

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 76/2025 OF 2ND JULY 2025

BETWEEN
BLUESWIFT CONTRACTORS & GENERAL
SUPPLIES LIMITEDAPPLICANT
AND
ACCOUNTING OFFICER,
STATE DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, MINISTRY OF LANDS, PUBLIC WORKS,
HOUSING AND URBAN DEVELOPMENT RESPONDENT
LED POWER TECHNOLOGIES (EA) K LTD..... INTERESTED PARTY

Review against the decision of the Accounting Officer, State Department of Housing and Urban Development, in relation to Tender No. MLPWHUD/SDHUD/AHP/117/2024-2025 for the Proposed Construction of Naromoru Affordable Housing and Associated Social Infrastructure at Naromoru, Kieni East Sub-County, Nyeri County.

BOARD MEMBERS PRESENT

- | | |
|-----------------------------------|-----------------------------|
| 1. Mr. George Murugu FCI Arb, I.P | - Chairperson |
| 2. Ms. Alice Oeri | - Vice Chairperson & Member |
| 3. Eng. Lilian Ogombo | - Member |
| 4. Ms. Jessica M'mbetsa | - Member |

IN ATTENDANCE

- | | |
|---------------------|---|
| 1. Mr. Abdalla Issa | - Holding Brief for the Board Secretary |
|---------------------|---|



- | | |
|--------------------|---------------|
| 2. Ms. Sarah Ayoo | - Secretariat |
| 3. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

**BLUESWIFT CONTRACTORS & GENERAL
SUPPLIES LIMITED**

Mr. Ogony	- Advocate, Abdihakim Haji & Company Advocates
-----------	--

RESPONDENTS

**THE PRINCIPAL SECRETARY, STATE
DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT & STATE DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT**

- | | |
|------------------------|---|
| 1. Ms. Charity Kagiri | - State Counsel |
| 2. Mr. John Maina | - Head, Supply Chain Management, State
Department of Housing & Urban Development |
| 3. Ms. Winrose Mutindi | - Procurement Officer, State Department of
Housing & Urban Development |

INTERESTED PARTY

LED POWER TECHNOLOGIES (EA) K LTD

- | | |
|-----------------------|--|
| 1. Mr. Anthony Simiyu | - Advocate, ASW Law Advocates LLP |
| 2. Mr. Michael Mutea | - Advocate, Mutea Muthuri & Company
Advocates |
| 3. Mr. Roy Chidi | - Advocate, ASW Law Advocates LLP |



BACKGROUND OF THE DECISION

The Tendering Process

1. The State Department of Housing and Urban Development, (hereinafter referred to as "the Procuring Entity") invited qualified and interested tenderers to submit sealed tenders in response to Tender No. MLPWHUD/SDHUD/AHP/117/2024-2025 for the Proposed Construction of Naromoru Affordable Housing and Associated Social Infrastructure at Naromoru, Kieni East Sub-County, Nyeri County (hereinafter referred to as the "subject tender") by use of open competitive method (National). The invitation was by way of an advertisement on 13th November 2024 in My Gov Newspaper and on the Procuring Entity's website www.housingandurban.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download. A total of five (5) addendums were issued with the tender submission deadline initially scheduled on 13th November 2024 at 09.00 a.m. extended to 10th January 2025 at 09.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held 10th January 2025 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015



(hereinafter referred to as the 'Act'), a total of three (3) tenders were submitted in response to the subject tender. The said three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Blueswift Contractor & General Supplies
2.	Refco HB Co. Ltd
3.	Ledpower Technologies

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the three (3) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 25th February 2025 in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation.

Preliminary Evaluation

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause A Preliminary and Mandatory Requirements



Checklist of Section III- Evaluation and Qualification Criteria at page 31 of 163 to 32 of 163 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

5. At the end of evaluation at this stage, one (1) tender was determined non-responsive, while two (2) tenders, being the Applicant's and Interested Party's tenders, were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Stage 2: Technical Evaluation Criteria for the Bidders of Section III- Evaluation and Qualification Criteria at page 33 of 163 to 35 of 163 of the Tender Document. Tenderers were required to attain the minimum score of 70 points so as to progress for further evaluation.
7. At the end of evaluation at this stage, the two (2) tenders were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause C Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 36 of 163 of the Tender Document.



9. At the end of evaluation at this stage, the Evaluation Committee ranked the responsive bids as follows:

B/N o	Bidder Name	Bid Amount (Ksh)	Corrected Bid amount (Ksh)	Error Amount (Ksh)	% Erro r	Cost Per SQM	Project Estimate	Remark s
2	Blueswift Contractor & General Supplies	2,473,712,548.9 6	2,429,430,355.5 0	44,282,193.4 6	1.66%	38,500.0 5	2,500,000,00 0	It is within the project estimates
3	Ledpower Technologie s	2,499,053,306.9 4	2,540,557,705.0 0	- 41,504,398.0 6	1.79%	40,261.13	2,500,000,00 0	It is above the project estimate

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to M/s Blueswift Contractor & General Supplies at its quoted tender sum of Two Billion, Four Hundred and Seventy-Three Million, Seven Hundred and Twelve Thousand, Five Hundred and Forty-Eight and Ninety-Six Cents (Ksh. 2,473,712,548.96) only being the lowest evaluated bidder subject to confirmation of the bidder's qualifications during post-qualification exercise pursuant to Section 83 of the Act.

Due Diligence

11. According to the Due Diligence Report dated 7th March 2025, the Evaluation Committee carried out due diligence in accordance with Section 83 of the Act on the lowest responsive bidder, M/s Blueswift Contractor & General Supplies. The scope of the due diligence entailed (a) ascertaining the authenticity of the bid security and Line of credit submitted by the tenderers, and (b) ascertaining the authenticity of the firm's experience and also confirming completion status of one sample project of similar nature, complexity and magnitude done by the firm.

Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to M/s Blueswift Contractor & General Supplies at its quoted tender sum of Kenya Shillings Two Billion, Four Hundred and Seventy-Three Million, Seven Hundred and Twelve Thousand, Five Hundred and Forty-Eight and Ninety-Six Cents (Ksh. 2,473,712,548.96) only being the lowest evaluated bidder.

First Professional Opinion

12. In a Professional Opinion dated 1st April 2025 (hereinafter referred to as the "First Professional Opinion"), the Head Supply Chain Manager, Mr. John Maina reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

13. However, the Respondent on 4th April 2025 did not approve the First Professional Opinion for the reason that the recommended bidder had existing work with the Procuring entity and had performed dismally. He directed for the second lowest evaluated bidder, M/s Ledpower Technologies, to be evaluated and engaged with negotiations so as to match its price with that of M/s Blueswift Contractor & General Supplies.



