

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 66/2025 OF 12TH JUNE 2025

BETWEEN

KIKOSI LIMITED APPLICANT

AND

THE MANAGING DIRECTOR,

KENYA ELECTRICITY GENERATING

COMPANY PLC 1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY PLC 2ND RESPONDENT

SOHN & SOL TECHNOLOGIES LTD INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company PLC in relation to Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|--------------|
| 1. Ms. Jessica M'mbetsa | -Chairperson |
| 2. Mr. Robert Chelagat | -Member |
| 3. Eng. Lilian Ogombo | -Member |

IN ATTENDANCE

- | | |
|--------------------------|---------------|
| 1. Ms. Sarah Ayoo | - Secretariat |
| 2. Ms. Christabel Kaunda | - Secretariat |
| 3. Mr. Robert Kimani | - Secretariat |

PRESENT BY INVITATION

APPLICANT

KIKOSI LIMITED

Mr. Gabriel Kimotho

Director, Kikosi Limited

RESPONDENTS

THE MANAGING DIRECTOR,

**KENYA ELECTRICITY GENERATING
COMPANY PLC,**

**KENYA ELECTRICITY GENERATING
COMPANY PLC,**

Ms. Joan Jeruto

Advocate, Muthomi & Karanja Advocates

INTERESTED PARTY

SOHN & SOL TECHNOLOGIES LTD

Ms. Margretta Mutonyi

Advocate, Walker Kontos Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company PLC (hereinafter referred to as “the Procuring Entity”) invited eligible tenderers to submit tenders in response to Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance (hereinafter referred to as the “subject tender”)

using an open national method of tendering and by way of an advertisement on the mygov issue of 11th March 2025 with a submission deadline of 27th March 2025, on or before 2.00pm.

Tender Submission Deadline and Tender Opening

2. According to the Tender Opening Committee, twelve (12) tenderers participated in response to the subject tender within the tender submission deadline of 27th March 2025. The said twelve (12) tenderers were recorded in the opening minutes for the subject tender dated 27th March 2025 (hereinafter referred to as "Tender Opening Minutes") as follows:

Bid No	Name of Bidder
1.	Techsavanna Company Limited
2.	Techmate Solutions Limited
3.	Neptech Digital Solutions Limited
4.	Digital Tailor Agency Limited
5.	Kikosi Limited
6.	Sabalink Technologies Company Hotel
7.	Sohn & Sol Technologies Ltd
8.	Kenyaweb.com Limited
9.	Shiftech Africa Limited
10.	Bitwise Digital Solutions Limited
11.	Peak and Dale Solutions Limited
12.	Belva Digital Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") as appointed by the 1st Respondent undertook evaluation of the twelve (12) bids in the following three stages as recorded in the Tender Evaluation Report dated 25th April 2025 (hereinafter referred to as the "Evaluation Report"):

- i. Mandatory Requirements;
- ii. Technical Requirements;
- iii. Financial Evaluation.

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in the table marked Mandatory Requirements of the blank tender document issued to prospective tenderers by the Procuring Entity (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the 18 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation Stage, with failure to satisfy any of the 18 mandatory requirements rendering one's tender non-responsive at this stage.

5. At the end of evaluation at this stage, only three (3) tenders, including that of the Interested Party were found responsive thus proceeded for evaluation at the Technical Requirements Stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in the table marked 'Technical Requirements' of the blank tender document. Tenders were required to attain a pass mark of 80 marks (80%) to proceed to the financial evaluation stage.
7. At the end of technical evaluation, only one (1) bid, being that of the Interested Party, was found to be responsive and therefore proceeded for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

8. The Evaluation Committee herein was required to examine tenders using the criteria as set out in the Tender Document wherein the bidder having the highest combined technical and financial score would be eligible for award in line with the provisions of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as 'the Act').
9. It was determined that the Interested Party, being the only responsive bidder, had attained the highest combined technical and financial score of 86.00% and was therefore the best evaluated bidder for purposes of award of the subject tender.

Recommendation

10. The evaluation committee recommended the award of **Tender No. KGN-COMM-005-2025 for Website Development, Hosting,**

Support and Maintenance be awarded to **Sohn & Sol Technologies Ltd** at their quoted price of **Nine Million, Forty-Five Thousand, Six Hundred and Ninety-Nine only (Kshs. 9,045,699)** inclusive of VAT for a period of three (3) years.

Professional Opinion

11. In a Professional Opinion dated 26th May 2025 prepared by the 2nd Respondent's Ag. General Manager, Supply Chain, the Ag. General Manager Supply Chain approved the evaluation committee's recommendation to award the subject tender: **Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance** to **Sohn & Sol Technologies Ltd** at their quoted price of **Nine Million, Forty-Five Thousand, Six Hundred and Ninety-Nine only (Kshs. 9,045,699)** inclusive of VAT for a period of three (3) years.

Notification of Award

12. *Vide* a Letter of Notification dated 29th May 2025 the Procuring Entity wrote to the parties herein informing them that the tender had been awarded to the Interested Party with the Applicant being informed of the reasons why its submitted bid was unsuccessful.

REQUEST FOR REVIEW

13. Dissatisfied with the outcome of the tender evaluation process, the Applicant herein, on 12th June 2025 filed a Request for Review dated 12th June 2025 together with a Supporting Affidavit of even date sworn by Gabriel Kimotho, its Director, through its Director Gabriel Kimotho, seeking the following orders in *verbatim*:

- a) The disqualification of the Applicants tender vide a letter dated 29th May 2025 Ref PROC.475/VM/va be annulled and set aside;**
- b) Any letter of award of tender arising from the Tender No. KGN-COMM-005-2025 for website development, hosting, support and maintenance of respondent's website to Interested Party be cancelled and set aside;**
- c) The Public Procurement Administrative Review Board be pleased to review and direct the independent re-evaluation of applicants bid by PPRA under set out criteria**
- d) Public Procurement Administrative Review Board be pleased to review and direct the Respondent to submit their re-evaluation report for comparison with the PPRA one;**
- e) The Public Procurement Administrative Review Board be pleased to review and direct the Respondent to award the said tender to the Applicant being the lowest evaluated bidder;**

- f) The Procuring Entity be directed to re-admit the Applicant's bid at the technical stage and to carry out a re-evaluation under a new evaluation committee noting to observe and apply the criteria in the Tender Document as required by the Act at Section 80 (2) and to carry out the re-evaluation in compliance with Section 83 and 86 of the Act and Regulation 80 of the Regulations;**
- g) An order or further relief or reliefs as the Board shall deem just and expedient;**
- h) The cost of this Review be borne by the Respondent(s) i.e. costs incurred as a result of the wrongful disqualification, including but not limited to legal fees, bid preparation costs, and any other losses caused; and**
- i) An order for penalty to the Respondent(s) paid to the Board which the Board shall deem just to deter such future malpractices by the Respondent(s).**

14. In a Notification of Appeal and a letter dated 12th June 2025, Mr. James Kilaka, the Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19.

15. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 12th June 2025.
16. In response thereto, Messrs. Muthomi and Karanja Advocates entered appearance for the Respondents on 16th June 2025 and thereafter filed on behalf of the Respondents their Memorandum of Response dated 17th June 2025 together with a bundle of Exhibits in support of the Memorandum of Response equally dated 17th June 2025.
17. On their part, the Interested Party on 19th June 2025 filed a Notice of Preliminary Objection dated 18th June 2025.
18. The Applicant thereafter on 20th June 2025 filed their response to the Interested Party's Notice of Preliminary Objection as well as their response to the Respondents' Memorandum of Response of 17th June 2025.
19. The Respondents thereafter on 24th June 2025 filed their Written Submissions together with List and Bundle of Authorities both dated 23rd June 2025.
20. The Board Secretary issued a Hearing Notice dated 26th June 2025 inviting the parties herein and all bidders by extension to the virtual hearing of the matter scheduled for Monday, 30th June 2025 between 14.00 and 16.00 hours.

21. When the Board convened for the hearing on 30th June 2025, their respective Advocates represented the parties. The Board then went through the list of pleadings as filed by parties with counsel on record with counsel in attendance confirming the same.
22. Noting that there was a Notice of Preliminary Objection filed in the matter, the Board directed that the hearing would proceed orally and thereafter gave parties directions on the order and length of address of issues by parties before it in line with the provisions of Regulation 209 (4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter 'the Regulations') which allows the Board to hear the preliminary objection as part of the substantive request for review and issue one decision.
23. Parties were also informed that the instant Request for Review having been filed on 12th June 2025 was due to expire on 3rd July 2025 and that the Board would communicate its decision on or before 3rd July 2025 to all parties via email to their respective last known email addresses.

PARTIES' SUBMISSIONS

Interested Party's Submissions on Notice of Preliminary Objection

24. Counsel for the Interested Party, Ms. Mutonyi, began her submissions by making reference to the Notice of Preliminary Objection dated 18th June 2025 by stating that the Applicant had failed to include a mandatory

party to the proceedings, being the Accounting Officer, in line with the provisions of Section 170 (b) of the Act.

25. Counsel thereafter referred the Board to decisions made on the same and annexed to the Interested Party's Notice of Preliminary Objection, being the Court of Appeal decision in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** wherein the Court held that there was no leeway to file pleading without joining the parties set put in the said section since the requirement under Section 170(b) was explicit with the language used being compulsive.
26. Counsel further submitted that the implication of the Court of Appeal decision was that failure to include an Accounting Officer in a Request for Review Application rendered the same incompetent with jurisdictional consequences.
27. Counsel further submitted that if any mandatory party listed in Section 170 of the Act was omitted, then the said Request for Review Application could not be sustained and the same was rendered incompetent. Counsel further submitted that no Court or Tribunal has jurisdiction to entertain an incompetent claim brought before it, which defect was incurable even by way of an application for amendment.
28. Counsel then submitted that whereas Section 67 of the Public Finance Management Act 2012 designates the office of the Managing Director as

Accounting Officer, the same did not mandatorily prescribe that the Managing Director of a State Corporation shall be the Accounting Officer of the said State Corporation.

29. Counsel further submitted that the same had been a misapprehension on the part of the Applicant who had not provided a Gazette Notice to the effect that the 2nd Respondent's Managing Director had been designated as its Accounting Officer. Counsel further added that whereas it might have been the case that one office was carrying out dual roles, it was the office of the Accounting Officer that ought to have been sued, which was not the case in the present Application.
30. Counsel then submitted on the issue of late filing as alleged by the Applicant that Regulation 205(3) of the Regulations gave parties five (5) days to file their responses as well as any other document in support of their case. Counsel further submitted that not only had the Interested Party been served on 17th June 2025 which she later clarified that service was effected on her clients on 19th June, 2025 but also that in any event, the Interested Party was not a party bound by the said Regulation.
31. Counsel, in urging the Board to uphold the Interested Party's Notice of Preliminary Objection, further submitted that issues of jurisdiction could be raised at any point and that the said Notice of Preliminary Objection had been filed in good time.

Applicant's Submissions in Opposition to the Notice of Preliminary Objection

32. Mr. Gabriel Kimotho for the Applicant in objection to the Notice of Preliminary Objection began by first submitting that going by the Respondents' responses to the procurement proceedings with respect to the subject tender, all of them were being addressed to the Managing Director.
33. Mr. Kimotho further submitted that the Board should be guided by the principle of substance over form in that the substance of the request for review was more important and that the intent of it was clear thus in the present circumstances, it was not the wording that was important but the intent as to who the Accounting Officer was, which ought to be taken into account. Mr. Kimotho further submitted that all the procurement documents under the provisions of Section 84(2) of the Act, being the procurement documents, memos and professional opinions were issued with the Managing Director's approval therefore citing the Managing Director was a matter of form and not substance.
34. Mr. Kimotho thereafter referred the Board to the decision in ***Republic vs PPARB & Another ex-parte Managing Director Kenya Ports Authority*** where he submitted that the Court therein had held that naming the Accounting Officer the Managing Director did not invalidate the Application.

35. Mr. Kimotho then submitted that the Request for Review had been filed out of time, inviting the Board to consider the decision in ***Republic v PPARB & Another Ex Parte Sports, Arts and Social Development Fund [2021] KEHC 5905*** where the Court held that statutory requirements in procurement proceedings were strict and mandatory and that non-compliance deprived the Board of jurisdiction to entertain the matter.
36. Mr. Kimotho then submitted that Regulation 205(3) provided for strict timelines within which responses were to be filed in the matter therefore because the Interested Party had been served with the instant pleadings on 12th June 2025; 17th June 2025 was the final day on which the said Notice of Preliminary Objection ought to have been filed.
37. Mr. Kimotho thereafter referred to the decision in ***ADK Technologies Ltd & Consortium v PPARB [2022] KECA 407*** in submitting that the timelines were strict and that the Board had no jurisdiction in accepting late filings such as the instant Notice of Preliminary Objection, which undermined the Applicant's constitutional right to fair hearing.
38. Mr. Kimotho in urging the Board to dismiss the Notice of Preliminary Objection referred it to the provisions of Article 159 (2) of the Constitution of Kenya, 2010 and Section 173 of the Act in submitting that the same emphasized substantive over procedural justice e.

