and fit in the circumstances.

21. 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, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st May 2025.

22. On 30th May 2025, the 1st and 2nd Respondents, through their Advocate – Ms Lynn Owano, filed a Notice of Appointment dated 30th May 2025 and the Respondents' Memorandum of Response dated 29th May 2025.

23. On 30th May 2025, the Acting Board Secretary issued a Hearing Notice to the parties, informing them that the hearing of the Request for Review would be held virtually on 4th June 2025 at 11:00 AM via the provided link.

24. On 4th June 2025, the 4th Interested Party, through the firm of Kwaje & Associates Advocates, filed a Notice of Appointment dated 4th June 2024 together with a Replying Affidavit sworn by Isaac Macharia Wambui,

one of the Directors of the 4th Interested Party, on 6th June 2025.

25. On 4th June 2025, the 5th Interested Party, through the firm of Mukele Moni & Company Advocates, filed a Notice of Appointment of Advocates dated 3rd June 2025, together with the 5th Interested Party's Memorandum of Response dated 3rd June 2025 and a Notice of Preliminary Objection dated 3rd June 2025.

26. On 4th June 2025, the Applicant filed a Further Affidavit sworn by Samuel Mburu Nganga, the Director of the Applicant, on 3rd June 2025.

27. On 4th June 2025, the 1st Interested Party, through the firm of Njiinu & Company Advocates, filed a Notice of Appointment dated 3rd June 2025.

28. When the Board convened for the hearing on 4th June 2025 at 11:00 AM, the Applicant was represented by Mr. Karugu Mbugua, the Respondents were jointly represented by Ms. Lynn Owano, the 1st Interested Party was represented by Mr. Njiinu and Mr. Oyugi, the 4th Interested Party was represented by Mr. Otieno, and the 5th Interested Party was represented by Mr. Edwin Mukele and Ms. Elizabeth Karanja.

29. The Board reviewed the pleadings filed by the parties, all of whom confirmed that the documents had been duly filed and exchanged. However, Counsel for the 5th Interested Party sought an adjournment to enable them to internalize the contents of the Further Affidavit filed by the Applicant. None of the other Counsel, including Counsel for the Applicant, objected to the application. Consequently, the Board granted leave to the 5th Interested Party to respond to the Further Affidavit. Additionally, the 1st and 2nd Interested Parties were granted leave to

respond to the Request for Review. The responses were to be filed and served by midday on 5th June 2025, and all parties were directed to file their Skeleton Submissions by 2:00 p.m. on the same date. The matter was adjourned to 5th June 2025 at 3:00 p.m.

30. On 5th June 2025, the 5th Interested Party filed a Supplementary Affidavit sworn by Joyce Moraa Oyaro, the 5th Interested Party's Sole Proprietor, sworn on 5th June 2025 together with the 5th Interested Party's Skeleton Submission dated 5th June 2025, and the 5th Interested Party's Written Submissions dated 4th June 2025.

31. On 5th June 2025, Jepco Services and Renovators Ltd filed a Notice of Motion dated 5th May 2025 together with a Supporting Affidavit sworn by Dorcas Mwangi on 5th May 2025 seeking joinder and evaluation of their bid.

32. On 5th June 2025, the Respondents filed their Submissions dated 5th June 2025.

33. On 5th June 2025, the 1st Interested Party filed its Submissions dated 5th June 2025

34. On 5th June 2025, the 4th Interested Party filed a Replying Affidavit sworn by Isaac Macharia Wambui on 4th June 2025 together with Submissions dated 5th June 2025

35. When the Board convened for the hearing on 5th June 2025 at 3:00 p.m., the Applicant was represented by Mr. Karugu Mbugua. The Respondents were jointly represented by Ms. Lynn Owano. The 1st

Interested Party was represented by Mr. Njiinu and Mr. Oyugi; the 4th Interested Party by Mr. Odhiambo; and the 5th Interested Party by Mr. J.B. Macharia, Ms. Elizabeth Karanja, and Ms. Elizabeth Onyango. Jepco Services and Renovators Limited was represented by its Operations Manager, Mr. Simeon. The Board read aloud the pleadings filed by the parties, who confirmed that all documents had been duly filed and exchanged. Thereafter, the Board allocated time for each party to present their respective submissions.

