

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.75/2025 FILED ON 30TH JUNE 2025

BETWEEN

NOLADS ENGINEERING LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
KENYA FISHERIES SERVICE.....1ST RESPONDENT**

KENYA FISHERIES SERVICE.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Fisheries Service, in relation to TENDER NO. KeFS/OT/005/2024-2025 – Proposed Renovation of Faulty Laboratory Electrical Installations at Kenya Fisheries, Mombasa.

BOARD MEMBERS PRESENT

Mr. George Murugu FCI Arb & IP Chairperson

Ms. Jessica M'mbetsa Member

Mr. Daniel Langat Member



IN ATTENDANCE

Mr. Robert Mwangi

Holding Brief for the Board Secretary

PRESENT BY INVITATION

APPLICANT

NOLADS ENGINEERING LIMITED

Mr. Abidha Nicholas

Advocate, Abidha & Co. Advocates

1ST AND 2ND RESPONDENTS

**THE ACCOUNTING OFFICER,
KENYA FISHERIES SERVICE**

KENYA FISHERIES SERVICE

Mr. Leonard Bett

Advocate, Kenya Fisheries Service

Mr. Mwakio

Advocate, Kenya Fisheries Service

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The Kenya Fisheries Service (hereinafter referred to as "the Procuring Entity") invited tenders through the open tendering method pursuant to TENDER NO. KeFS/OT/005/2024-2025 – Proposed Renovation of Faulty Laboratory Electrical Installations at Kenya Fisheries, Mombasa



(hereinafter referred to as "the subject tender"). Interested bidders were required to submit their bid documents to the specified address on or before 11th June 2025.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 11th June 2025, which were submitted to the Public Procurement Administrative Review Board (hereinafter "the Board") by the Procuring Entity as part of the confidential documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"), a total of eight (8) tenders were received in response to the subject procurement. The tenders were recorded as follows:

NO.	Tenderer
1.	Stima Technics Limited
2.	Eccentric Investment
3.	Micronet Power Systems Limited
4.	Uhaga Enterprises Limited
5.	Parjoy Systems Limited
6.	Fossils Agencies Limited
7.	Nolads Engineering Limited
8.	Enercom Technologies Limited

1st Evaluation of Bids

3. According to the Evaluation Report dated 14th June 2025 (hereinafter



referred to as “the 1st Evaluation Report”), the Tender Evaluation Committee (hereinafter referred to as “the Evaluation Committee”) convened to evaluate the tenders received. The evaluation was conducted in three distinct stages, as outlined below:

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

1st Preliminary Evaluation

- 4. At the first stage, the Evaluation Committee undertook a preliminary evaluation to determine the responsiveness of each tender, based on the criteria set out under Section III – Evaluation and Qualification Criteria at pages 23 to 24 of the blank Tender Document. Only those tenders that satisfied all the mandatory requirements at this stage were deemed responsive and consequently eligible to proceed to the Technical Evaluation stage.
- 5. Upon conclusion of the preliminary evaluation stage, two (2) tenders, including the one submitted by the Applicant, were found to be responsive. The remaining six (6) tenders, including the one submitted by Fossils Agencies Limited, were found to be non-responsive. Consequently, only the two responsive tenders proceeded to the Technical Evaluation stage.



1st Technical Evaluation

6. At the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements outlined under Section III – Evaluation and Qualification Criteria at pages 24 to 25 of the blank Tender Document. To qualify for progression to the Financial Evaluation stage, a tender was required to attain a minimum technical score of seventy percent (70%).
7. Upon conclusion of the Technical Evaluation stage, both tenders that had progressed to this stage attained scores exceeding the minimum required technical score of seventy percent (70%). Accordingly, the two tenders were advanced to the Financial Evaluation stage.

1st Financial Evaluation

8. At the Financial Evaluation stage, the Evaluation Committee conducted a financial comparison of the two (2) tenders that had qualified to this stage. Upon conclusion of the evaluation, the Committee established that Nolads Engineering Limited, the Applicant, was the lowest evaluated bidder, having quoted a sum of KES 5,296,581.25.

1st Evaluation Committee's Recommendation

9. The Evaluation Committee recommended that the subject tender be awarded to the Applicant, having been determined to be the lowest



responsive evaluated bidder, at a total contract price of KES 5,296,581.25.

1st Professional Opinion

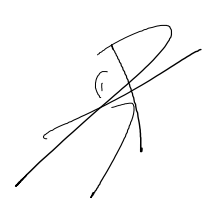
10. In a Professional Opinion dated 16th June 2025 (hereinafter referred to as "the 1st Professional Opinion"), the Acting Head of Supply Chain Management Services of the Procuring Entity, Ms. Lilian Mbuthia, reviewed the procurement process, including the evaluation of tenders, and concurred with the Evaluation Committee's recommendation to award the subject tender to the Applicant. The 1st Professional Opinion was subsequently approved on the same date by Mr. Daniel Mungai, the Director General of the Procuring Entity.

1st Notification to Tenderers

11. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 16th June 2025.

2nd Evaluation of Bids

12. On 18th June 2025, Fossils Agencies Limited issued a letter of the same date, expressing dissatisfaction with the reason provided for its disqualification. In the letter, the firm contended that the tender required bidders to provide an EPRA Class A-1 license, which it had submitted, along with a solar license classified as C1. However, it was allegedly disqualified on the basis that it had not provided a Class C1



license. In conclusion, Fossils Agencies Limited requested a detailed summary of its technical evaluation score.