Respondent's Submissions on the Notice of Preliminary Objection

39. Counsel for the Respondent, Ms. Jeruto began her submissions by confirming that the Respondents had not filed any responses or written submissions with respect to the said Notice of Preliminary Objection.
40. Counsel Ms. Jeruto however clarified that the Interested Party's Notice of Preliminary Objection was improper for the reason that, drawing from Exhibit 1 attached to the Respondents' substantive response being the document titled "Delegation of authority with respect to procurement proceedings in relation to Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance", the Managing Director of the Respondent was the Accounting Officer of the Procuring Entity.

Interested Party's Rejoinder on the Notice of Preliminary Objection

41. Counsel for the Interested Party Ms. Mutonyi in rejoinder submitted that whereas it had been Ms. Jeruto's submission that the Managing Director was the Accounting Officer, the 2 decisions that the Interested Party relied on equally had the Managing Director joined as a party to proceedings but that the Courts had indicated that joining the Accounting Officer to the proceedings was a mandatory requirement.

42. Counsel further reiterated that it was not a question of a party performing dual roles as the Act was very clear on which office should be sued, not in individual capacity but in the capacity of the office they held thus in this instance the office of the Accounting Officer had not been sued. Counsel further submitted that as per the finding in the Court of Appeal in the two decisions, which were binding on the Board by virtue of the doctrine of *stare decisis*, it was not up to a party to choose whom to sue.

43. Counsel Ms. Mutonyi on the issue of service further clarified that the Interested Party had been served on 19th June 2025 and not 17th June 2025 as Mr. Kimotho for the Applicant had submitted and further, that the Notice of Preliminary Objection was filed on the same day.

Applicant's Submissions on Request for Review

44. Mr. Kimotho for the Applicant in support of the Applicant's Request for Review Application submitted that the same had been filed to challenge the unlawful, irrational and procedurally unfair disqualification of the Applicant's bid in the subject tender because of alleged non-compliance with a requirement on tender validity period.

45. Mr. Kimotho further submitted that the Applicant's bid provided over-compliance and enhanced protection, referring to the bid-bond terms declaring a tender validity period of 340 days as per the document on page 17 of its submitted bid, which was beyond the standard norm.
46. Mr. Kimotho further submitted that the Applicant's bid bond had an expiry of 280 days referencing and supporting the Applicant's tender validity set forth in the Applicant's Form of Tender. He further submitted that the wording in the bid bond explicitly stated that it would become payable if the Applicant withdrew its tender during the validity period set for the Applicant's form of tender, which demonstrated direct alignment and enforceability with the form of tender declared and not a mere compliance with a generic standard.
47. Mr. Kimotho further submitted that the same was not a case where the Procuring Entity's protection was not reduced but rather, that it had been enhanced, with the Applicant's actions demonstrating good faith and the commitment to uphold the procurement process.
48. Mr. Kimotho then submitted that the provisions of Section 80(2) of the Act were clear on the issue of evaluation of tender documents and the Procuring Entity had applied an unconstitutional interpretation by disregarding the Applicant's declared validity period of 340 days and failing to assess the Applicant's bid security in proper context.

49. Mr. Kimotho submitted that the result of such unconstitutional evaluation was punitive exclusion, which undermined the purpose of the procurement process. Mr. Kimotho further added that there was no prejudice suffered by the Procuring Entity, as the bid bond was enforceable for a substantial period of 280 days and that there was no gap where the Procuring Entity was unprotected during the critical stages of the evaluation period.
50. Mr. Kimotho further submitted that there was no evidence or allegation that the Applicant's bid introduced a risk or undermined the Procuring Entity.
51. Mr. Kimotho then referred the Board to some authorities relied on by the Applicant in support of their case such as ***Taurus Supplies Ltd. Vs PPARB (2021)*** on minor deviations being acceptable and ***Republic vs PPARB ex-parte Selex Sistemi (2008)*** on mandatory requirements being interpreted with fairness.
52. Mr. Kimotho also referred to ***Sheribiz Supplies Ltd. vs Kenya Airports Authority (2014)*** in submitting that the bid bonds protected the Procuring Entity and that its bid bond was to expire on 1st January 2026 thus the Procuring Entity was highly safeguarded.
53. Mr. Kimotho also referred to ***Span Cleaning Services vs Geothermal Development Co.*** on bonds covering the evaluation period and submitted that the issue of the bond validity was well

addressed and that the Procuring Entity had been well protected at all times

54. Mr. Kimotho then submitted that rigid technical interpretation defeated a bid in substance as well as enhanced competition, that in fact its Bid Bond reduced risk and promoted fair participation and that the matter at hand boiled down to a bidder who went beyond standard requirements and acted in good faith being excluded on rigid technical grounds when no harm occurred. He then concluded his submissions by requesting that the Board grants the prayers sought in the Request for Review.

Respondents' Submissions on the Request for Review Application

55. Counsel for the Respondents, Ms. Jeruto, began her submissions by placing reliance on the pleadings filed by the Respondents in support of their case, being the Memorandum of Response and Exhibits in Support thereof, Written Submissions and Bundle of Authorities in Support thereof as well as the confidential documents supplied to the Board.
56. Counsel Ms. Jeruto submitted that the main issue before the Board for its consideration was whether the Applicant's bid bond conformed to the eligibility and mandatory requirements and criteria as set out in the tender document. Ms. Jeruto submitted that the Request for Review was frivolous and based on misapprehension of Mandatory Requirement 15.

57. Counsel Ms. Jeruto submitted that it was common ground that a tender was responsive only if it conformed to all the eligibility and mandatory requirements and further, that upon opening of tenders, the evaluation committee carried out preliminary evaluations to ascertain that among other things, the tender security was in the required form, amount and tender validity period.
58. Counsel Ms. Jeruto then submitted that Regulation 74 of the Regulations provided that where a submitted tender contained material deviations from the terms and conditions of the tender document that the same shall not be further considered and also that the said bidder shall never be permitted or invited to withdraw the material deviation once the tender is opened.
59. Counsel Ms. Jeruto submitted that 12 tenderers participated in the subject tender and were subjected to the evaluation criteria as per the tender documents. Ms. Jeruto further submitted that the results of the evaluation were captured in the evaluation report submitted to the Board as part of the confidential documents, with 9 tenderers, including the Applicant, failing to comply with the mandatory requirements thereof.
60. Counsel Ms. Jeruto submitted that the tender document contained clear instructions to bidders, particularly Mandatory Requirement 15 which required bidders to furnish the Procuring Entity with a Tender Security of Kshs. 300,000 valid for 30 days beyond the tender validity period. Counsel further submitted that the same was to be in the form of

tender security from a reputable bank, guarantee issued by a financial institution approved by the Central Bank of Kenya or a guarantee issued by an insurance company registered with the Insurance Regulatory Authority.