PARTIES SUBMISSIONS

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

36. Counsel for the Applicant submitted that the Board has jurisdiction to hear and determine the Request for Review, as it was filed within the prescribed timelines. He further argued that the Request for Review fundamentally challenges the manner in which the evaluation of bids under the subject tender was conducted, asserting that the process was flawed.

37. Counsel for the Applicant contended that the financial evaluation criteria provided in the Tender Document required bidders to account for all costs, including insurance, VAT, withholding tax, and any other applicable taxes. Accordingly, Counsel submitted that financial evaluation is not merely about considering the prices quoted by bidders but rather about determining the *lowest evaluated* bid. He argued that

none of the Interested Parties met the financial evaluation criteria, as their quoted prices failed to incorporate specific requirements outlined in the Tender Document, such as compliance with labour laws and the inclusion of all statutory costs and taxes. Counsel further emphasized that Clause 9.2 of the Tender Document was disregarded during the financial evaluation process.

38. Counsel further submitted that there was an affiliation between the 1st and 4th Interested Parties, as evidenced by their respective CR12 forms. He pointed out that both entities were registered under the same postal address, P.O. Box 4380, City Square, and listed the same telephone number. Counsel noted that the said telephone line is registered to Isaac Wambui, who is a director of the 4th Interested Party.

39. Counsel submitted that the notification letters issued to tenderers failed to indicate the award status of certain regions that were part of the subject tender. Specifically, no explanation was provided regarding the fate of regions such as South Nyanza (Kisii Office and Homa Bay Office) and the North Eastern Region (Ruiru and Thika Depots), which were omitted from the notifications.

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

40. The Respondent's Counsel submitted that the Applicant's allegation of a breach of section 66 of the Act lacked merit as the purported affiliation between the 1st and 4th Interested Parties had not been substantiated.

Counsel argued that affiliation under the law is determined by actual control, evidenced through directorships, shareholding, or corporate actions, not by mere similarities in names or business activity. It was submitted that the CR-12 forms provided by the Applicant confirmed that the companies had different directors and shareholders, and no evidence had been tendered to establish common control or coordinated bidding.

41. It was further submitted that, pursuant to sections 55 and 66 of the Act, a Procuring Entity may only disqualify a bidder for collusion or submission of multiple bids through affiliated entities if concrete evidence exists. In the absence of overlapping shareholding, identical bid patterns, or coordinated strategy, the allegation of affiliation could not stand.

42. On the alleged breach of section 70 of the Act regarding financial evaluation, the Respondent's Counsel submitted that all bidders, including the 1st, 2nd, and 5th Interested Parties, met the mandatory financial evaluation requirements under Clause 9.2 and ITT 35 of the Tender Document. These included proper completion of the price schedules, inclusion of all statutory costs, adherence to payment terms, and compliance with labour laws. It was argued that the Evaluation Committee reviewed and confirmed compliance with these requirements, and the award was made to the lowest evaluated bidders per premise in line with section 86 of the Act and Clause 10 of the Tender Document.

43. The Respondent also addressed the Applicant's claim that some bidders could not afford labour costs, submitting that such a claim was speculative and lacked evidentiary support. It was asserted that each company was individually responsible for its own financial obligations under the contract, and the evaluation process did not reveal any shortcomings in the bidders' financial capacity or compliance with wage regulations.

44. Regarding the alleged breach of section 79 of the Act on admission of bid documents, the Respondent's Counsel denied any irregularity. It was submitted that the tender closing date was lawfully extended to 7th March 2025 through an Addendum dated 3rd March 2025, and that Joymacx Enterprises submitted its bid on 6th March 2025, well within the stipulated deadline. The Tender Opening Committee, as required by section 78 of the Act, duly recorded all 48 submissions, including Joymacx Enterprises, and documented them in the Tender Opening Register and Minutes. Five entities which submitted bid securities without accompanying bids were excluded, but Joymacx Enterprises was not among them.

45. In response to allegations of manipulation of the tendering system through the assignment of random serial numbers, the Respondent's Counsel submitted that the use of the SAP Tendering Portal ensured fairness, transparency, and security. Counsel contended that the anonymization of bids prior to evaluation was a widely accepted international best practice that promoted impartiality. It was submitted that the Applicant had failed to demonstrate any evidence of system manipulation, tampering, or preferential treatment resulting from the randomization process.