13. According to a letter dated 20th June 2025, submitted as part of the confidential documents, the 1st Respondent directed the Evaluation Committee to reconvene and undertake a re-evaluation of the bid submitted by Fossils Agencies Limited.
14. According to an Evaluation Report dated 23rd June 2025 (hereinafter referred to as 'the 2nd Evaluation Report'), the Evaluation Committee undertook the re-evaluation process in three stages, as set out below:
 - a. Preliminary Evaluation
 - b. Technical Evaluation
 - c. Financial Evaluation

2nd Preliminary Evaluation

15. Pursuant to the directive of the 1st Respondent, the Evaluation Committee reconvened and conducted a fresh preliminary evaluation of the tenders, focusing on responsiveness in accordance with the criteria set out under Section III – Evaluation and Qualification Criteria at pages 23 to 24 of the blank Tender Document. Only those tenders that fully satisfied all the mandatory requirements at this stage were deemed eligible to proceed to the Technical Evaluation stage.

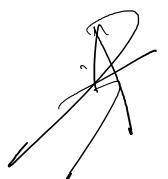
16. Upon conclusion of the preliminary evaluation stage, three (3) tenders, including those submitted by the Applicant and Fossils Agencies Limited, were found to be responsive. The remaining five (5) tenders were found to be non-responsive. Accordingly, the three responsive tenders proceeded to the Technical Evaluation stage.

2nd Technical Evaluation

17. At the Technical Evaluation stage, the Evaluation Committee assessed the three responsive tenders for compliance with the technical requirements set out under Section III – Evaluation and Qualification Criteria at pages 24 to 25 of the blank Tender Document. To qualify for progression to the Financial Evaluation stage, each tender was required to attain a minimum technical score of seventy percent (70%).
18. Upon conclusion of the Technical Evaluation stage, all three (3) tenders that had progressed to this stage attained scores exceeding the minimum required technical score of seventy percent (70%). Accordingly, the three tenders were advanced to the Financial Evaluation stage.

2nd Financial Evaluation

19. At the Financial Evaluation stage, the Evaluation Committee conducted a financial comparison of the three (3) tenders that had qualified to this stage. Upon conclusion of the evaluation, the Committee established



that Fossils Agencies Limited was the lowest evaluated bidder, having quoted a sum of KES 3,847,294.00.

2nd Evaluation Committee's Recommendation

20. The Evaluation Committee recommended that the subject tender be awarded to Fossils Agencies Limited, having been determined to be the lowest responsive evaluated bidder, at a total contract price of KES 3,847,294.00.

2nd Professional Opinion

21. In a Professional Opinion dated 23rd June 2025 (hereinafter referred to as "the 2nd Professional Opinion"), the Acting Head of Supply Chain Management Services of the Procuring Entity, Ms. Lilian Mbutia, reviewed the procurement process, including the evaluation of tenders, and concurred with the Evaluation Committee's recommendation to award the subject tender to the Applicant. The 1st Professional Opinion was subsequently approved on the same date by Mr. Daniel Mungai, the Director General of the Procuring Entity.

2nd Notification to Tenderers

22. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 23rd June 2025.

REQUEST FOR REVIEW



23. On 30th June 2025, the Applicant filed a Request for Review dated the same day. The application was accompanied by a Witness Statement by Mr. Joseph Adoyo, the Principal Officer of the Applicant, also dated 30th June 2025, and an Affidavit sworn by the same deponent on the same date. In the Request for Review, the Applicant sought the following orders:

a) The decision by the Kenya Fisheries Service communicated in the letter dated 23rd June 2025 altering the original intention to award be set aside.

b) The original intention to award the tender to the Applicant as communicated on 16th June 2025 be upheld.

c) That the Procuring Entity be restrained from signing any contract arising from Tender No. KeFS/OT/005/2024-2025 until this Review is determined.

d) That the Applicant be awarded the costs of this Application.

24. In a Notification of Appeal and a letter dated 30th June 2025, Mr. James Kilaka, the 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 30th June 2025.

25. On 4th July 2025, the 1st and 2nd Respondents filed a Replying Affidavit sworn on 3rd July 2025 by Mr. Daniel Mungai, the 1st Respondent. On the same day, the Respondents also submitted the confidential documents to the Board in compliance with Section 67(3) of the Act.
26. On 8th July 2025, the Board issued notifications to all bidders informing them of the filing of the Request for Review.
27. On 8th July 2025, the Board Secretary issued a Hearing Notice dated 8th July 2025 to the parties, notifying them that the hearing of the Request for Review would be held virtually on 15th July 2025 at 11:00 a.m. via the provided link.
28. On 9th July 2025, the Applicant filed a Notice of Appointment of Advocates dated the same day, appointing the firm of Abidha & Company Advocates to act on its behalf in the proceedings.
29. On 11th July 2025, the Applicant filed a Notice of Motion Application under a certificate of urgency, seeking orders to compel the Respondents to furnish it with copies of the annexures marked as DM1

to DM16, which were referenced in the Replying Affidavit sworn by Mr. Daniel Mungai on 3rd July 2025.

30. On 14th July 2025, the Applicant filed a Supplementary Affidavit sworn on the same date by Mr. Joseph Adoyo.
31. On 15th July 2025, the Respondents filed a Notice of Preliminary Objection dated the same day.
32. On 15th July 2025, being the scheduled hearing date, the Applicant was represented by Mr. Abidha, while the Respondents were represented by Mr. Bett. The Board began by addressing the Applicant's Notice of Motion and afforded Counsel for the Respondents an opportunity to make submissions thereon. In response, Counsel submitted that the Respondents had not refused to serve the requested documents, but rather maintained that the documents in question constituted confidential material.
33. The Board proceeded to issue directions requiring the Respondents to serve the Applicant with the annexures to the Replying Affidavit by 1:00 p.m. on 15th July 2025. The Board reasoned that, having annexed the documents to their Replying Affidavit, the Respondents were obligated to serve the same on the Applicant to ensure a fair hearing. The Board further granted leave to the Applicant to file a Further Affidavit, if necessary, together with Written Submissions by 11:00 a.m. on 16th July 2025. Similarly, the Respondents were granted leave to file their Written Submissions in response to the Applicant's Written Submissions

on the Notice of Preliminary Objection by midnight on the same date. The hearing was adjourned to 17th July 2025 at 2:00 p.m.