Re-Evaluation of the subject tender

14. On 7th April 2025, the Head of Supply Chain Management marked the Professional Opinion to the Secretary of the Evaluation Committee with instructions to take note of the comments by the Respondent and to table the report for re-evaluation.

Extension of Tender Validity Period

15. Vide letters dated 29th May 2025, bidders were notified of extension of the tender validity period for 30 days up to and including 10th July 2025.

Second Due Diligence

16. According to the Due Diligence Report dated 16th June 2025, the Evaluation Committee carried out due diligence in accordance with Section 83 of the Act on the second lowest responsive bidder, M/s Ledpower Technologies. The scope of the due diligence entailed (a) ascertaining the authenticity of the bid security and Line of credit submitted by the tenderers, and (b) ascertaining the authenticity of the firm's experience and also confirming completion status of one sample project of similar nature, complexity and magnitude done by the firm.
17. Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to M/s Ledpower Technologies at its quoted tender sum of Kenya Shillings Two Billion, Four Hundred and Ninety-Nine Million, Fifty-Three Thousand, Three Hundred and Six and Ninety-Four Cents (Ksh. 2,499,053,306.94) only being the lowest evaluated bidder.



Second Professional Opinion

18. In a Professional Opinion dated 18th June 2025 (hereinafter referred to as the "Second Professional Opinion"), Mr. Benard Oloo for the Head Supply Chain Manager reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

19. The Respondent approved the Second Professional Opinion on 18th June 2025.

Notification to Tenderers

20. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 18th June 2025.

REQUEST FOR REVIEW NO. 76 OF 2025

21. On 2nd July 2025, Blueswift Contractors & General Supplies Limited, the Applicant herein, filed a Request for Review dated 2nd July 2025 together with an Applicant's Statement in Support of the Request for Review sworn by Zakariya Shariff Abdullahi, its director (hereinafter referred to as 'the instant Request for Review') through the firm of Abdihakim Haji & Co, Advocates seeking the following orders from the Board in verbatim:



- A. A Declaration that the Procuring entity has breached the Applicant's right to a fair, efficient and reasonable administrative action;***
- B. That the decision of the Procuring entity as communicated to the Applicant via an e-mail message dated 18 June, 2025 indicating that the Applicant had been unsuccessful in the said tender be set aside and/or annulled.***
- C. That the procurement process with regard to the impugned tender be annulled and or set aside.***
- D. That the Procuring entity be directed to forthwith halt the procurement process.***
- E. That this Honourable Board do issue an Order directing the Procuring Entity to redo the procurement process.***
- F. That this Honourable Board do issue and Order directing the Accounting Officer and the Procuring Entity to award the tender reference number MLPWHUD/SDHUD/AHP/117/2024-2025 to the Applicant, being the lowest evaluated responsive bidder.***
- G. That the Respondent be ordered to pay costs of and incidental to these proceedings.***
- H. That this Board grants any other or further reliefs and/or orders as may deem fit and just in the circumstances.***

22. In a Notification of Appeal and a letter dated 2nd July 2025, Mr. James Kilaka, the Board Secretary notified the Respondent of the filing of the



Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 2nd July 2025.

23. On 8th July 2025, the Respondent, PS Charles M. Hinga, CBS, CA (SA), filed a Response on Appeal of the subject tender dated 7th July 2025 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

24. *Vide* email dated 10th July 2025, the Board Secretary notified all tenderers in the subject tenders via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

25. *Vide* a Hearing Notice dated 10th July 2025, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 15th July 2025 at 2.00 p.m., through the link availed in the said Hearing Notice.



26. On 11th July 2025, the Interested Party filed through ASW Law Advocates LLP a Notice of Appointment dated 11th July 2025.

27. On 14th July 2025, the Interested Party filed an Interested Party's Replying Affidavit sworn on 13th July 2025 by Robert Kimani Kuria, its director and Written Submissions dated 14th July 2025

28. When the matter first came up for hearing on 15th July 2025, the Board read out pleadings filed by parties in the matter. Mr. Ogony for the Applicant sought for an adjournment on the grounds that they had availed an erroneous email address in the Request for Review application being info@ahadvocates.co.ke instead of info@ahlegal.co.ke that the said firm uses for litigation thereby inhibiting their access to not only the Hearing Notice issued by the Board Secretariat but also responses filed by both the Respondent and the Interested Party. When asked to respond to the Applicant's application, both the Respondent and Interested Party's counsels agreed to indulge the Applicant's application and were not opposed to the adjournment. Subsequently, the Board having heard parties' submissions issued the following orders:

- i. The Application for adjournment be allowed. However, the Board pointed out that it was ready to proceed with the hearing save for indulgence afforded to the Applicant by both the Respondents and Interested Party on its application for adjournment.
- ii. The Respondent and Interested Party to serve the Applicant's counsel with their responses by 4.00 p.m. on 15th July 2025



through their elected and confirmed email address being info@ahlegal.co.ke and copy the Board for record purposes in addition to filing a return of service.

- iii. The Applicant be granted leave to file and serve its rejoinders, if need be, together with its written submissions and list & bundle of authorities by 12.00 noon on 16th July 2025.
- iv. The Respondents be granted leave to file and serve their written submissions and list & bundle of authorities by 9.00 a.m. on 17th July 2025.
- v. The Interested Party be granted leave to file and serve its supplementary written submissions by 9.00 a.m. on 17th July 2025.
- vi. The matter be slated for hearing on 18th July 2025 at 9.00 a.m. for purposes of highlighting submissions.
- vii. Parties are cautioned to adhere to the stipulated timelines.

29. *Vide* email of 15th July 2025 at 15:19 hrs, the Respondent served the Applicant with its response and copied the Board as directed.

30. *Vide* email of 16th July 2025 at 14:50 hrs, the Respondent once again served the Applicant with its response and copied the Board. It further filed vide email of 16th July 2025 at 18:13 hrs an Affidavit of Service sworn on 16th July 2025 by Winrose Mutindi, a licensed Procurement Professional working for the Procuring Entity in the Department of Supply Chain Management.