1st Interested Party's Submissions on the Notice Preliminary Objection and the Request for Review

46. The 1st Interested Party's Counsel submitted that the Applicant had failed to provide any cogent or credible evidence to prove affiliation between the two entities involved in the procurement process. Counsel argued that the only acceptable proof of affiliation under the law is through evidence of identical ownership, control, or management, which the Applicant had not demonstrated. Instead, the CR12 documents on record indicated that the entities had separate directors, undermining the Applicant's claims of affiliation.

47. It was further submitted that the Applicant's claims were unfounded, aimed at frustrating a tendering process that had been lawfully and procedurally conducted. The 1st Interested Party contended that the Application was brought in bad faith and lacked merit, as the Applicant merely challenged a tender it had not been awarded. Counsel argued that the Applicant's conduct was selective, particularly since it had participated in two tenders and been awarded one, yet proceeded to challenge the outcome of the other.

48. Counsel for the 1st Interested Party also submitted that the Honourable Board ought not to interfere with a lawfully executed procurement process merely because one party was dissatisfied with the outcome. The Board was urged to view the Applicant as a busybody with a habit of challenging procurement decisions even where it had benefitted from them, as demonstrated by previous unsuccessful applications for review, including Application No. 32 of 2025.

49. Referring to precedent, the 1st Interested Party relied on the case of ***Peesam Limited v Public Procurement Administrative Review Board & 2 Others***, where the Court emphasized the requirement of cogent and credible evidence to support claims of collusion under section 66 of the Public Procurement and Asset Disposal Act. Mere similarities in names or past business relationships were, according to the judgment, insufficient to establish collusion or conflict of interest, a principle the 1st Interested Party urged the Board to adopt.

50. Further, Counsel invoked the authority of ***Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another (2014) eKLR***, where Gikonyo J underscored the sanctity of separate corporate personality in company law. Counsel submitted that the two companies cited by the Applicant were distinct legal persons, and no statutory justification had been made for lifting the corporate veil. Accordingly, the Applicant's allegations of affiliation were legally untenable and unsupported by the evidence.

4th Interested Party's Submissions on the Notice of Preliminary Objection and the Request for Review

51. The 4th Interested Party's Counsel submitted that allegations of collusion or conflict of interest must be supported by concrete and credible evidence, and not by mere conjecture or incidental similarities. To buttress this argument, Counsel cited the decision in ***Peesam Limited v Public Procurement Administrative Review Board & 2 others; Hannaneli Suppliers Limited (Interested Party)*** **(Judicial Review Application E096 of 2025)**, particularly

paragraph 67, where the court held that overlaps or similarities in information do not in themselves constitute proof of collusion under procurement law.

52. Additionally, Counsel highlighted that the 4th Interested Party's postal address, as shown in its tender documents and the notification of intention to award letter dated 30th May 2025, is 23403-00625 Kangemi, and that no credible evidence had been adduced by the Applicant to link this address, or any other feature of the 4th Interested Party, to the 1st Interested Party in a manner that would suggest an actual or apparent conflict of interest.

53. The 4th Interested Party's Counsel submitted that the Applicant had failed to demonstrate any legal or beneficial ownership connection between the 4th and 1st Interested Parties. Citing the principle of corporate separateness, Counsel reiterated that companies are distinct legal entities separate from their shareholders and directors. Reliance was placed on ***Victor Mabachi & another v Nurtun Bates Limited [2013] eKLR***, where the Court of Appeal affirmed that a corporate entity retains legal independence from its members and agents.

54. Counsel contended that the Applicant had not discharged the burden of proof as required under Section 107(1) of the Evidence Act. The 4th Interested Party maintained that the procuring entity had properly exercised its mandate in line with Sections 79, 80, 86, and 87 of the Act and Article 227 of the Constitution, and urged the Board to dismiss the Request for Review.