34. On 16th July 2025, the Applicant filed a Further Affidavit sworn on the same date by Mr. Joseph Adoyo, together with its Written Submissions dated 16th July 2025.
35. On 16th July 2025, the Respondents filed a Further Replying Affidavit sworn on the same date by Dr. Simon Macharia, together with their Written Submissions dated 16th July 2025.
36. On 17th July 2025, the hearing proceeded as scheduled, with both parties represented by their respective Advocates on record. Before the substantive hearing commenced, Counsel for the Applicant raised an objection to the Respondents' document titled "Further Replying Affidavit," arguing that it had been filed without leave of the Board and that its contents placed the Applicant in a position where a response would be necessary. In response, Counsel for the Respondents submitted that the document had been filed pursuant to the Board's directions permitting the filing of a rejoinder.
37. The Board issued directions acknowledging that the error stemmed from its own communication, noting that its intention had been for the Respondents to file a rejoinder, if necessary, in the form of Written Submissions limited to the Notice of Preliminary Objection. Nevertheless, the Board directed the Applicant to respond to the Further Replying Affidavit by the end of the day. The hearing was accordingly



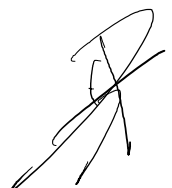
adjourned to 18th July 2025 at 11:00 a.m.

38. On 17th July 2025, the Applicant filed a Further Affidavit sworn on the same date by Mr. Joseph Adoyo.
39. On 18th July 2025, being the resumed hearing date, the parties were represented by their respective Advocates on record, as earlier indicated. Upon reviewing the pleadings and receiving confirmation from Counsel, the Board was satisfied that all documents had been duly filed and served among the parties. The Board thereafter allocated time for the parties to highlight their respective submissions.

PARTIES SUBMISSIONS

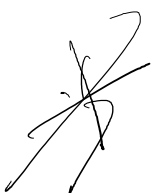
Applicant's Submissions on the Request for Review and the Preliminary Objection

40. The Applicant's Counsel submitted that the Respondents' Notice of Preliminary Objection dated 15th July 2025 was filed out of time, contrary to Regulation 209(1) of the Regulations, 2020, as the Respondents had received notice from the Board and filed a Replying Affidavit on 4th July 2025, which should have been the proper time to raise any objections.
41. Counsel submitted that the Preliminary Objection did not raise a pure point of law as required under the case of ***Mukisa Biscuits Manufacturing Company Ltd v West End Distributors***



[1969] EA 696 and instead delved into disputed facts, as evidenced by the Respondents' reliance on paragraphs 26 to 30 of the Replying Affidavit and the annexed circular dated 27th June 2025.

42. Counsel submitted that the circular dated 27th June 2025, which the Respondents relied on, is inapplicable to the subject tender since it pertains to the 2025/2026 financial year, while the tender in dispute was for the 2024/2025 financial year, as confirmed by the Respondents' own affidavit. Counsel submitted that the circular cannot operate retrospectively, given that the notification of award was issued on 16th June 2025 and the review of that notification occurred on 23rd June 2025, and therefore, any reliance on the circular to justify subsequent actions is unfounded.
43. The Applicant's Counsel submitted that the Respondents violated the Applicant's right to enjoy the full standstill period by reducing it through a letter dated 23rd June 2025, thereby interfering with the Applicant's right to be debriefed and to challenge the decision effectively. Counsel submitted that in line with ***Public Procurement Administrative Board v Four M Insurance Brokers Ltd & 3 others***, the standstill period is crucial for a bidder to gain actual or constructive knowledge of a breach, and the reduction of this period impeded the Applicant's rights under Section 167(1) of the Act.
44. Counsel submitted that the Respondents failed to consider the Applicant's complaint dated 26th June 2025, nor did they respond to its letter dated 30th June 2025, thereby denying the Applicant its legitimate



expectation to be debriefed and to receive a reasoned decision. Counsel submitted that it was only upon the Board's direction on 15th July 2025 that the Respondents provided the Replying Affidavit with annexures, including the letter dated 30th June 2025, which the Applicant had not previously seen, thereby confirming that no proper debriefing had taken place. Counsel submitted that the Respondents discriminated against the Applicant contrary to Articles 27(1) and 50(1) of the Constitution, by acting swiftly on the 6th bidder's complaint received on 18th June 2025, while failing to act on the Applicant's complaint of 26th June 2025, and reducing the standstill period for the Applicant.

45. The Applicant's Counsel submitted that the Respondents' justification for the reevaluation process, allegedly prompted by the 6th bidder's complaint, was unfounded, since the letter from the 6th bidder dated 18th June 2025 did not request a reevaluation but merely sought access to the technical evaluation report. Counsel submitted that the reasons cited by the Respondents regarding the EPRA license allegedly submitted by the 6th bidder were contradictory and not supported by the tender documents, as the evaluation report clearly marked the EPRA requirement as "not attached" and described the license as below the required class.
46. Counsel submitted that the Applicant suffered significant prejudice, including financial loss, reputational harm, and violation of its legitimate expectation of award, as well as breaches of its constitutional rights to information and fair administrative action, thus warranting intervention by the Board.