61. Counsel Ms. Jeruto submitted that the Applicant's bid was considered non-responsive, as its tender security was only valid for a period of 28 days beyond the tender validity period. Ms. Jeruto further submitted that a template of the form of tender security had been provided at page 52 of the standard tender document and further, that the Applicant's submitted bid bond was inconsistent with the template as provided and created material ambiguity.
62. Counsel pointed out that the Applicant's guarantee stated that it would expire 28 days after the end of the tender validity period before stating that any demand for payment had to be received on or before 1st January 2026.
63. Counsel submitted that the validity of the guarantee could only be determined by the first provision, that is, 28 days after the expiry of the tender validity period as a demand on the same could only be made within that 28-day period as stipulated.
64. Counsel further submitted that in view of the conflicting positions present in the Applicant's Guarantee, the principle of *contra proferentum* rule on ambiguity being interpreted against the party that created it

applied and further, that the form of tender supplied to parties was not to be altered but was to be presented to a bank as it was.

65. Counsel Ms. Jeruto concluded in urging the Board to dismiss the instant Request by submitting that the Applicant's guarantee was only valid for a period of 28 days beyond the tender validity period and that the date of 1st January 2026 as shown only served the interests of the bank.

APPLICANT'S REJOINDER

66. In brief rejoinder thereto, Mr. Kimotho for the Applicant submitted that the Applicants bid bond was fully compliant as per the provisions of Section 79 of the Act. Mr. Kimotho further submitted on the provisions of Section 79(1) of the Act that the Applicant's bid had been valid as it provided a 340-day tender validity period and a 280-day tender security expiry thus meeting the objectives of the tender document in substance.

67. Mr. Kimotho further submitted on the provisions of Section 80 of the Act on evaluation that the Procuring Entity evaluated the tender bid against the Applicant's assumed default contrary to the declared period of 340 days in the Applicant's form of tender which misalignment violated the provisions of Section 80(2) of the Act.

68. Mr. Kimotho also referred to Section 3(c) of the Act on guiding principles of public procurement in submitting that the Procuring Entity had erred in disqualifying it for its extended validity period which was

longer than the standard validity period and stated that, that action constituted unfair treatment.

CLARIFICATIONS

69. The Board sought clarification from Counsel for the Interested Party Ms. Mutonyi on the date the Interested Party was served with the Request for Review. Counsel confirmed that her clients were served on 19th June 2025 as evidenced by the email correspondence received. Counsel equally confirmed that the Notice of Preliminary Objection was filed on 19th June 2025.
70. The Board sought clarification from both the Applicant and the Respondents on how they each independently calculated the tender validity period.
71. In response thereto, Mr. Kimotho for the Applicant submitted that according to the Applicant, the validity period had been calculated based on the minimum days the Procuring Entity required, which was then further applied in the form of tender, a legally binding document.
72. Mr. Kimotho further submitted that the expiry period of the bid bond was calculated based on the minimum number of days required by the Procuring Entity and adding 96 days to it.
73. On the Respondents' part, Counsel Ms. Jeruto submitted that as per Clause 20.1 on Instruction to Tenderers, the tender validity period was

154 days and that tender opening was on 27th March 2025. Counsel further submitted that the same would end on 30th August 2025 as per the Professional Opinion shared with the Board thus the required security validity period was to be 30 days beyond 30th August 2025, being 27th September 2025.

74. The Board further queried Mr. Kimotho on what the expiry date was on the Applicant's bid bond to which Mr. Kimotho clarified was 1st January 2026. In a further clarification, the Board queried Mr. Kimotho for the Applicant where he drew his submission of 340 days validity from to which Mr. Kimotho responded that the Applicant had added more days to the minimum period the Procuring Entity had required, offering more days and more confidence to the Procuring Entity a period that was also set out in the form of tender, referenced in the bid bond. Mr. Kimotho clarified further that the bid bond indicated its expiry was 280 days but also referenced the tender validity period as per the form of tender, inviting the Board to scrutinize the same further.

75. When queried when the 340 days ran from, Mr. Kimotho clarified that the same ran from the close of tender, which was also the date from which expiry of tender validity period was calculated from.

76. The Board then sought clarification from Counsel for the Respondent on the tender validity period and whether it was accurate to then state that the tender validity period was a cumulative number of 184 days, taking into account the 30 days required in the bid bond.

77. In response thereto Counsel Ms. Jeruto submitted that the tender validity period was 154 days from the tender opening date of 27th March 2025, ending on 30th August 2025. Counsel further clarified however that the validity of the security was required to be 30 days beyond the tender validity period and that 30 days period was only the period within which the Procuring Entity could claim from the bids presented before it.
78. The Board thereafter requested Counsel for the Respondents to distinguish the mandatory requirements, that is, Mandatory Requirement 15 from the tender validity period.
79. In response thereto, Counsel Ms. Jeruto referred the Board to ITT 21.1, which held that the original tender security of Kshs. 300,000 was to be valid for 30 days beyond the tender validity period, being 30 days after the 154 days. Counsel further clarified that both provisions made it a mandatory requirement for the tender security to be valid for a further 30 days after tender validity period
80. The Board then queried Counsel for the Respondent on the validity of Applicant's bid document, which Counsel Ms. Jeruto clarified was only valid for a period of 28 days after the expiry of the validity document. Another clarification was then sought clarification from Mr. Kimotho representing the Applicant on where the Applicant had obtained the template for the bid document it had submitted to which Mr. Kimotho

clarified that the Applicant had submitted to the Bank, the tender document from which it extracted the bid bond in the format that it did.

81. The Board thereafter directed parties to page 52 of the blank tender document at clause 4 as compared with the Applicant's Bid Bond as submitted and queried from Mr. Kimotho for the Applicant why there was a variation in the submitted. The Board also directed parties to clause 5 of the bid bond at page 52 of the blank tender document and queried them on their understanding of what date was being referred to therein.
82. Counsel Ms. Jeruto in response to the same clarified that the date in question was within 30 days of the expiry of the tender validity period, which was 154 days together with the now 30 days, which position Mr. Kimotho agreed with.
83. The Board then posed the question to Mr. Kimotho for the Applicant on why the Applicant felt the need to modify clauses 4 & 5 of the bid bond in its submitted Tender security. Mr. Kimotho responded that the Procuring Entity stood to suffer no prejudice in that regard since it had been covered by the dates as submitted in its Tender Security.
84. The Board then sought clarification from Counsel for the Interested Party Ms. Mutonyi on whether it was possible for the Procuring Entity to have a Managing Director who served as the Accounting Officer and whether there would any prejudice suffered by the parties in these proceeding if the party joined was the managing director and not the

accounting officer tying the issue to Section 67 of the Public Finance Management Act as well as the fact that Ms. Jeruto had informed the Board that she represented both the 1st and the 2nd Respondents.