5th Interested Party's Submissions on the Notice of Preliminary Objection and the Request for Review

55. The 5th Interested Party's Counsel submitted that the Applicant lacked locus standi to initiate the Request for Review as required under Section 167(1) of the Act. It was argued that the Applicant had neither pleaded nor demonstrated that it had suffered, or was at risk of suffering, any loss or damage as a result of the alleged breach of procurement procedures. Counsel emphasized that the statutory provision demands a claimant must establish such loss or risk in order to invoke the jurisdiction of the Review Board. In the absence of such a claim, Counsel contended, the request for review was incompetent and should be dismissed outright.

56. Further, Counsel for the 5th Interested Party relied on the Court of Appeal's decision in ***James Oyondi t/a Betoyo Contractors & another v. Elroba Enterprises Limited & 8 others [2019] eKLR***, underscoring that not every candidate or tenderer has an automatic right to seek administrative review. It was submitted that a party must, at the very least, assert that it has suffered or is at risk of suffering loss or damage. According to Counsel, this authority confirmed that a mere participation in the procurement process does not suffice; a demonstrable grievance is essential to confer standing under the Act.

57. Counsel submitted that the 5th Interested Party submitted its bid to the 2nd Respondent on 6th March 2025, which was well within the tender submission deadline of 7th March 2025.

58. Counsel further submitted that the 5th Interested Party is not affiliated with Hannaneli Suppliers Limited, and that the allegations suggesting such an affiliation are unsubstantiated and not supported by any evidence on record.

59. Counsel submitted that the discrepancy between the amounts quoted in the Notification of Award and those in the accompanying Appendix was a minor and inadvertent error in the communication to bidders. He argued that this error did not affect the substance of the tender and was capable of being corrected without causing any prejudice to the bidders.

60. Counsel submitted that the 5th Interested Party complied with the Regulation of Wages (General Amendment Order) 2024, as read together with the provisions of the subject tender. He stated that the 5th Interested Party submitted its financial proposal in accordance with these requirements and, in so doing, adhered to the applicable legal framework.

Applicant's Rejoinder

61. Counsel submitted that the evaluation of the bids was not conducted in accordance with Section 80 of the Act. He clarified that the Applicant was not introducing a new evaluation criterion but was instead

emphasizing the need to adhere strictly to the provisions of the Tender Document regarding the financial evaluation stage.

62. Counsel further submitted that there is no room for errors in public procurement, and such errors form a legitimate basis for seeking a review. On the issue of alleged collusion, Counsel argued that the concern was not limited to similarities in the CR-12 forms, but also extended to the use of identical phone numbers by the implicated parties.

63. Counsel submitted that the mere fact that the Applicant had submitted a tender and is now seeking a re-evaluation on grounds of unfair evaluation demonstrates that the Applicant suffered loss as a result of the procurement process. He further argued that seeking clarification is not a prerequisite for filing a Request for Review before the Board.

Submissions by Jepco Services and Renovators Ltd on its Application

64. Mr. Simeon, the Operations Manager of Jepco Services and Renovators Ltd, submitted that the reason for filing the application was that the firm received communication from the Procuring Entity indicating that it had not submitted a bid and, as a result, was not evaluated.

65. The Operations Manager further submitted that upon receiving a Notification of Appeal, they opted to file their application, given that the Procuring Entity had delayed in providing a satisfactory response regarding why their bid was not evaluated. He asserted that their application was filed within the prescribed timelines.

66. He further submitted that through their application, they were requesting the Board to find that the Procuring Entity violated the provisions of the Act by failing to evaluate their bid, despite having evidence demonstrating that the bid was duly submitted. He added that they were also seeking an order setting aside the awards made to the Interested Parties and directing that the bid submitted by Jepco Services and Renovators Ltd be evaluated.

Respondent's Submissions on the Application by Jepco Services and Renovators Ltd

67. Counsel submitted that the Request for Review filed by Jepco Services and Renovators Ltd was time-barred, noting that the said Applicant was notified on 9th May 2025. Counsel contended that there was no justification for Jepco Services and Renovators Ltd to wait until another party filed an application for review before filing its own application, which was embedded within a joinder application.

CLARIFICATIONS

68. The Board sought clarification from Counsel for the Applicant regarding the basis for asserting that the 1st and 4th Interested Parties were related, aside from sharing the same phone number and postal address. In response, Counsel submitted that the similarities in contact information were too significant to be mere coincidence, suggesting a relationship between the two entities.