Respondents' Submissions to the Request for Review and the Preliminary Objection

47. The Respondents' Counsel submitted that the Preliminary Objection dated 15th July 2025 was properly before the Board and raised a pure point of law challenging the Board's jurisdiction to review a retracted notification of award, which had been lawfully withdrawn and was therefore moot. Counsel submitted that the objection was timely filed, noting that the 1st Respondent had already raised it in paragraph 30 of its Replying Affidavit filed on 3rd July 2025, with a formal notice filed on 15th July 2025, thus complying with the statutory time limits under Regulation 209(1) of the Regulations, 2020.
48. The Respondents' Counsel submitted that the circular issued by the National Treasury (though the Board observes that the circular is actually issued by the Public Procurement Regulatory Authority) on 27th June 2025 constituted general procurement policy guidance for the 2025/2026 financial year, and it barred procuring entities from making awards before implementation of the e-GPS system, guidance that directly applied to the procurement in question.
49. The Respondents' Counsel submitted that the communication dated 16th June 2025 was merely a notification of intention to award, not a notification of award, and that the withdrawal of this notification was based on a mandatory verification process prompted by an error in the 6th bidder's technical evaluation, not because of the Treasury's circular.

50. Counsel submitted that the standstill period under Section 87 of the Act was not violated, as no contract had been signed during that period. The withdrawal of the intention to award was made within the permissible period and in line with the law to correct a material oversight. Counsel submitted that the Applicant's allegations regarding the premature termination of the standstill period were misleading, and that the letter of 23rd June 2025 clearly acknowledged the remaining days, during which the Applicant exercised its right to complain and received a debrief in a timely manner. Counsel submitted that the Applicant's request for an extension of the standstill period had been overtaken by events, as the Respondents had already provided a detailed debrief on 30th June 2025, well before the expiration of the standstill period.

51. Counsel submitted that the Applicant's claims of unequal treatment were unsubstantiated, arguing that the 6th bidder's complaint was materially different as it highlighted an error in the evaluation of its EPRA license, which the Evaluation Committee lawfully corrected under Section 80 of the Act. Counsel submitted that the Applicant's concerns regarding lack of information were addressed in full through correspondence dated 30th June 2025, and that the Applicant was not treated unfairly or denied any procedural rights; rather, it simply disagreed with the outcome of a lawful reevaluation.

52. Counsel submitted that the reevaluation process was valid, as no contract had been formed and the Procuring Entity retained the legal

right to correct evaluation errors before contract award, pursuant to Sections 80 and 87 of the Act. Counsel submitted that the correction of the EPRA license issue was necessary to ensure procurement integrity and compliance with the statutory obligation to award tenders to the lowest evaluated bidder, as required under Section 86(1)(a) of the Act.

53. Counsel submitted that the Applicant's claim of financial loss and reliance on legitimate expectation was untenable, as no contract had been signed, and a notification of intention to award does not create any legally enforceable rights under Section 135(1), (4), and (5) of the Act. Counsel submitted that the Applicant acted prematurely by engaging suppliers and incurring expenses without a signed contract, and any expectation it had was unreasonable and unsupported by law, policy, or conduct attributable to the procuring entity.

Applicant's Rejoinder

54. In rejoinder, Counsel for the Applicant submitted that the notification letters issued on 23rd June 2025 ought to be set aside, as they were the product of an unlawful process. He urged the Board to uphold the letter of notification issued on 16th June 2025.

CLARIFICATIONS

55. The Board sought clarification from Counsel for the Respondents regarding the necessity of conducting a re-evaluation. In response, Counsel explained that the re-evaluation was prompted by a complaint

from the sixth bidder, Fossils Agencies Limited, alleging that one of its documents, the EPRA license, had not been taken into consideration during the initial evaluation.

56. The Board further sought clarification from Counsel for the Respondents as to whether it was his position that none of the members of the Evaluation Committee had initially seen the EPRA license submitted by the 6th bidder. In response, Counsel answered in the affirmative and confirmed that this oversight was the basis upon which the re-evaluation was undertaken.
57. The Board also sought clarification from Counsel for the Respondents as to whether the Procuring Entity was in a position to lawfully terminate the tender, given that a notification letter had already been issued on 16th June 2025. The Board further inquired as to the legal basis for the existence of a document referred to as a "Notification of Intention to Award." In response, Counsel cited Section 87 of the Act, as well as Sections 43, 44, 45, and 46 of the Standard Tender Document, as the legal foundations for such a notification.
58. The Board further sought clarification from Counsel for the Respondents as to why the Procuring Entity intended to terminate the tender while simultaneously seeking an order for the award made to the sixth bidder to be upheld. The Board notes that this question was not answered by Counsel.
59. The Board sought clarification from Counsel for the Respondents

regarding the legal basis upon which the Procuring Entity assumed the power to receive and determine complaints, to the extent of conducting a re-evaluation and issuing a reviewed notification, particularly in light of the provisions of Section 167 of the Act. The Board further inquired under what law the Procuring Entity is empowered to issue a reviewed notification. In response, Counsel referred the Board to Section 45 of the Standard Tender Document and Section 80(2) of the Act.

BOARD'S DECISION

60. 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.

B. Whether the receipt and determination of the complaint by the 6th bidder, Fossils Agencies Limited, and the subsequent issuance of reviewed letters of notification by the Procuring Entity contravened the Act and Article 227 of the Constitution.