85. In response thereto, Counsel Ms. Mutonyi submitted that Section 67 did not mandatorily assign the role of the Accounting Officer to the Managing Director of a State Corporation. Counsel Ms. Mutonyi further submitted that the main issue in contention was that non-joinder of the Accounting Officer rendered the entire Application defective and incompetent, taking away the Board's jurisdiction in handling the same.

86. Counsel further submitted that because of the nature of preliminary objections, it was not necessary to delve into the roles being carried out by parties but rather, have a cursory glance at pleadings and note whether indeed the Accounting Officer had been joined as a party to proceedings.

87. In providing clarification on the issue raised, both Mr. Kimotho representing the Applicant and Counsel Ms. Jeruto for the Respondents clarified that in the case of the procuring entity, the Managing Director was also the Chief Executive Officer (CEO) and was the Accounting Officer for purposes of procurement proceedings.

88. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12th June 2025 was due to expire on 3rd July 2025 and that the Board would communicate its

decision to all parties in the Request for Review via email on or before that date.

BOARD'S DECISION

89. The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

i. Whether the Interested Party's Notice of Preliminary Objection dated 18th June 2025 is merited in the circumstances.

In determining whether the Interested Party's Notice of Preliminary Objection is merited in the circumstances, the Board will analyse also analyse another limb to that issue namely;

a. Whether the Interested Party's Notice of Preliminary Objection dated 18th June 2025 was filed out of time.

In determining the that sub-limb of the issue, the Board will make a determination on whether the Notice of Preliminary Objection was filed out of time in line with the provisions of Regulation 209 as considered with the provisions of Regulation 205 of the Regulations.

In determining the merits of the Notice of Preliminary Objection, the Board shall address itself on the issue of joinder/non-joinder of parties in line with the provisions of Section 170(b) of the Act.

Depending on the determination of issues hereinabove, the Board will then proceed to determine the following issues:

ii. Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's bid at the Preliminary (Mandatory) Evaluation Stage;

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

The Board will now proceed to address the issues framed for determination as follows:

Whether the Interested Party's Notice of Preliminary Objection dated 18th June 2025 is merited in the circumstances

96. We note that the Interested Party in response to the Applicant's Request for Review Application elected to file a Notice of Preliminary Objection dated 18th June 2025, with the same being filed on 19th June 2025.

97. We further note that the Interested Party's Notice of Preliminary Objection raises the ground that the Applicant's Request for Review Application is defective for the reason that the Applicant failed to join the

Accounting Officer as a party to proceedings, contrary to the provisions of Section 170 (b) of the Act.

98. Black's Law Dictionary, *11th Edition* defines a Preliminary Objection as follows:

"...an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the court's jurisdiction is an example of a Preliminary Objection."

99. The celebrated case of ***Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696*** looked further into what constituted a preliminary objection when their Lordships therein observed as follows:

"-----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 a contract giving rise to the suit to refer the dispute to arbitration."

100. In the same case Sir Charles Newbold, P. stated:

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

101. In more recent times, the Supreme Court in the case of ***Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR*** held that:-

"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."

102. We are cognizant of the foregoing positions and align ourselves with them. It is therefore imperative that we determine the Interested Party's Preliminary Objection at the onset as the outcome of the same may be of significant consequence to the Applicant's instant Request for Review Application.

103. However, before we delve into the substance of the Interested Party's Notice of Preliminary Objection of 18th June 2025, we must first address ourselves on whether the same has been properly filed before us, that is, whether the same was filed within the timelines as stipulated in the Regulations.

104. The Applicant has raised an issue in its pleadings as well as in the oral submissions of Mr. Kimotho that the Interested Party's Notice of Preliminary Objection was filed out of the 3-day window set out in Regulation 209 for filing preliminary objections.

105. Counsel for the Interested Party submitted that the Notice of Preliminary objection was filed on the same day service of the Request for Review was effected on her client which she stated to be on the 17th of June, 2025 but later clarified to be on 19th June, 2025. She also submitted that the Interested Party is not one of the parties bound by the provisions of Regulation 209 and further that a Preliminary Objection can be raised at any point of the proceedings since it takes away the Board's ability to hear the substantive Request for Review.

106. In analysing this preliminary issue, we note that Regulation 209(1) of the Regulations states as follows:

"209. (1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for

review to the Secretary of the Review Board within three days from the date of notification.

107. For purposes of clarity, Regulations 205 (3) and (5) which are pertinent to the issue in question, state as follows:

"203. (3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

108. From the foregoing, we note that notification of the instant Request for Review proceedings on the Interested Party was contingent on the Board Secretary receiving documents pursuant to the provisions of Regulation 205(3). Accordingly, the Interested Party as one of the other parties to the Review could only be notified of the same once the 2nd Respondent filed its documents.

109. It is not in dispute that the Respondents filed their Memorandum of Response dated 17th June 2025 together with a bundle of Exhibits in

support of the Memorandum of Response equally dated 17th June 2025 on 18th June 2025, as evidenced by the Board Secretary's dated Stamp thereon. It thus follows that the Interested Party could have only been notified of the proceedings on or after 18th June 2025.

110. It was the Interested Party's Counsel's submission that the Board Secretary served the instant Request for Review proceedings on the Interested Party on 19th June 2025, which position was not refuted at the hearing, at which juncture they filed their Notice of Preliminary Objection, dated 18th June 2025.

111. Whereas we note the inaccuracy in referencing of dates in Counsel's submission, the overarching fact remains that the Notice of Preliminary Objection was received by the Board Secretary on 19th June 2025, a day after notification ought to have been effected on the Interested Party and clearly still within the stipulated timelines as per the provisions of Regulation 209(1) of the Regulations. Further, this Board is also cognisant of the fact and agrees with the submission of Counsel for the Interested Party that a Preliminary objection can be raised at any point of the proceedings since it has the effect of taking away the Board's power and ability to hear and determine the Request for Review.

112. Accordingly, it is our finding that the Interested Party's Notice of Preliminary Objection was filed within the timeline stipulated in the Regulations.

113. Having found that the Interested Party's Notice of Preliminary Objection dated 18th June 2025 was filed within the timelines as stipulated in Regulation 209 (1) of the Regulations, we find that the same is properly before and we can now proceed to make a determination on the same.