31. The Applicant filed vide email of 16th July 2025 at 13:47hrs an Applicant's Further Affidavit sworn on even date by Zakariya Shariff Abdullahi and Written Submissions dated 16th July 2025.
32. The Applicant also filed a Bundle of Authorities vide email of 17th July 2025 at 17:29 hrs.
33. The Respondent filed on 17th July 2025 Written Submissions of even date.
34. At the hearing of the instant Request for Review on 18th July 2025 at 9.00 a.m., the Board once again read out the documents filed by parties in the matter. Mr. Ogony for the Applicant proceed to make an application for:
- i. the Board not to rely on the Respondent's response as filed in the matter on the ground that the Respondent failed to serve him the said response as directed on 15th July 2025 and consequently, the Applicant did not address issues raised in the said response as it was only served by the Board Secretariat on 16th July 2025 at 2.50 p.m. after the Applicant had filed its Further Affidavit on the said 16th July 2025 1.47 p.m., and;
 - ii. the annexures relied upon by the Applicant in the instant Request for Review marked as ZSA - 4 being an Internal Memo dated 23rd June 2025 addressed to the Chair, Tender Evaluation Committee from the Director, Housing Department and ZSA – 5 being a Progress Status Report



dated 12th June 2025 authored by Zimaki Consult Ltd and addressed to the Director of Housing be expunged

35. Asked by the Board if the documents sought to be expunged constitute internal documents of the Procuring Entity, Mr. Ogony answered in the affirmative.

36. In opposing the Applicant's applications, Ms. Kagiri submitted that the Applicant had been served with the Respondent's response as directed by the Board and a Return of Service filed evidencing the said service. She also opposed the application to expunge the Applicant's annexures arguing that no grounds had been adduced on what had occasioned expungement of the said documents. Counsel pointed out that the Applicant had confirmed that the said documents constitute internal confidential documents of the Procuring Entity and were of significant effect to the Applicant's case hence ought not to be dealt with as a preliminary issue but as a substantive issue.

37. On his part, Mr. Simiyu associated himself with the sentiments of Ms. Kagiri and opposed the Applicant's applications. Counsel submitted that the Applicant ought to demonstrate that it made an effort in reaching out so as to get hold of a copy of the Respondent's response since as of 15th July 2025, it was aware that a response had been filed by the Respondent. He pointed out that the proceedings before the Board are time bound and enough time had been lost. As to expungement of the Applicant's annexures, counsel submitted that the Interested Party



formed its response on the basis of the documents sought to be expunged and this would materially affect its response to the request for review. He argued that access to the said documents constitutes a criminal offence and carries the consequence of administrative sanctions such as debarment. He pointed out that if the Applicant was keen on withdrawing the entire request for review, it was at liberty to do so and ought not try to circumvent the present proceedings by way of expungement of documents.

38. Having considered parties' submissions, the Board cautiously revisited its entire record with regard to service of the Respondent's and Interested Party's pleadings upon the Applicant as directed on 15th July 2025.

39. The Board confirmed compliance with its previous orders having established that the Applicant had been served through its preferred and elected email address with the Respondent's response on two occasions, first on Tuesday, 15th July 2025 at 15:19 hrs and on Wednesday, 16th July 2025 at 14:50 hrs and being satisfied with the said service, declined the Applicant's first application.

40. As to the Applicant's second application, the Board observed that issues had already joined substantively on the question of the annexures sought to be expunged and pointed out that the Applicant had in its Further Affidavit deponed as to the said documents being so critical in sustaining the instant Request for Review. The Board also



pointed out that it is required by law to deal with the nature of the documents sought to be expunged noting that the Applicant had admitted that these are the Procuring Entity's internal documents which in effect makes them confidential documents and the Board would need to hear how the Applicant came into custody of the same. While agreeing with Ms. Kagiri, the Board noted that no grounds had been given as to why the annexures should be expunged at this preliminary stage and proceeded to dismiss the Applicant's application.

41. Subsequently, the Board proceeded to allocate time for parties to highlight their respective cases. Thus, the instant Request for Review proceeded for hearing as scheduled.

PARTIES SUBMISSIONS

APPLICANT'S CASE

42. In its submissions, the Applicant relied on its pleadings and documents filed before the Board in the instant Request for Review.

43. The Applicant submitted that it received an email notification on 18th June 2025 from the Procuring Entity informing it that its bid was unsuccessful because of non-performance of the previously awarded contracts with the Procuring Entity. It contends that by rejecting its tender, the Respondent and Procuring Entity violated the provisions of Articles 10, 47, 201, 227 and 232 of the Constitution and Section 3 and 80 of the Act by unfairly, unlawfully and unreasonable declining to



award it the subject tender yet it had complied with all the mandatory eligibility criteria outlined in the Tender Document.

44. Mr. Ogony submitted that the Procuring Entity unlawfully introduced additional requirements during evaluation of the subject tender and at the due diligence stage leading to a subjective analysis of the Applicant's tender in breach of Section 80 of the Act. He argued that by unreasonably pegging the disqualification of the Applicant's tender through a subjective consideration of the status of performance of previous contracts which in the strict sense was not a non-performing one was a breach of Regulations 74, 76, and 77 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") which requires that all evaluation criteria must be outlined in the Tender Document in a fair and objective manner.

45. Counsel submitted that use of past contracts to disqualify a bidder without clear performance valuation undermines the principles of fairness, transparency, and equal treatment stipulated under Article 227 of the Constitution and Section 3 of the Act which mandates public entities contracting for goods and services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

46. He pointed out that the invitation for expression of interest was silent on the weighting or criteria by which previous performance would be



judged and failed to outline any clear threshold or mechanism for measuring satisfactory performance. He further pointed out that the period for the performance of the previous contract awarded to the Applicant is yet to lapse hence solely relying on that as a ground to deny awarding the subject tender to an otherwise eligible and cost-effective bidder is an outright expression of bad faith on the part of the Respondent and Procuring Entity.

47. While making reference to Section 83 of the Act as read with Regulation 80 of Regulations 2020, the Applicant submitted that whilst the Act and Regulations 2020 allow the Respondent to undertake due diligence, question remains as to the yardstick used in the instant matter to gauge the non-performance of otherwise of the previous tender. Mr. Ogony submitted that whilst Clause 7 under Section III – Evaluation and Qualification Criteria at page 38 of the Tender Document stipulated that a bidder ought to provide at least 5 contracts that have been satisfactorily and substantially completed as a prime contractor, each with a minimum value of Kshs. 2,500,000,000/=, the indicators for assessing the satisfaction were not provided with the consequence that the due diligence was based on opaqueness and generality thereby hindering transparency and fairness. In support of his argument, he made reference to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M.s AAKI Consultants Architects and Urban Designers (Interested Party) (2019) KEHC (KLR)*.



48. Mr. Ogony submitted that the administrative law principle of reasonableness as outlined in Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act imposed upon the Procuring Entity the obligation to ensure that administrative decisions are made in good faith whilst considering relevant issues which were however violated in the instant case. He argued that the variance in terms of compliance with the previous tender was so meagre that it was unreasonable to disqualify the Applicant on this basis.