69. The Board sought clarification from Counsel for the Applicant on why the Applicant had not expressly stated that it would suffer loss if the award was not granted in its favour. In response, Counsel submitted that the Applicant's participation as a bidder, coupled with its contention that the evaluation process was conducted unfairly, was sufficient to demonstrate that the Applicant had been adversely affected, thus justifying its appearance before the Board.

70. The Board sought clarification from Counsel for the Applicant on whether there was any demonstration of control between the 1st and 4th Interested Parties, given that the CR12 forms presented indicated different shareholders and directors for each entity. In response, Counsel submitted that the assertion regarding the phone number, specifically, that it is registered to a director of the 4th Interested Party and is also listed in the records of the 1st Interested Party, had not been controverted.

71. The Board sought clarification from Counsel for the Applicant on whether the Applicant attended the tender opening process and, if so, why it did not raise the issue of affiliation between the 1st and 4th Interested Parties at that stage. In response, Counsel confirmed that the Applicant did attend the tender opening but explained that the issue of affiliation only became apparent after the issuance of the Notification of Intention to Award.

72. The Board sought clarification from Jepco Services and Renovators Ltd as to why it did not file a Request for Review immediately upon learning that its tender had not been evaluated. In response, the Operations

Manager explained that the company filed its application in reaction to the Notification of Appeal letter it received from the Board.

73. The Board sought clarification from Jepco Services and Renovators Ltd as to when the cause of action arose. In response, the Operations Manager stated that the cause of action arose after the debriefing.

BOARD'S DECISION

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

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

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

(i) Whether the Applicant has *locus standi* before the Board.

B. Whether Application by Jepco Services and Renovators Ltd is meritorious.

C. Whether there exists any affiliation between the 1st and 4th Interested Parties.

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

E. **What orders the Board should issue in the circumstance.**

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

75. In response to the Request for Review, the 5th Interested Party filed a Notice of Preliminary Objection on the ground that the Applicant lacks *locus standi*, having failed to plead that it has suffered, or stands to suffer, any loss as a result of the alleged breach by the Respondents.

76. In response, Counsel for the Applicant submitted that the Applicant is a tenderer challenging the evaluation process, and by virtue of that status, it stands to suffer loss, thereby conferring upon it the requisite *locus standi*.

77. The effect of the ground mentioned above, if proven, would strip this Board of the jurisdiction to entertain the present Request for Review. Consequently, given the preliminary nature of this objection, it must be addressed as a matter of priority.

78. This Board is mindful of the well-established legal principle that courts and decision-making bodies can only adjudicate matters within their jurisdiction. When a question of jurisdiction arises, it is essential that

the Court or tribunal seized of the matter addresses it as a threshold issue before proceeding further.

79. As a fundamental principle, when the issue of jurisdiction is raised before a court or decision-making body, it must be addressed as a priority before any other matters are considered. Jurisdiction is the cornerstone of adjudication, and in its absence, a court or tribunal lacks the legal authority to proceed further.

80. In ***Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022)***, the Supreme Court reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process. Where a question of jurisdiction is raised, it must be addressed and resolved at the earliest stage of the proceedings.

> ***On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In R v Karisa Chengo [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;***
>
> > ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted***

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

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

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

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

The functions of the Review Board shall be –
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

83. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings. Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline the Board's powers in handling such proceedings.

84. Therefore, in light of the foregoing, the Board has no alternative but to examine its jurisdiction by determining whether the Applicant has locus standi and whether the Request for Review was filed outside the mandatory statutory timeline.

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

85. The Interested Party submitted that the Applicant lacked the requisite *locus standi* under Section 167(1) of the Public Procurement and Asset Disposal Act to institute or sustain the present administrative proceedings. Counsel contended that the Applicant had neither pleaded nor demonstrated that it had suffered, or was likely to suffer, any loss or damage arising from an alleged breach of a duty imposed on the Procuring Entity under the Act.

86. In response, Counsel for the Applicant submitted that the Applicant is a tenderer challenging the evaluation process, and that by virtue of this status, it automatically stands to suffer loss, thereby satisfying the threshold for *locus standi* under Section 167(1) of the Act.