114. We understand the Interested Party's objection to be that the provisions of Section 170 (b) of the Act are couched in mandatory terms and therefore, regardless of whether the Managing Director carried out the role of the Accounting Officer or not, it was obligatory that the office of the Accounting Officer be joined as a party to proceedings.

115. In further support of their case, the Interested Party has placed reliance on the decisions in ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** as well as in ***Republic v Public Procurement Administrative Review Board v Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR***.

116. On their part, we understand the Respondents' position to be that in the 2nd Respondent's circumstances, the role of the Accounting Officer is performed by the Managing Director with respect to procurement proceedings by virtue of the provisions of Section 67 of the Public Finance Management Act 2012.

117. We further understand the Respondents' case to be that from the delegation of authority annexed as Exhibit 1 to the Respondents' substantive response; the Managing Director is the Accounting Officer of the Procuring Entity. We also understand the Applicant's case to be similar to that of the Respondents in that the Managing Director was the Accounting Officer of the state corporation.

118. Simply phrased, this Board is called to make a determination as to whether the Applicant in naming the 1st Respondent as the Managing Director of Kenya Electricity Generating Company PLC and not the Accounting Officer of Kenya Electricity Generating Company Plc failed to comply with the provisions of section 170 of the Act rendering the Request for Review fatally defective.

119. It is the Applicant's submission that the role of the managing director of the procuring entity is played by the managing director in line with Section 67 of the Public Finance Management Act and as evidenced by the various correspondences that have been shared by the procuring entity which are signed by or for and on behalf of the managing director.

120. Section 67 of the Public Finance Management Act provides as follows:

"67. (1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the

different national government entities as may be specified in the different designations.

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.

(3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity.”

121. It is evident from the above provision that the Cabinet Secretary is vested with mandate to designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations such as the 2nd Respondent which is a State Corporation.

122. Counsel for the Interested Party submitted further that the Applicant did not provide evidence in form of a Gazette Notice from the Cabinet secretary designating the Managing Director of the 2nd Respondent as its accounting Officer. Having considered submissions from all the parties on this issue, the Board notes that:

- I. It is not in contention that Counsel for the 1st and 2nd Respondents was present in court and with instructions to represent both the Managing Director of the procuring entity as well as the procuring entity;
- II. It is also an admission on the part of Counsel for the Respondent that the accounting officer of the procuring entity in this case, Kenya Electricity Generating Company Plc is the Managing Director who also goes the the title Chief Executive Officer (CEO); and
- III. Counsel further directed this Board to it Exhibit 1 which is the Delegation of Authority with Respect to Procurement Proceedings in Relation to Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance and submitted that the accounting officer of the procuring entity is the Managing Director.

123. This Board has analysed the said Document which is not dated but stamped as received by this Board on 18th June 2025 which reads in part as follows:

"I, ENG. PETER NJENGA, being the Managing Director and Chief Executive Officer of Kenya Electricity Generating Company PLC ("hereinafter referred to as "KenGen") a corporate body, being the Accounting Officer of

KenGen for the purpose of public procurement and asset disposal proceedings ...”

IN WITNESS whereof I have hereto set my hands at NAIROBI on this 17th Day of June, 2025

ENG. PETER NJENGA

***MANAGING DIRECTOR & CEO/ACCOUNTING OFFICER-
KenGenPLC***

124. It is clear from the said Delegation of Authority that the Managing Director is the accounting officer of the 2nd Respondent for the purpose of public procurement and asset disposal. No evidence was also provided to the contrary and this Board is therefore persuaded that in the circumstances of the 2nd Respondent; the role of the Accounting Officer is indeed played by the Managing director. This then leads us to the conclusion that the pleadings filed by the Applicant joining the 1st Respondent as the Managing Director of the 2nd Respondent do not contravene the provisions of Section 170 (b).

125. Counsel for the Interested Party also submitted that based on the doctrine of *Stare decisis* the decisions of the Court of Appeal in ***Betoyo Contractors [Supra]*** and ***Jalaram Industrial Suppliers Limited [Supra]*** which allegedly substantially mirror the circumstances of this case are binding on this Board and we cannot therefore depart from

them. This Board has taken the time to analyse the particulars of those cases and finds it necessary to distinguish the particular circumstances of each of those cases with the circumstances in the current Request for Review.

126. In so doing, we will first delve into the circumstances pertaining to the ***Betoyo Contractors Case [Supra]*** in which the facts were that the Appellants challenged the decision of the High Court of 11th July 2018 quashing the Board's decision of 7th September 2017 allowing Request for Review. One of the grounds for appeal was that the High Court Judge had erred in finding that the proceedings before the Board had been a nullity and issuance of the Order of Certiorari because of non-joinder of KPA's Accounting Officer in place of the Procuring Entity itself.

116. The Court of Appeal in ***Betoyo Contractors [Supra]*** thus found as follows:

"In the case before us, the learned Judge determined the petition before him principally on two issues that went to the jurisdictional competency of the review proceedings that were before the Board. We think that this appeal also turns on the same two issues. The first relates to the legal consequences of non-joinder of KPA's accounting officer in the review proceedings. The appellants complain that the learned Judge was wrong to hold that the omission rendered the proceedings incompetent, null and void, and argue that so

long as KPA, as the procuring entity, had been joined as respondent, the non-joinder of the accounting officer could not invalidate the proceedings. The argument by the petitioners as well as KPA and its managing director is to the contrary end that the requirement is mandatory and goes to the root of the proceedings.

Now, section 170 of the PPADA is in rather straight-forward terms;

"The parties to a review shall be-

- (a) The person who requested the review;**
- (b) The accounting officer of a procuring entity;**
- (c) The tenderer notified as successful by the procuring entity, and**
- (d) Such other persons as the Review Board may determine." (Our emphasis)**

This issue was fully engaged before the Board and, disallowing the objections based on the non-joinder of the accounting officer, it rendered itself as follows;

"It is common knowledge that the Procuring Entity is a state corporation with perpetual succession. As a state corporation the procuring entity discharges its functions through its employees, including the accounting officer.

Employees of the procuring entity when performing their duties in accordance with their terms of is the one to be sued and not the agent. The accounting officer acts on behalf of the procuring entity but the procuring entity does not act on behalf of the accounting officer. It is the firm view of the Board that the Procuring Entity is the party in this request for review and was properly sued and, equally, was properly represented in the proceedings.”