49. On the issue of whether the Applicant is in breach of Section 67 of the Act in its filing of the instant Request for Review, counsel submitted that pursuant to Section 68(2)(d)(iii) of the Act, a summary of the proceedings of the opening of tenders, evaluation and comparison of the tender proposals or quotations, including the evaluation criteria can be used as prescribed. He argued that the impugned annexures in the instant matter do not offend any provisions of law and that the Applicant is not a party to any alleged violation of the confidentiality principles. Further, that the burden lies on the Respondent to prove or disapprove any alleged violation of Section 67 of the Act.

50. Mr. Ogony submitted that under Article 35 of the Constitution and Section 67(3) of the Act, the Applicant was entitled to access the impugned documents upon which the unfair and unreasonable administrative action was made. He argued that the present case should be distinguished from the illegally obtained evidence which was the subject of the Supreme Court decision in *Kenya Railways*



Corporation & 2 Others v Okoiti & 3 Others (2023) eKLR since the Applicant in the instant matter obtained the same through debriefing in line with Section 68 of the Act. The Applicant therefore contends that the said documents are proper before the Board for the just determination of the instant Request for Review.

51. Counsel urged the Board to allow the instant Request for Review as prayed.

RESPONDENT'S CASE

52. In its submissions, the Respondent relied on its pleadings and documents filed before the Board in the instant Request for Review.

53. As to whether the Respondent breached the law while undertaking post-qualification process on the Applicant in the subject tender, Ms. Kagiri submitted that the Respondent adhered to the evaluation criteria stipulated in the Tender Document in carrying out due diligence and evaluation of tenders hence no new criterion was introduced as alleged by the Applicant.

54. She drew the Board's attention to Clause 7 of Section III – Evaluation and Qualification Criteria of the Tender Document and read with Item 2 of Addendum 2 dated 22nd November, 2024 that clarified on the aspect of due diligence stipulating that a bidder if currently or previously engaged on other projects with the Procuring Entity would be assessed on their current performance and their delivery on those



projects and contractors with a poor performance would not be recommended for award. Counsel submitted that the aforementioned criterion was within the knowledge of all prospective bidders before close of the subject tender and no clarification had been sought in regard to the same.

55. She submitted that in carrying out due diligence on the Applicant's tender, the Head Supply Chain management Services sought for due diligence from Director, Housing Department of the Procuring Entity on confirmation whether the bidder's performance was compliant and satisfactory as per the specification and within the completion timeline, That in response, and by an internal memo dated 29th April 2025, the Director Housing Department indicated that for the Matuga AHP Project, the Consultant (Zimaki Consult Ltd) had issued a notice dated 28th February, 2025 that cited slow progress and poor procurement practices.; on the Ogembo AHP Project, it was indicated that the Project Manager had issued a default notice in March, 2025. Counsel submitted that it was the Director's conclusion that although there was improvement in the Matuga AHP Project, performance of the Ogembo AHP Project had been unsatisfactorily and non-compliant. In effect, and as per the due diligence requirements set out in the tender document in terms of Section 75(4) of the Act, the Applicant had a poor performance record of current projects with the Procuring Entity and was not to be recommended for award of the subject tender.



56. Ms. Kagiri argued that the assertion by the Applicant that the percentage of performance was minor is not the interpretation or import of the stipulated evaluation criteria and it is not for the Applicant to assess whatever degree of non-conformance and to the contrary, this is a confirmation by the Applicant that its performance with the Procuring Entity was not satisfactory. She reiterated that the Applicant was evaluated in accordance with the set criteria that was objectively applied in the evaluation process and referred the Board to the holding by the High Court in *Nairobi Judicial Review Application No. E189 of 2022 Republic versus Public Procurement Administrative Review Board and Accounting Officer, Kenya Medical Supplies Authority and Others; Guardforce Group Limited vs Public Procurement Administrative Review Board, Pwani University and 2 Others*(HC Mombasa JR No.32 of 2020) and the South African case *in the matter between WBHO-LUBOCON JV vs Eskom Holdings Soc Ltd and Grinaker LTA-ENZA Construction Joint Venture*(Case No:005599/2022 High Court of South Africa, Gauteng Local Division, Johannesburg).

57. As to whether the Applicant in filing the instant Request for Review has contravened Section 67 of the Act, Ms. Kagiri submitted that the Applicant in its Supporting Affidavit sworn by Zakariya Shariff Abdullahi on 2nd July, 2025 annexed at paragraph 9 a copy of a memo dated 23rd June, 2025 from Director, Housing Department to Chair, Tender Evaluation Committee regarding performance by the Applicant on Matuga AHP Project and marked as ZSA-4 . Counsel submitted that the said document is titled "internal memo" meaning that it was for all



intents and purposes tailored for internal consumption of the Procuring Entity and addressed to the Chair, tender evaluation committee and thus a confidential document.

58. Ms. Kagiri submitted that Section 67 of the Act prohibits disclosure of confidential information during or after procurement proceedings. She argued that although section 67(1) makes reference to an employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity, the consequences of contravention entails debarment and this confirms the position that the Applicant is called upon to adhere to these requirements on confidentiality. In support of her argument she referred the Board to the holding in *PPARB Application No. 21 of 2015 Thwama Building Services Case vs Tharaka Nithi County Government*.

59. She urged the Board to dismiss the instant Request for Review with costs.

INTERESTED PARTY'S CASE

60. In its submissions, the Interested Party relied on its pleadings filed before the Board.

61. As to whether the Applicant can be permitted to found its Request for Review on the Internal memo dated 23rd June 2025 and the letter dated



12th June 2025, Mr. Simiyu while making reference to Section 67 of the Act and the holding in *PPARB Application No. 21 of 2015 Thwama Building Services Case vs Tharaka Nithi County Government* and *PPARB Application No. 11 of 2016 Amro Insurance Brokers Limited v Kenya Wildlife Service* invited the Board to consider the decision by the Supreme Court in *Kenya Railways Corporation & 2 others v Okoit & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment)* with respect to evidence that is produced before any decision making body that has been illegally obtained.

62. Counsel submitted that the Supreme Court was emphatic that there has to be a proper channel as regards how a party relying on a public document acquired the said document, in addition to the chain of custody in terms of a request being presented and forwarding of the documents to the party requesting the same.