C. What orders the Board should issue in the circumstance.

Whether the Board has jurisdiction to hear and determine the

instant Request for Review

61. In response to the Request for Review, the Respondents filed a Notice of Preliminary Objection. The Preliminary Objection was premised on the following grounds, quoted verbatim as they appear in the said Notice of Preliminary Objection:

- 1. THAT there is no existing Contract between Nolads Engineering Limited and the Respondents yet, since the 1st Respondent has not issued a Notification of Award under the Act, but merely issued a Notification of Intention to Award and Review of Notification of Intention to Award.***
- 2. THAT the Public Procurement Regulatory Authority vide a circular dated 27th June 2025, reiterated the government's intention to transition to the End-to-End Electronic Government Procurement System (e-GPS) from 1st July 2025. The Authority further directed all procuring entities to inter alia, and with immediate effect, invoke the provisions of Section 63 of the Act on termination and cancellation of procurement proceedings, provided that no letters of notification of awards have been issued.***
- 3. THAT the procurement process has been overtaken by events owing to the communication from the Public***

Procurement Regulatory Authority on a directive to transition to the E-Procurement system, which was served upon the procuring entity, and in compliance thereof, the procurement process in this matter had to be estopped.

4. THAT the Respondents have complied with all the provisions of the law, specifically the Public Procurement and Asset Disposal Act, The Fair Administrative Action Act No. 4 of 2015, The Public Procurement and Asset Disposal Regulations, 2020, and all the provisions of the Constitution.

5. THAT the complaint herein is incompetent, bad in law, and an abuse of process, and should be dismissed.

62. In response to the Preliminary Objection, Counsel for the Applicant submitted that the objection did not raise a pure point of law, as required under the principles established in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696***. Instead, it was argued that the objection delved into contested factual issues, as evidenced by the Respondents' reliance on paragraphs 26 to 30 of the Replying Affidavit and the annexed circular dated 27th June 2025.

63. Applicant's Counsel further argued that the circular dated 27th June 2025, which the Respondents relied on, is inapplicable to the subject

tender since it pertains to the 2025/2026 financial year, while the tender in dispute was for the 2024/2025 financial year, as confirmed by the Respondents' own affidavit. Counsel submitted that the circular cannot operate retrospectively, given that the notification of award was issued on 16th June 2025 and the review of that notification occurred on 23rd June 2025, and therefore, any reliance on the circular to justify subsequent actions is unfounded.

64. The effect of the above grounds in the preliminary objection, if established, would deprive the Board of jurisdiction to entertain the present Request for Review. Consequently, given the preliminary and jurisdictional nature of the grounds, they must be addressed as a matter of priority.
65. The Board is mindful of the well-established legal principle that courts and decision-making bodies may only adjudicate matters that fall within their jurisdiction. Where a question of jurisdiction arises, it must be addressed as a threshold issue before any further proceedings can be undertaken.
66. 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.
67. 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.”

68. 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.

69. 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.***

70. 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.

71. In light of the foregoing, the Board finds it necessary to first address the issue of its jurisdiction by examining the grounds advanced in support of the Preliminary Objection.

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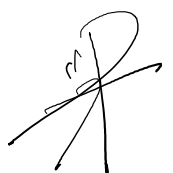
72. In determining the Preliminary Objection, the Board states that such an objection must be based purely on a point of law. This position was authoritatively stated by the Court of Appeal in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696** at page 701, paragraph B–C, where Sir Charles Newbold, P. observed as follows:

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

73. The Board understands the above *locus classicus* case law to mean that a Preliminary Objection is a legal device that challenges the legal sufficiency of a case without delving into factual disputes. It must be based solely on a clear point of law and assumes, for purposes of the objection, that all the facts presented by the opposing party are true. A Preliminary Objection is therefore inappropriate where the Court would need to examine or verify facts or where the issue raised calls for the Court's discretion rather than a strict legal determination.
74. Before delving into the merits of the grounds raised in the Preliminary Objection, the Board notes that it must first assess whether the said grounds satisfy the legal threshold of what constitutes a Preliminary

Objection. The guiding principles for such an assessment were clearly laid out in the ***Mukisa Biscuit*** case cited above, which set out the parameters of what amounts to a valid Preliminary Objection.

75. The Board observes that during the hearing, Counsel for the Applicant submitted that the Preliminary Objection is premised on both facts and law. Ordinarily, such an admission would suffice to warrant its dismissal, as a Preliminary Objection must be based purely on a point of law. However, the Board notes that this position contradicts the Applicant's written submissions, which assert that the Preliminary Objection raises a pure point of law. In view of this inconsistency, the Board shall not summarily dismiss the Preliminary Objection but will instead proceed to analyze the grounds advanced in support thereof.
76. The Board has carefully examined the grounds set out in the Notice of Preliminary Objection and finds that none of them raises a pure point of law. With respect to the first ground, that there exists no contract between Nolads Engineering Limited and the Respondents, the Board finds that this is a factual contention rather than a legal issue, and in any event, it is not a point that can dispose of the matter at a preliminary stage, as there is no legal basis upon which such an assertion, even if proven, would be dispositive. The second ground similarly fails to meet the threshold of a preliminary objection, as it is not self-contained and relies on extrinsic evidence, namely the circular dated 27th June 2025. As for the third, fourth, and fifth grounds, the Board is unable to identify any specific legal principles upon which they are anchored. This finding equally applies to the first ground.