The learned Judge rejected that reasoning and drew a clear distinction between section 170 of the PPADA and the statute it replaced, namely the Public Procurement and Disposal Act 2005 (repealed) which provided at section 96, as follows;

“96. The parties to a review shall be-

(a) the person who requested the review;

(b) the procuring entity;

(c) if the procuring entity has notified a person that the person’s tender, proposal or quotation was successful, that person; and

(d) Such other persons as the Review Board may determine.”

(Our emphasis)

It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply."

117. We therefore surmise from the foregoing that evidently, the issue before the Court of Appeal in **Betoyo Contractors [Supra]** was the

non-joinder of the accounting officer unlike the circumstances of the current Request for Review in which the accounting officer is joined but through joined as the managing director and not the accounting officer of the procuring entity.

118. In the second case that was relied on by Counsel for the Interested Party, that is to say ***Jalaram Industrial Suppliers Limited [Supra]***. The Court at paragraphs 15, 16 and 25 of its decision held as follows:

" 15. The requirement that the accounting officer and the successful tenderer to be [sic] made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission.

16. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the

Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it.

.....

25. A reading of Section 170 of the Act reveals that the procuring entity is not among the parties to review stipulated therein. The Request for Review filed by the Interested Party on 25.3.19 against the procuring entity is incompetent for the reasons stated herein. In so far as the purported amendment allowed by the Respondent enjoined other parties, namely the accounting officer of the procuring entity and the successful bidder, the amended Request for Review is a fresh request for review against the new parties. The purported amended Request for Review was filed on 11.4.19 which is 14 days after the deadline for filing a request for review. The amended Request for Review was thus filed in contravention of the express provisions of Section 167(1) of the Act which provides:"

119. It is indeed clear from the paragraphs quoted above that the Accounting Officer and successful tenderer were not joined as parties to the Request for Review contrary to the provisions of section 170 of the Act unlike in the current request for review in which the accounting officer

is joined but under a different title and the successful tenderer was joined and is in fact the party that has filed the current preliminary objection.

120. We are therefore of the considered view that the two authorities as relied upon by the Interested Party in support of their case are distinguishable from the pertinent facts and issues in question. It then follows that this Board is at liberty to make its finding based on the pertinent facts and issues in question in this Request for Review.

121. Consequently, it is our considered view that the Applicant in naming the Managing Director of the 2nd Respondent as the 1st Respondent did not flaunt the provisions of Section 170 (b) of the Act. We therefore find that the accounting officer of the procuring entity who uses the titles Managing Director and Chief Executive Officer was properly joined to this proceedings and further that the Interested Party's Notice of Preliminary Objection fails on that basis.

Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's bid at the Preliminary (Mandatory) Evaluation Stage

122. Having found that the Interested Party's Notice of Preliminary Objection is devoid of merit, this Board will now proceed to substantively determine the Applicant's instant Request for Review Application.

123. From the pleadings filed by parties and rival oral submissions made by parties at the hearing, the main issue for determination is whether the Applicant's bid was unfairly evaluated at the Preliminary (Mandatory) Evaluation Stage by the Procuring Entity's Evaluation Committee.

124. At the hearing, Counsel for the Respondents submitted that the reason that the Applicant's bid had been found non-responsive at the Preliminary (Mandatory) stage had been that the Applicant's bid security submitted was only valid for a period of 28 days beyond the tender validity period, yet the it was mandatorily required to be valid for 30 days beyond the Tender validity period.

125. It was the Applicant's case at the hearing however, that the bid bond submitted was valid until 1st January 2026. Mr. Kimotho submitted that as per the Form of Tender submitted in the Applicants Bid, the Tender validity period was 340 days which validity period was beyond the requirements of the tender document, thus there was no justifiable reason for its bid to be found non-responsive at that stage.

126. In determining the issue in question, the Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles stated 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.

127. Insofar as evaluation of tenders is concerned, Section 80 (2) of the Act states as follows:

"(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

128. We are also minded of several judicial pronunciations on the issue of evaluation of tenders such as was the position in ***Public Procurement Administrative Review Board; Arid Contractors & General Supplies; Ex parte Meru University of Science & Technology; 2019 eKLR*** where Mativo J (as he then was) held as follows:

"74.it is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages

wide competition in that all bidders are required to tender on the same work and to the same terms and conditions

79. For there to be fairness in the public procurement process as required under Article 227, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it....

129. The upshot of the foregoing is that for it to be said that the evaluation of submitted tender bids was carried out in a manner that embraces the spirit of public procurement, the same has to be carried out in a fair, equitable, transparent and competitive manner, guided chiefly by the provisions and or criteria established in a tender document.

130. Turning to the matter at hand, we have reproduced an excerpt of the provisions of the tender document, and particularly at Section I-Instruction to Tenderers at I.T.T 21 as follows:

"21 Tender Security

21.1 The Tenderer shall furnish as part of its Tender, either a Tender-Securing Declaration or a Tender security, as specified

in the TDS, in original form and, in the case of a Tender Security, in the amount and currency specified in the TDS.

21.2 A Tender Securing Declaration shall use the form included in Section IV, Tendering Forms.

21.3 If a Tender Security is specified pursuant to ITT 21.1, from a reputable source, and an eligible country and shall be in any of the following forms at the Tenderer's option:

i) cash;

ii) a bank guarantee;

iii) a guarantee by an insurance company registered and licensed by the Insurance Regulatory Authority listed by the Authority; or

iv) a guarantee issued by a financial institution approved and licensed by the Central Bank of Kenya,

21.4 If a Tender Security is specified pursuant to ITT 20.1, any Tender not accompanied by a substantially responsive Tender Security shall be rejected by the Procuring Entity as non-responsive.

131. It is noteworthy from the excerpt above that Tenderers were *inter alia* required to:

- I. furnish as part of their Tenders, either a Tender-Securing Declaration or a Tender security, as specified in the TDS, in original form and, in the case of a Tender Security, in the amount and currency specified in the TDS; and

II. **Mandatorily use** the form included in Section IV, Tendering Forms.

132. The Applicant was informed of disqualification of its Bid through the Letter of Notification (Letter of Regret) issued by the Procuring Entity to the Applicant dated 29th May 2025. The reason its bid was deemed not successful was given as:

"Your firm did not meet the following mandatory requirement as stipulated in the tender document.

a. ***The performance security you provided did not meet the requirement of MR15, where the Tender Security for Kshs. 300,000 is to be valid for 30 days beyond the tender validity period."***

133. For ease of reference, the said Mandatory Requirement MR15 provided as follows:

"MR15 - Tender Security of KES 300,000.00 valid for 30 days beyond the tender validity period as per the requirement in the Tender Data Sheet (TDS)."