63. Mr. Simiyu submitted that while Mr. Ogony alleged that the Supreme Court decision was not applicable, he did not offer any explanation as to why it was not applicable. Counsel further submitted that the Applicant has not offered an explanation as to as to how they came across these confidential documents, whose unauthorized disclosure attracts criminal and administrative sanctions. He indicated that absent any explanation, the said documents are inadmissible and that the Applicant is guilty of collusion in the willful breach of the Act through its unauthorized access of confidential information against the Act.



64. He invited the Board, as a deterrent measure to bidders who are in the habit of subverting procurement laws by unauthorized access to confidential information to dismiss the instant Request for review with costs and recommend investigations against the Applicant with respect to the unauthorized access to the confidential information.

65. As to whether the Applicant was validly disqualified from the subject tender in accordance with provisions of the Tender Document, the Act and Regulations 2020, counsel submitted that Section 83 of the Act as read with Regulation 80 of Regulations 2020 are clear with respect to the conduct of due diligence, which may include securing confidential references from 3rd parties, prior to award of tender to the lowest evaluated bidder.

66. Mr. Simiyu referred the board to the holding in *PPARB Application No. 55 of 2024 Lakepark Cleaners Limited v Chief Executive Officer, Kenyatta University Teaching and Referral Hospital*, and submitted that the Board set aside the decision of the accounting officer therein for ignoring the findings contained in a due diligence report that had found the lowest responsive bidder unsuitable for the performance of the works in the tender in question.

67. He pointed out that from the provisions under Clause 7 of Section III – Evaluation and Qualification Criteria at page 38 of the Tender Document, it is apparent that the Tender Document contemplated that



the post-qualification exercise in the subject tender would entail, among others, the verification of a bidder's satisfactory performance of works similar to those under the subject tender and consequently, a report of unsatisfactory performance by a bidder from a confidential reference would lead to the disqualification of the bidder from the subject tender. Counsel indicated that the Procuring Entity received a confidential reference that indicated the Applicant's past work with the Procuring Entity was unsatisfactory and, in this regard, it was rightfully disqualified.

68. As to whether the Applicant had substantiated its claim that the Interested Party's bid was unresponsive to the requirements in the Tender Document, Mr. Simiyu submitted that Section 107 of the Evidence Act underpins the established evidentiary principle that he who alleges must prove and made reference to the holding by the Court of Appeal in *Civil Appeal No.E270 of 2022; CIC General Insurance Limited v Madison General Insurance Kenya Limited & Ors*. He argued that an Applicant before the Board shoulders the evidentiary burden to substantiate its allegations as against other bidders. Counsel further argued that the Applicant's allegation that the Interested Party failed to satisfy certain unspecified requirements in the Tender Document remains unsubstantiated noting that no specific requirement was highlighted and that there was also no evidence of non-compliance on the part of the Interested Party.



69. Mr. Mutea subsequently affirmed submissions made by Mr. Simiyu and counsels urged the Board to dismiss the instant Request for Review with costs.

APPLICANT'S REJOINDER

70. In a rejoinder, Mr. Ogony referred to provisions under Section 83 of the Act and submitted that the Respondent was not absolved of the duty to ensure fairness and transparency in employing the criteria for assessing the performance or otherwise of a bidder in view of Article 47 of the Constitution.

71. He maintained that the Applicant was not in breach of Section 67 of the Act since the impugned documents relied on are permissible documents and that the provisions therein apply to procurement entities, employees or agents.

CLARIFICATIONS

72. The Board sought to know how the Applicant came into custody of the Internal Memo dated 23rd June 2025 addressed to the Chair, Tender Evaluation Committee from the Director, Housing Department marked as annexure ZSA – 4 .

73. In response, Mr. Ogony submitted that the basis of why the Applicant was making the application to expunge the said documents was because it could not get hold of the letter requesting for debriefing through which the Applicant came into custody of the said documents.



74. Asked whether the Applicant sought clarification on how non-performance would be gauged during due diligence which it confirmed to having been aware of the laid-out criteria in the Tender Document. In response, Mr. Ogony submitted that the Applicant has a legitimate expectation that there would be a set out criteria in the Tender Document to assess due diligence as opposed to blanketly indicating that due to non-performance in previous tenders, it would not be awarded the subject tender.

75. Asked if Addendum 2 dated 22nd November, 2024 that clarified on the aspect of due diligence was not part of the Tender Document and did not form an evaluation criterion capable of being understood under the provisions of Section 80(2) of the Act, Mr. Ogony submitted that the said addendum was part of the Tender Document and that the issue being raised is that the criteria used was subjective and the blanket award of the unsatisfaction of previous performance was not specified hence the Applicant would be pleased to understand how the score was assessed taking into account all the factors in the performance of such contracts in similar area.

76. When asked to address the Applicant's assertion that there is a letter through which the Applicant sought the impugned documents in the instant matter, Ms. Kagiri submitted in the negative and indicated that there was no formal request ever submitted to the Procuring Entity for



the Applicant to access the same and as such, the said documents were obtained through other exterior means other than the formal process.

77. At the conclusion of the online hearing, the Board informed parties that it would communicate its decision to all parties in the instant Request for Review via email before the deadline within which it is required to render itself.

BOARD'S DECISION

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

I. Whether the Applicant based the instant Request for Review on confidential information thus rendering it fatally defective and incompetent.

Depending on the determination of Issue I;

II. Whether the Procuring Entity lawfully disqualified the Applicant's tender in the subject tender.

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



Whether the Applicant based the instant Request for Review on confidential information thus rendering it fatally defective and incompetent.

79. The Board has heard the Respondent's submission that the Applicant in the instant Request for Review is in violation of Section 67 of the Act for relying and being in possession of confidential and unauthorized information, *to wit*, (i) an Internal Memo dated 23rd June 2025 addressed to the Chair, Tender Evaluation Committee from the Director, Housing Department marked as ZSA - 4 and, (ii) a Progress Status Report dated 12th June 2025 authored by Zimaki Consult Ltd and addressed to the Director of Housing marked as ZSA – 5, which were intended for the Evaluation Committee in the subject tender.

80. The Respondent contends that the Applicant's possession and reliance on the aforementioned documents which it did not officially received from the Procuring Entity suggests unauthorized access that potentially amounts to interference with the procurement process in breach of Section 46 of the Act as read with Regulation 30 (d) of Regulations 2020. Further, the Respondent pointed out that Section 176(1)(f) of the Act criminalizes disclosure of confidential documents in contravention of Section 67 of the Act and any person found culpable under the said provision is subject to criminal and penal consequence including debarment for a period of 10 years and prohibition from working with a public entity or state organ.