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77. The Board notes that a true Preliminary Objection must raise a pure point of law and cannot be entangled with contested facts or matters requiring judicial discretion. Any objection that falls short of this threshold ceases to be a proper Preliminary Objection and instead burdens the Board with an unwarranted detour, a legal expedition whose inevitable conclusion is the dismissal of the objection itself.
78. Notwithstanding the foregoing findings, the Board opted to analyze the second ground of the Preliminary Objection, which is premised on the circular dated 27th June 2025 issued by the Public Procurement Regulatory Authority (hereinafter "the Authority"). Upon perusal of the said circular, the Board noted that it directed procuring entities to refrain from issuing any awards or entering into contracts arising from framework agreements and/or framework contract processes for the financial year 2025/2026 until the roll-out of the e-GPS. The circular further advised procuring entities to invoke the provisions of Section 63 of the Act on termination and cancellation, provided that no letters of notification of award had been issued.
79. In light of the specific instructions issued by the Authority to procuring entities under the aforementioned circular, the Board finds that the same is inapplicable to the present tender for the following reasons: First, the subject tender pertains to the financial year 2024/2025, whereas the circular expressly relates to tenders for the financial year 2025/2026. Second, the Respondents in the present tender had already issued letters of notification of award, initially on 16th June 2025 and

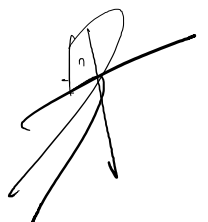


subsequently reviewed on 23rd June 2025, thereby removing the tender from the scope of the circular's applicability.

80. In view of the foregoing analysis, the Board finds that the Notice of Preliminary Objection is devoid of merit. Accordingly, the Board affirms that it has the requisite jurisdiction to hear and determine the present Request for Review.

Whether the receipt and determination of the complaint by the 6th bidder, Fossils Agencies Limited, and the subsequent issuance of reviewed letters of notification by the Procuring Entity contravened the Act and Article 227 of the Constitution.

81. The Applicant's Counsel argued that the Respondents violated the Applicant's right to enjoy the full standstill period by reducing it through a letter dated 23rd June 2025, thereby interfering with the Applicant's right to be debriefed and to challenge the decision effectively.
82. The Applicant's Counsel argued that the Respondents failed to consider the Applicant's complaint dated 26th June 2025, nor did they respond to its letter dated 30th June 2025, thereby denying the Applicant its legitimate expectation to be debriefed and to receive a reasoned decision. Counsel submitted that it was only upon the Board's direction on 15th July 2025 that the Respondents provided the Replying Affidavit with annexures, including the letter dated 30th June 2025, which the Applicant had not previously seen, thereby confirming that no proper debriefing had taken place.

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83. The Applicant's Counsel submitted that the Respondents' justification for the reevaluation process, allegedly prompted by the 6th bidder's complaint, was unfounded, since the letter from the 6th bidder dated 18th June 2025 did not request a reevaluation but merely sought access to the technical evaluation report. Counsel submitted that the reasons cited by the Respondents regarding the EPRA license allegedly submitted by the 6th bidder were contradictory and not supported by the tender documents, as the evaluation report clearly marked the EPRA requirement as "not attached" and described the license as below the required class.
84. In response, the Respondents' Counsel argued that the communication dated 16th June 2025 was merely a notification of intention to award, not a notification of award, and that the withdrawal of this notification was based on a mandatory verification process prompted by an error in the 6th bidder's technical evaluation, not because of the Treasury's circular.
85. The Respondents' Counsel argued that the standstill period under Section 87 of the Act was not violated, as no contract had been signed during that period. The withdrawal of the intention to award was made within the permissible period and in line with the law to correct a material oversight. Counsel submitted that the Applicant's allegations regarding the premature termination of the standstill period were misleading, and that the letter of 23rd June 2025 clearly acknowledged the remaining days, during which the Applicant exercised its right to complain and received a debrief in a timely manner. Counsel submitted

that the Applicant's request for an extension of the standstill period had been overtaken by events, as the Respondents had already provided a detailed debrief on 30th June 2025, well before the expiration of the standstill period.

86. The Respondents' Counsel argued that the Applicant's claims of unequal treatment were unsubstantiated, arguing that the 6th bidder's complaint was materially different as it highlighted an error in the evaluation of its EPRA license, which the Evaluation Committee lawfully corrected under Section 80 of the Act. Counsel submitted that the Applicant's concerns regarding lack of information were addressed in full through correspondence dated 30th June 2025, and that the Applicant was not treated unfairly or denied any procedural rights; rather, it simply disagreed with the outcome of a lawful reevaluation.
87. The Board understands the crux of the Applicant's case to be that the 6th bidder, who was subsequently declared the lowest responsive bidder following the re-evaluation, had initially been found non-responsive and was therefore ineligible for award.
88. The Board notes that in resolving the present matter, it must first consider the legal framework governing procurement dispute resolution, particularly where a dispute arises after notification has been issued pursuant to Section 87 of the Act, so as to provide clarity on the proper course of action in such circumstances.
89. The Constitution of Kenya, being the supreme law of the land, forms the primary point of reference in addressing public procurement

matters. Article 227 thereof provides the foundational principles governing public procurement, and states as follows:

227. Procurement of public goods and services

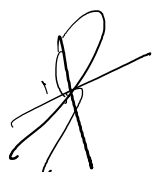
(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

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

a. categories of preference in the allocation of contracts;

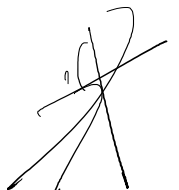
b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

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d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

90. The Board observes that the Act of Parliament contemplated under Article 227(b) of the Constitution is the Public Procurement and Asset Disposal Act (hereinafter “the Act”). The long title of the Act expressly states that it is an Act of Parliament enacted to give effect to Article 227 of the Constitution, to provide procedures for efficient public procurement and asset disposal by public entities, and for connected purposes. A reading of both the long title and Section 4 of the Act affirms that the statute was enacted to establish a comprehensive legislative framework governing public procurement in Kenya.
91. Having established the substantive statute governing public procurement, the Board now turns its attention to the specific provisions of the Act that address the resolution of disputes arising in the course of public procurement processes.
92. The Board notes that the Act provides two distinct avenues for addressing disputes arising from public procurement processes. The first is found under Section 35 of the Act, which allows any person to lodge a complaint with the Public Procurement Regulatory Authority (the Authority) for purposes of investigation where there is an alleged breach of the Act. The enforcement mechanisms following such investigations are outlined under Section 38 of the Act. The second



avenue is under Section 167, which provides a specific and limited class of persons, such as candidates or tenderers, with the right to request a review of a procurement process before the Public Procurement Administrative Review Board (the Board). The enforcement mechanisms applicable to this route are set out under Section 173 of the Act.