87. Section 167(1) of the Act provides:

> ***167. Request for a review***
> ***(1) Subject to the provisions of this Part, a candidate or <u>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</u>.***

88. In essence, to properly invoke the jurisdiction of the Review Board under Section 167(1) of the Act, an applicant must satisfy the following conditions:

    (a) they must qualify as either a candidate or a tenderer, as defined under Section 2 of the Act;

    (b) they must claim to have suffered, or be at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Act or its Regulations; and

    (c) they must file the request for administrative review within fourteen (14) days from the date of notification of the award or the occurrence of the alleged breach, in accordance with Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020.

89. Superior courts have consistently addressed the requirement to plead loss or damage under Section 167(1) of the Act. This Board takes cognizance of the Court of Appeal's decision in ***James Ayodi t/a***

***Betoyo Contractors & Another v Elroba Enterprises Ltd & Another* [2019] eKLR, Mombasa Civil Appeal No. 131 of 2018** (hereinafter "the *James Ayodi* case"). In that matter, the Court considered an appeal challenging the High Court's finding that the Review Board ought to have held the appellants lacked locus standi, having failed to demonstrate that they had suffered, or were likely to suffer, loss. The Court of Appeal offered clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

> ***"........ It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;....***
>
> ***...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. ......***
>
> ***......The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]***

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

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

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

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

93. The High Court in ***Alfred Njau and Others v City Council of Nairobi*** **(1982) KAR 229** described *locus standi* as:

> ***…a right to appear in Court and conversely to say that a***

person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.

94. The import of the above holdings is that *locus standi* refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack *locus standi*, it cannot be heard, regardless of whether its case has merit. This issue alone may lead to the preliminary dismissal of the Request for Review without delving into its substantive aspects.

95. The Board reviewed the pleadings filed by the Applicant and notes that, at no point, did the Applicant allege that it had suffered, or was at risk of suffering, any loss as a result of the alleged breach by the Respondents.

96. Moreover, the Board undertook a holistic review of all the pleadings filed by the Applicant and observed that, at no point, did the Applicant even remotely assert that it had suffered, or stood to suffer, any loss as a result of the alleged breach by the Respondents.

97. During the hearing, the Board specifically queried Counsel for the Applicant on the failure to plead any actual or potential loss arising from the alleged breach. In response, Counsel reiterated that the Applicant was a tenderer and had challenged the evaluation process, which, in his view, implied that the Applicant was bound to suffer loss.

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

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

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

100. Before concluding that it lacks jurisdiction to proceed further, the Board notes that Jepco Services and Renovators Ltd filed an application seeking joinder and requesting that the Respondents be ordered to evaluate its bid document and that the awards made to the Interested Parties be set aside. However, since this application was filed within the same Request for Review initiated by Peesam Limited, the application by Jepco Services and Renovators Ltd necessarily fails. This is because, as established above, the Board lacks jurisdiction to determine any matter arising from the Request for Review by Peesam Limited.

101. Further, the Board emphasizes that any party dissatisfied with an action or inaction by a procuring entity must file an application for review within 14 days of becoming aware of the alleged breach. Additionally, an application filed within the context of another party's application for review cannot be used to raise a separate cause of action, as the proceedings are confined to the issues raised in the original, or "parent," application.

What orders the Board should issue in the circumstance.

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

103. Consequently, the Request for Review dated 21st May 2025, concerning TENDER NO. KP1/9A.2/OT/063/ADM/24-25 – For Provision of Cleaning Services to Northeastern Region (YWPWD), is hereby struck out on the following specific grounds:

FINAL ORDERS

104. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 21st May 2025:

1. **The Request for Review dated 21st May 2025 is hereby struck out;**

2. **The Accounting Officer of the Kenya Power & Lighting Company PLC is hereby directed to oversee the tender proceedings for TENDER NO. KP1/9A.2/OT/063/ADM/24-25 – For Provision of Cleaning Services to Northeastern Region (YWPWD) to their logical and lawful conclusion; and**

3. **Each party shall bear its own costs of the proceedings.**

Dated at NAIROBI, this 11th day of June 2025.

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PANEL CHAIRPERSON

PPARB

....

SECRETARY

PPARB