81. On its part, the Interested Party aligned itself with the Respondent's submissions and submitted that Section 67 of the Act classifies as confidential any information and material relating to the evaluation and comparison of tenders by a procuring entity and further criminalizes unauthorized disclosure of such information or material. The Interested Party further submitted that the Applicant has not offered an explanation as to how it came to be in possession of the impugned documents and indicated that the same are inadmissible in the present proceedings urging the Board to be guided by the holding of the Supreme Court in *Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment)* and dismiss the instant Request for Review.

82. In response, the Applicant submitted that under Article 35 of the Constitution and Section 67(3) of the Act, it is entitled to access the impugned documents which it has relied upon and contends that an unfair and administrative action was made. It argued that the present matter is distinguishable from the circumstances in the Supreme Court case of *Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment)* cited by the Interested Party since it obtained the impugned documents through debriefing in line with Section 68 of the Act.



83. During the hearing, Mr. Ogony informed the Board that the reason the Applicant was making the application to expunge the impugned documents was because it could not get hold of the letter requesting for debriefing through which the Applicant came into custody of the said documents. It is the Applicant's case that it has not violated the confidentiality principles espoused under Section 67 of the Act and urged the Board to find that that the burden lies on the Respondent to prove or disapprove any alleged violation of Section 67 of the Act. Suffice it to state that the respondents Counsel strenuously denied the issuance of the impugned confidential documents by the respondents and equally denied receipt by the Respondents of any request for the same from the Applicant.

84. Having considered parties submissions on this issue, the Board is called upon to make a determination of whether the instant Request for Review as filed is pegged on confidential information thus rendering it fatally defective and incompetent. If proven, the effect of pegging the instant Request for Review on confidential information will strip the Board of the jurisdiction to entertain the said review. As a fundamental principle, when an issue of jurisdiction arises, it ought to be addressed as a priority before any other matters are considered since jurisdiction is the cornerstone of adjudication and in its absence, a court or quasi-judicial body lacks the legal authority to proceed.

85. Turning to the instant matter, we note that the Applicant's grievance is based on the evaluation process in the subject tender that led to its

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

disqualification due to non-performance of the previously awarded contracts with the procuring Entity. The Applicant at paragraphs 12, 13, 14, 15, 16, and 17 refers to (i) an Internal Memo dated 23rd June 2025 addressed to the Chair, Tender Evaluation Committee from the Director, Housing Department which is produced at paragraph 9 of its Statement in Support of the Request for Review and marked as ZSA - 4 and, (ii) a Progress Status Report dated 12th June 2025 authored by Zimaki Consult Ltd and addressed to the Director of Housing produced at paragraph 10 of its Statement in Support of the Request for Review and marked as ZSA – 5 and pleads as follows:

12. That via an Internal memo dated 23rd June 2025, from the Director, Housing Department addressed to the Chair. Tender Evaluation Committee, the Acquiring entity acknowledged that the Applicant was previously engaged in the Affordable Housing Programme in Matunga, Kwale County.

13. That the said Memo derives from a report authored by M/S Zimaki Consultant Ltd dated 12th June, 2025 wherein it is indicated that the Applicant in the previous contracted had attained a project completion status of 45.3% against a projected 50.72%.

14. That the said "Zimaki Consultant Ltd Report" upon which the Acquiring Entity declined to award the Applicant the tender outlines the causes of delay to



include shortage of ballast in the coast region due to closure of quarries and disruptions as a result of heavy rains in the months of May and June, 2025.

15. That besides, it is further expressed in the said Report that while the project is behind schedule, the contractor (the Applicant herein) has shown commitment to recover the time through an accelerated program.

16. That from the said Report and Internal Memo, there is demonstrable active commitment and a sincere effort by the Applicant to honor previous contractual obligations. The context of the performance, including administrative delays and challenges beyond the Applicant's control, ought to have been considered in good faith, fairly and reasonable.

17. That conversely, the Procuring Entity alleging "non-performance of previous contracts" by the Applicant as the sole basis for declining to award the tender is unreasonable and made in bad faith, especially considering the variance of 5% in the performance and the reasons for the delays.

86. From the foregoing, there is no doubt that the Applicant was in possession of confidential information pertaining evaluation of the subject tender upon which confidential information the applicant has



anchored the instant Request for Review. This is further crystallized under paragraph 11 of the Applicant's Further Affidavit sworn on 16th July 2025 by Zakariya Shariff Abdullahi where it contends that nullification of the impugned documents would render the instant proceedings nugatory and depones as follows:

"11. THAT it is further imperative to note that the nullification of such document as confidential would render the proceedings of the Board nugatory as they contain material evidence relevant in the regularity of the evaluation and award process."

87. The Board is mindful of the provisions of Section 67 of the Act, which mandates the confidentiality of procurement documents and proceedings by the procuring entity, subject to disclosures permitted by law and safeguards integrity of parties' tender documents in the following terms:

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

(a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;



- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

(a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;



- (d) the disclosure is pursuant to a court order; or*
- (e) the disclosure is made to the Authority or Review Board under this Act.*

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."

88. Section 67 of the Act ought to be read with Section 68(2)(d)(iii), 4, 5, and 6 of the Act on procurement records which provides that:

"(2) The records for a procurement shall include –

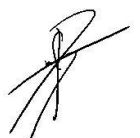
.....

(d)

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

.....

(4) The accounting officer of a procuring entity may charge a fee for making the records available but the fee



shall not exceed the costs of making the records available to any person.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 67(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 67(1).

(6) An accounting officer of a procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files that facilitates an audit trail.”

89. Further, Section 176(1)(f) of the Act prohibits any person from divulging confidential information under section 167 and violation thereof carries with it criminal and penal consequences.

90. From the above, it is clear that the Act upholds the confidentiality of public procurement proceedings and information. Specifically, a procuring entity, its officers, agents and indeed any person are prohibited from disclosing any procurement information that would (i) be against the public interest; (ii) prejudice the legitimate commercial interest of tenderers; (iii) disclose the evaluation and comparison of tenders, and (iv) the contents of tenders. Any such disclosure of procurement information is an offence attracting criminal sanctions in addition to debarment and prohibition from working for a government



entity or where the government is a shareholder for a period of 10 years.

91. However, Section 67(3) of the Act provides instances when disclosure of confidential information is permitted such as when such disclosure is for purposes of a review under the Act. In essence, a person submitting a tender is entitled to be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. However, this entitlement only crystalizes when such a person submitting a tender makes a request to the Procuring Entity to be furnished with the same.

92. Notably, all communication and enquires between parties in procurement proceedings must be in writing as provided under Section in 64(1) of the Act.