93. The Board observes that the avenues outlined above constitute the primary mechanisms for dispute resolution under the public procurement legal framework. However, the Board further notes that the Standard Tender Document (STD)—and in particular, the STD for Procurement of Goods, which is applicable in this matter—also provides for procedures and guidance on the handling of disputes arising during the tendering process. Accordingly, reference shall be made to the relevant provisions of the said Standard Tender Document.

44. Debriefing by the Procuring Entity

44.1 On receipt of the Procuring Entity's Notification of Intention to Enter into a Contract referred to in ITT 41, an unsuccessful tenderer may make a written request to the Procuring Entity for a debriefing on specific issues or concerns regarding their tender. The Procuring Entity shall provide the debriefing within five days of receipt of the request.

44.2 Debriefings of unsuccessful Tenderers may be done in writing or verbally. The Tenderer shall bear its own costs of attending such a debriefing meeting.



94. The Board understands the above to mean that upon receiving a Notification of Intention to Enter into a Contract from the Procuring Entity, an unsuccessful tenderer is entitled to seek clarification through a formal written request for a debriefing, particularly on matters they find unclear or of concern in relation to the evaluation of their tender. The Procuring Entity is then under an obligation to respond and conduct the debriefing within five days of receiving such a request. The provision underscores that the purpose of the debriefing is to enhance transparency by enabling unsuccessful bidders to understand the reasons behind their non-selection. It may be conducted either in writing or verbally, and any costs associated with attending the debriefing are to be borne by the tenderer. The Board emphasizes that the debriefing process is a critical accountability mechanism under the procurement framework, designed to promote fairness and facilitate informed decision-making for future participation in public tenders.
95. Debriefing is a post-evaluation process through which an unsuccessful tenderer, upon receiving a Notification of Intention to Enter into a Contract, may seek and obtain feedback from the Procuring Entity regarding specific issues or concerns about the evaluation of their bid. The objective of this process is to promote transparency, enhance accountability, and enable tenderers to understand the reasons behind their unsuccessful outcome. The Procuring Entity is required to provide this debriefing within five days of receiving a written request.
96. Further, the Board notes that a debriefing is not an adjudicative process, nor does it confer upon the Procuring Entity any authority to

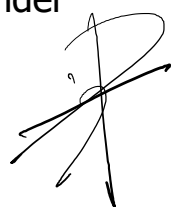
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resolve procurement disputes or make binding determinations on contested issues. Any attempt by the Procuring Entity to resolve or pronounce itself on matters in dispute during a debriefing would be acting *ultra vires*, as such powers are vested in the dispute resolution mechanisms provided under the Act. Accordingly, the Procuring Entity's role during debriefing is limited to providing factual information and clarifications, not resolving grievances or interpreting the law.

97. In ***Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited*** the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefore when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"

98. The Board understands the import of the cited case law to be that Article 47 of the Constitution, which guarantees the right to fair administrative action, imposes a duty on administrative bodies not only to render

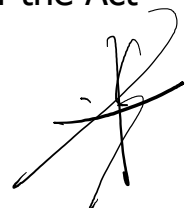


decisions but also to provide reasons for those decisions within a reasonable time. This constitutional safeguard ensures that affected parties are furnished with sufficient information to evaluate the merits of the decision and determine whether to pursue redress. In the context of public procurement, this principle forms the bedrock of the debriefing process, which enables an unsuccessful tenderer to understand the reasons for the rejection of its bid and to assess whether there were any procedural or substantive irregularities warranting challenge.

99. The Board notes that debriefing is a necessary mechanism aimed at actualizing the right to fair administrative action. However, a Procuring Entity that oversteps its mandate by using the debriefing process as a forum for resolving procurement disputes acts *ultra vires* the law. Such conduct creates an untenable situation where the entity that is a party to the dispute purports to also adjudicate it, thereby offending the principles of impartiality and procedural fairness.

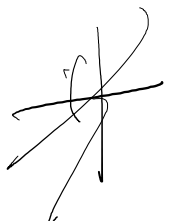
100. The Board understands that, under the procurement legal framework, once an unsuccessful tenderer has been debriefed, such a tenderer may elect to invoke the dispute resolution mechanisms provided under the Act. This is because it is at the point of debriefing that the tenderer gains insight into the reasons underpinning the decision made by the Procuring Entity, particularly where further clarification is required beyond what was communicated in the notification of intention to award.

101. Further, the Board finds it necessary to emphasize that the statutory timeline for lodging a Request for Review under Section 167 of the Act

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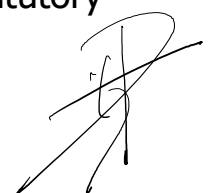
is not suspended merely because a tenderer opts to seek a debrief. A party must exercise vigilance in determining how to pursue a dispute, bearing in mind the distinct implications of each available avenue, particularly with regard to the applicable timelines for initiating and resolving procurement disputes.