134. We note that the form, amount and currency of the tender security had been specifically set out in the Tender document and that tenderers were obliged to obtain the same from specified institutions and more importantly, any tender not accompanied by a substantially responsive

tender security was to be rejected as non-responsive. We have reproduced the form of Tender Security for Bank Guarantees as set out on page 52 of the Blank Tender document as below:

FORM OF TENDER SECURITY-[Option 1–Demand Bank Guarantee]

Beneficiary:

Request for Tenders No:

Date:

TENDER GUARANTEE No.:

Guarantor:

1. We have been informed that_____ (hereinafter called "the Applicant") has submitted or will submit to the Beneficiary its Tender (hereinafter called" the Tender") for the execution of _____under Request for Tenders No. ("the ITT").

2. Furthermore, we understand that, according to the Beneficiary's conditions, Tenders must be supported by a Tender guarantee.

3. At the request of the Applicant, we, as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of () upon receipt by us of the Beneficiary's complying demand, supported by the Beneficiary's statement, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:

(a) has withdrawn its Tender during the period of Tender validity set forth in the Applicant's Letter of Tender ("the Tender Validity Period"), or any extension thereto provided by the Applicant; or

b) having been notified of the acceptance of its Tender by the Beneficiary during the Tender Validity Period or any extension there to provided by the Applicant, (i) has failed to execute the contract agreement, or (ii) has failed to furnish the Performance.

4. This guarantee will expire: (a) if the Applicant is the successful Tenderer, upon our receipt of copies of the contract agreement signed by the Applicant and the Performance Security and, or (b) if the Applicant is not the successful Tenderer, upon the earlier of (i) our receipt of a copy of the Beneficiary's notification to the Applicant of the results of the Tendering process; or (ii) thirty days after the end of the Tender Validity Period.

5. Consequently, any demand for payment under this guarantee must be received by us at the office indicated above on or before that date.

[signature(s)]

Note: All italicized text is for use in preparing this form and shall be deleted from the final product.

135. From the excerpt of the Tender Security for Bank Guarantees, it can be deduced that tenderers who opted to issue Tender securities in the form of Bank Guarantees were **obligated** by the Tender document and specifically ITT. 21.2 reproduced above to issue securities in the format set out above. This Board has sighted the Tender Security provided by the Applicant issued by SMEP Microfinance Bank dated 26th March 2025. Having analysed the Tender Security, we noted the following from it:

- I. At paragraph three, the Bank as the Guarantor undertook to pay the Beneficiary of the Bid Security a sum not exceeding Kenya shillings Three Hundred Thousand Only (Kshs. 300,000.00) which was in compliance with MR15 in terms of the amount of the Tender Security.
- II. The Guarantee was substantially similar in form to the Template provided in the Form of Tender at page 52 save for:
 - a) at the 5th paragraph, part b) it was to expire 28 days after the end of the Tender validity period which differed with the requirement set out in MR15 as well as part b (ii) of the 4th paragraph of the Form of Tender security which required the validity to be 30days after the end of the Tender validity period; and
 - b) it provided a date of 1st January 2026 before which any demand for payment under the guarantee ought to have been received by the guarantor at their offices at the last paragraph.

This introduction of the date was a departure from the template provided since the template required the demand for payment under the guarantee to be received by the guarantor on or before the date of expiry of the guarantee set out in the previous paragraph.

136. During the hearing Mr. Kimotho for the Applicant maintained that despite the differences set out above, the Tender validity period in its Bid Security was 340 days. He also submitted that the disparities between the Tender security provided by the Applicant and the template set out in the Form of Tender ought to be treated as minor deviations that do not materially depart from the requirements set out in the tender documents in line with Section 79 (2) of the Act. Ms. Jeruto, Counsel for the Respondents on the other hand, maintained that the Applicant opted to amend the Form of Tender and in so doing introduced an ambiguity, which according to the *contra proferentem* should be interpreted against the Applicants.

137. We note that Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from
the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without
affecting the substance of the tender.

***(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and
comparison of tenders.”***

138. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

139. In **Application No. 85 of 2018** the High Court considered what amounts to a minor deviation and held as follows:

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of

tenders. A tender shall be rejected if it is not acceptable....

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

140. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be

considered for further evaluation. From the foregoing case above, a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

141. In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

142. This Board notes that the Applicant opted to issue a Tender security that had been amended to substantially differ with the template issued in the Form of Tender and in so doing ended up reducing the period within which the Tender was to expire to 28 days instead of the 30 days set out in MR15 and Form of Tender Security both of which requirements were couched in mandatory terms. Couched differently, the applicant opted to amend the Tender security such that it failed to comply with MR15 as well as ITT 21.2 which required Tenderers to mandatorily use the forms that were provided by the procuring entity in the Tender document. Contrary to Mr. Kimotho's submission, failure to comply with mandatory requirements set out in the tender documents cannot be considered a minor deviation. In fact as per the holding in **Application No. 85 of 2018** considering such non-compliance as a minor deviation would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions.

143. Considering the above, we are left with the inevitable conclusion that the Applicant by failing to issue its Tender Security in the Template provided in the Form of Tender and by reducing the period within which the Bid security was to be valid from 30 to 28 days after the end of the tender validity period failed to comply with mandatory requirement MR15 and ITT 21.2 and to consider the same as a minor deviation would in the words of Justice E.K Ogola encourage abuse of power and disregard of the law by not only bidders, but also procuring entities.

144. In the circumstances, the Board finds that the 2nd Respondent's Evaluation Committee by disqualifying the Applicant's Tender for failing to meet the mandatory requirement MR15, properly evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020. Ultimately, the Applicant's Request for Review Application fails in that regard.

What orders should the Board grant in the circumstances?

145. We have found that the Interested Party's Notice of Preliminary Objection dated 18th June 2025 lacks merit and hereby dismiss it.

146. We have subsequently also found that 2nd Respondent's Evaluation Committee by disqualifying the Applicant's Tender for failing to meet the mandatory requirement MR15, properly evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020.

147. The upshot of this finding is that the instant Request for Review fails in terms of the following specific orders:

FINAL ORDERS

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 this Request for Review:

- 1. The Interested Party's Notice of Preliminary Objection dated 18th June 2025 be and is hereby dismissed;**
- 2. The Applicant's Request for Review dated 12th June 2025 concerning Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance be and is hereby dismissed;**
- 3. The Respondents are hereby directed to proceed with and conclude the tender proceedings concerning Tender No. KGN-COMM-005-2025 for Website Development, Hosting, Support and Maintenance to their logical conclusion within the tender validity period; and**
- 4. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 3rd day of July 2025.

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PANEL CHAIRPERSON
PPARB

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SECRETARY
PPARB