93. It then follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records, **which can only be disclosed by the accounting officer of a procuring entity.**

94. During the hearing, Mr. Ogony was adamant that the confidential documents relied upon were obtained during debriefing. However, the



Applicant did not avail any documentation before the Board to support this allegation or at the very least any written communication depicting the said disclosure by the Respondent Which allegation was otherwise denied by the Respondents through counsel.

95. In view of the foregoing, it is evident that the Applicant illegally obtained the confidential information and documents produced as exhibits ZSA – 4 and ZSA-5 and relied upon for purposes of filing the instant Request for Review in view of its non-adherence to the provisions under Section 67(1), (3) and (4) of the Act on obtaining confidential procurement documents and proceedings read with Section 68(2)(d)(iii), 4, 5, and 6 of the Act in lodging the instant Request for Review noting that any reliance on confidential information which has not been disclosed as permitted in law is in breach of the Act.

96. In establishing whether the Applicant can benefit from a breach of the law having based its Request for Review on unlawfully and illegally obtained confidential documents and information, we are guided by Supreme Court's holding in **Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated))[2023] KESC 38 (KLR) (Civ) (16 June 2023) (Judgment)** (hereinafter referred to as "the Kenya Railways Corporation case") where the Supreme Court was called upon to determine, *inter alia*, whether irregularly obtained public documents/information were admissible as evidence in court. This was



an issue that had been previously decided at the High Court where the learned judges had expunged documents in support of the petition filed by the 1st, 2nd and 3rd respondents having found the same to be inadmissible and the decision by the High Court was upheld by the Court of Appeal leading to the appeal at the Supreme Court which held as follows:

".....

77. The 1st and 2nd respondents, in their cross-appeal, fault the superior courts' decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions. The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister's office; the Embassy of the People's Republic of China and Ministry of Transport; the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the Attorney General's Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General's office; and between the Office of the Deputy President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of



Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and installation of facilities, locomotives and rolling stock; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

78. In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under article 33 of the United Nations Convention Against Corruption. This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the Public Officer Ethics Act, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the Evidence Act and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under article 31 of the Constitution. The High Court was of the position that the 1st, 2nd and 3rd respondents ought to have properly compelled the Government to provide the



documents under article 35 of the Constitution. This position was affirmed by the Court of Appeal which added that admitting such documents would be detrimental to the administration of justice and against the principle underlying article 50(4) of the Constitution.

79. The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3rd respondents in support of their petitions filed at the High Court.....

80. The Evidence Act cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that:

Application.

1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

81. The Evidence Act provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states:



Certified copies of public documents.

1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allows the production of certified

A handwritten signature in black ink, consisting of a stylized 'S' followed by a long horizontal stroke and a small loop at the end.

copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.

83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby out rightly rendered inadmissible.

84. Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No 31 of 2016 was enacted to give effect to article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency.....

85. The right to institute an action in court only crystallizes once a citizen has requested for the



information from the State and the request has been denied or not provided. The 1st, 2nd and 3rd Respondents herein did not make a request to be provided with the information relied on.

.....

87. This court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in Njonjo Mue case (supra). In that case, we recognized that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

88. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.



Applying that test to the obtaining facts, we summed up the position as follows:

"(24) The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information."

.....

91. We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of the Constitution. Allowing such documents is akin to sanitizing illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the Constitution on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or



contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the Evidence Act or requested for information under article 35 of the Constitution, the documents are inadmissible, we so declare.

.....”[Emphasis ours]

97. The import of the above holding is that (a) the Evidence Act provides for admissibility of evidence in judicial proceedings save for proceedings before an arbitrator with Section 80 setting out the manner in which public documents may be produced in court, (b) for public documents adduced in evidence to be rendered admissible, they ought to either be produced as an original document or a duly certified copy, (c) for the right to access to information to be justiciable, the person seeking the information must establish that he or she has followed the set out procedure when requesting the information, (d) the right to institute an action in court only crystallizes once a citizen has requested for the information from the state and the request has been denied or not provided, (e) information held by the state or state organs should flow from the custodian of such information to the recipients in such a manner recognized in law without undue restriction to access of any such information, (f) there is a duty imposed upon



citizens to follow the prescribed procedure whenever they require access to any such information, and (g) admitting illegally obtained information is detrimental to the administration of justice since allowing such documents is akin to sanitizing an illicit action.

98. We note that in past decisions, this Board differently constituted has similarly affirmed that requests for review applications that are founded on confidential documents and information militate against public interest and are thus destined for dismissal as parties who breach the law should not be permitted to benefit from such breaches.

99. In **PPARB Application No. 21 of 2015 Thwama Building Services v Tharaka Nithi County Government** the Board was faced with a similar issue as the one in the instant Request for Review and while addressing Section 44 of the preceding statute to the present Act affirmed that an applicant founding its request for review on confidential documents in breach of procurement laws should not be allowed to benefit from such a breach. The Board held as follows:

"

The question that therefore remains to be determined by the Board is whether a party can base its Request for Review on an action or actions that are contrary to the law.

As the Board has always stated, procurement proceedings are sacrosanct and are confidential in nature and that is why the law prohibits the disclosure of certain information



under the Provisions of Section 44 of the Act. This is meant to enable parties in a tender process to have an equal playing field for the purposes of ensuring fairness and for the Procuring Entity to evaluate tenders without interferences.

Section 44 of the Act requires a Procuring Entity or an employee of a Procuring Entity not to disclose any confidential information save for the specific items of disclosure set out in the Act. Section 44 (1)(c) and (d) of the Act expressly bars the disclosure of information relating to evaluation, comparison or clarification of tenders, proposals or quotations or the contents of the tenders, proposals or quotations of any bidder.

Section 44(4) of the Act further criminalizes such a disclosure and states that any person who contravenes the Provisions of Section 44 of the Act shall be guilty of an offence.

Under the Provisions of Section 137 of the Act, a person who is guilty of committing an offence under the Provisions of Section 44 of the Act shall, if convicted be liable to a fine not exceeding four Million Shillings or to imprisonment for a term not exceeding ten years or to both.



On the issue the "whistle blower", Section 44(1) and (2) of the Act sets out the prohibition and specifically names the persons whom a disclosure may be made under the Act. The said Section of the Act provides as follows :-

.....

It is clear from the above provisions that an unidentified "whistleblower" is not one of the people to whom a disclosure of confidential information can be made and also that a bidder is not a person entitled to receive such information.

On the issue of illegality, it now trite law that an action based on the contravention of a statute and the law generally is deemed to be against public policy and cannot aid a party's case.