102. Turning to the present Request for Review, the Board notes that the Procuring Entity received a letter dated 18th June 2025 from Fossils Agencies Limited subsequent to the issuance of letters of notification on 16th June 2025, which had identified the Applicant as the lowest evaluated bidder. The Board further observes that the Procuring Entity relied on the contents of the said letter and proceeded to conduct a re-evaluation of the bids.
103. The Board observes that the Procuring Entity exceeded its mandate by proceeding to conduct a re-evaluation of the bids. At most, the Procuring Entity was only required to provide reasons for its decision, which would have constituted a lawful debrief. The Board further notes that the Procuring Entity failed to formally respond to the letter from Fossils Agencies Limited as required by law. Instead, it assumed the role of an arbiter in a matter in which it was an interested party and proceeded to unilaterally determine that a re-evaluation be conducted, culminating in the issuance of reviewed letters of notification dated 23rd June 2025.
104. The Board notes that no provision of the law permits a Procuring Entity to order a re-evaluation of bids after notifications have been issued under Section 87 of the Act. Indeed, the Procuring Entity's unlawful



actions resulted in the creation of an irregular and legally unrecognized document titled *Review of Notification of Intention to Award*, which has no basis in the public procurement legal framework.

105. In light of the foregoing analysis, the Board finds that the Respondents acted outside the law by receiving and determining the complaint lodged by Fossils Agencies Limited and subsequently issuing the reviewed letters of notification of intention to award.
106. Before concluding on this issue, the Board considers it necessary to highlight and comment on certain pertinent observations it made in the course of its analysis.
107. In view of the fact that the letter dated 18th June 2025 from Fossils Agencies Limited set in motion the chain of events culminating in the present Request for Review, the Board undertook a detailed examination of the confidential documents to determine whether the 6th bidder, Fossils Agencies Limited, was erroneously disqualified during the initial evaluation. In particular, the Board reviewed the notification of award dated 16th June 2025, which indicated that the bidder was disqualified for having submitted an EPRA practicing license below the required class, specifically, a Class C1 license. Upon further scrutiny of the bidder's submission, the Board notes that at page 365 of the bid document, Fossils Agencies Limited provided an EPRA practicing license of Class A-1, and at page 364, it submitted a Solar license of Class C-1.
108. In light of the error identified above, the Board emphasizes that the Respondents must exercise greater diligence in discharging their mandate in accordance with the provisions of the Act. The statutory

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requirement that the findings of the Evaluation Committee be subjected to an opinion by the Head of the Procuring Function and subsequently approved by the Accounting Officer serves as a safeguard, ensuring that such errors are identified and rectified prior to the issuance of any notification letters.

109. The Board notes that, as a result of the unprocedural actions taken by the Respondents, reviewed letters of notification of award were issued on 23rd June 2025. The Board finds that these letters are products of an irregular process and are, therefore, null and void, just like the process that gave rise to them. In any event, their existence is not anchored in law, as the Act does not recognize or provide for reviewed letters of notification of award.

110. The Board further notes with concern the disparity in the manner in which the Respondents handled the complaint by the Applicant compared to that of Fossils Agencies Limited. While the complaint by Fossils Agencies Limited was accorded almost immediate attention, the Applicant's complaint did not receive similar prompt consideration. The Board cautions the 1st Respondent that, as the Accounting Officer, he is required to exercise impartiality and transparency in the execution of his duties. Unequal treatment of bidders has no place within the current public procurement legal framework, as it runs counter to the values and principles enshrined under Article 227 of the Constitution.

111. In summary, the Respondents erred by assuming and executing responsibilities that are not legally vested in them, thereby acting outside their statutory mandate. In doing so, they violated both the

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provisions of the Act and the Constitution.

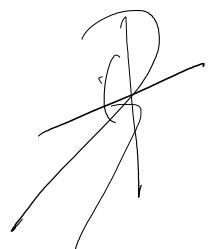
What orders the Board should issue in the circumstance.

112. Having considered the parties' submissions and evaluated all the evidence presented, the Board finds that it has jurisdiction to entertain the Request for Review. This determination is informed by the fact that the Notice of Preliminary Objection does not raise pure points of law and further relies on a circular dated 27th June 2025, which is inapplicable to the present circumstances.

113. The Board further finds that the Respondents acted in error by receiving and determining the complaint by Fossils Agencies Limited, thereby assuming powers not conferred upon them under the law. This unlawful assumption of authority culminated in the issuance of reviewed letters of notification, documents that have no basis or recognition within the existing procurement legal framework.

114. Lastly, the reviewed letters of notification of award dated 23rd June 2025 are hereby declared null and void, not only because they are alien to the procurement legal framework, but also because they are the products of an unlawful and unprocedural process.

115. Consequently, the Request for Review dated 30th June 2025, concerning TENDER NO. KeFS/OT/005/2024-2025 – Proposed Renovation of Faulty Laboratory Electrical Installations at Kenya Fisheries, Mombasa, is hereby allowed on the following specific grounds:

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FINAL ORDERS

116. 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 30th June 2025:

- 1. The Notice of Preliminary Objection dated 15th July 2025 is hereby dismissed;**
- 2. The Notification letters dated 16th of June 2025 and Reviewed Letters of Notification of Intention to Award dated 23rd June 2025, issued to the Applicant and all the other bidders with respect to TENDER NO. KeFS/OT/005/2024-2025 – Proposed Renovation of Faulty Laboratory Electrical Installations at Kenya Fisheries, Mombasa be and are hereby nullified and set aside;**
- 3. The 1st Respondent is hereby directed to re-convene the Evaluation Committee, admit all qualifying tenders at the Preliminary Evaluation stage and re-evaluate the said tenders, taking into consideration the findings of the Board herein and proceed with the subject tender proceedings to their lawful and logical conclusion in compliance with the Board's findings herein, the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution;**
- 4. Each party shall bear its own costs of the proceedings.**



Dated at NAIROBI, this

21st

day of July 2025.



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CHAIRPERSON
PPARB



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SECRETARY
PPARB