In the case Kenya Airways Limited –vs- Satwart Singh Flora (Nai CA No. 54 of 2005) the Court of Appeal held that any action prohibited by a statute is against Public Policy and that a party who breaches the Provisions of the law cannot benefit from such a breach. The court also held that any contract or transaction arising from such a breach is illegal and is unenforceable.



It is therefore clear from the above provisions of the Act and the above authority cited above that the issue of reliance on confidential information is a serious one and bears heavy consequences. The Applicant in this Request for Review and any other bidder are therefore warned that the Board will not in future allow reliance on confidential information as a basis for any Request for Review and will not hesitate to recommend sanctions against any bidder who breaches the provisions of the Act on confidentiality."

[Emphasis ours]

100. In **PPARB Application No. 6 of 2016 China Overseas Engineering Group Company Limited –vs- Kenya Rural Roads Authority**, the Board held as follows:

"Finally in view of the Board's findings that the Applicant relied on confidential information in bringing this Request for Review the Board finds that this is a proper case to direct the Director General of the Public Procurement Regulatory Authority to investigate the circumstances under which confidential information came to the knowledge of the Applicant with the aim of taking any remedial measure in order to stop this recurring trend which the Board has observed in several applications currently coming before it."

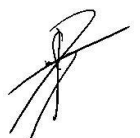


101. In **PPARB Application No. 11 of 2016 Amro Insurance Brokers Limited v Kenya Wildlife Service** the Board in addition to dismissing the Request for Review proceeded to refer the matter to the Ethics and Anti-Corruption Commission having established that the Applicant had based its case on confidential documents. It held as follows:

"The Board has looked at the Applicant's conduct in this application and finds the same to be gross and highly inappropriate. The Applicant's conduct of obtaining evaluation reports and other bidders tender and other confidential documents defeats the objectives of Article 227 and the objectives of Public Procurement and is not capable of any reasonable explanation. Such if allowed to occur will adversely affect completion, fair treatment to all bidders, it will diminish integrating reduce transparency and accountability and diminish public confidence in Procurement processes.

Owing to the gravity of this matter the Board finds that the Applicant's application cannot stand and therefore fails.

The Board further directs the Ethics and Anti-Corruption Commission and other relevant authorities to investigate the circumstances under which the Applicant in this Request for Review came into the possession of confidential documents including the tender documents



belong to other bidders with a view of taking any such remedial action as it or they deem appropriate... ”

[Emphasis ours]

102. Similarly, in the recent holding of the Board in **PPARB Application No. 44 of 2024 Greenworld Big Data Ltd v The Accounting Officer, Postal Corporation of Kenya & Others**, the Board found that the Applicant had relied on confidential information that was illegally obtained and held as follows:

116. In view of the foregoing, it is evident that the Applicant illegally obtained the confidential information and documents produced as exhibits JWM 8,11 and 14 in support of its Request for Review since for purposes of filing the instant Request for Review, it ought to have adhered to the provisions of Section 67(1), (3) and (4) of the Act on obtaining confidential procurement documents and proceedings read with Section 68(2)(d)(iii), 4, 5, and 6 of the Act in lodging the instant Request for Review as any reliance on confidential information which has not been disclosed as permitted in law is in breach of the Act.

117. It goes without saying that the request by the Applicant for further and better particulars as pleaded at



paragraph 3 of its Supplementary Affidavit in Support of the Request for Review and as listed in the Annexure marked 'JWM13' has been made irregularly, too late in time and after the fact and we view this request as a back door attempt by the Applicant in trying to regularize its case in view of the fact that it had already based its filed Request for Review on illegally obtained confidential documents and information and which request we decline and consequentially strike out.....

127. In the circumstances, we find and hold that the instant Request for Review as filed is based on confidential information and documents which were illegally obtained thus rendering it fatally defective and incompetent.

103. In view of the foregoing, the Board observes that a bidder bears a duty to follow the prescribed procedure whenever it requires access to any information pertaining to procurement proceedings and confidential information and especially if the said information is to be adduced in evidence in a request for review noting that the right to access information has to be balanced with the obligation to follow due process.

104. The Applicant in demonstrating how it gained confidential documents and information concerning the subject tender relied on in



the instant Request for Review did not at the very least show that it made a request to be provided with the confidential information relied on in the instant Request for Review. Neither did it satisfy any of the set - out procedures required to be followed in obtaining confidential information and adducing the same in evidence as stipulated under the Act, previous Board decisions or even in the Kenya Railways Corporation case where we have established that the Supreme Court made a determination that evidence obtained in an unlawful manner cannot be admitted as evidence as this would defeat administration of justice.

105. In the circumstances, we find and hold that the instant Request for Review as filed is based on confidential information and documents which were illegally obtained thus rendering it fatally defective and incompetent.

106. In the absence of a competent request for review before the Board, the Board has no jurisdiction to hear and determine the instant Request for review and this means that we down our tools at this juncture.

What orders should the Board grant in the circumstances?

107. The Board has found that the Applicant based the instant Request for Review on confidential information and documents which were illegally obtained contrary to the Act rendering it fatally defective and



incompetent. Having held that there is no competent request for review before the Board, it therefore follows that the Board cannot exercise its powers under Section 173 to grant the orders sought in the incompetent, fatally defective request for review.

108. Consequently, the Board deems it fit to refer this decision to the Director General of the Public Procurement Regulatory Authority for purposes of commencing investigations on the circumstances under which confidential information came to the knowledge and possession of the Applicant so as to deter such misconduct with a view of taking any such remedial action as it may deem appropriate with the relevant law enforcement authorities.

109. The upshot of our findings is that the instant Request for Review is dismissed and makes the following orders:

FINAL ORDERS

110. 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:

A. The Request for Review dated 2nd July 2025 and filed on even date be and is hereby dismissed.

B. The Respondent is hereby directed to proceed with the procurement proceedings for Tender No.



MLPWHUD/SDHUD/AHP/117/2024-2025 for the Proposed Construction of Naromoru Affordable Housing and Associated Social Infrastructure at Naromoru, Kieni East Sub-County, Nyeri County to its lawful and logical conclusion while strictly adhering to the Constitution, the Tender Document, the Act, Regulations 2020.

C. A copy of this decision be served upon the Director General of the Public Procurement Regulatory Authority for purposes of commencing investigations on the circumstances under which confidential information came to the knowledge and possession of the Applicant in the instant Request for review so as to deter such reprehensible and illegal conduct with a view of taking any such remedial action as he may deem appropriate in conjunction with the relevant law enforcement authorities.

D. In view of our findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 23rd Day of July 2025.

.....
CHAIRPERSON
PPARB

.....
SECRETARY
PPARB

