

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 77/2025 OF 4TH JULY 2025

BETWEEN

HENRY KIBET BARNO

T/A BERUR DRIVING SCHOOL..... APPLICANT

AND

THE CHIEF OFFICER,

YOUTH AFFAIRS AND SPORTS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU2ND RESPONDENT

ELDORET TECHNICAL TRAINING

INSTITUTE.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Department of Youth Affairs and Sports, County Government of Uasin Gishu in relation to Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County.

BOARD MEMBERS PRESENT

- | | |
|------------------------|--------------|
| 1. QS Hussein Were | -Chairperson |
| 2. Mr. Robert Chelagat | -Member |
| 3. Mr. Daniel Lagat | -Member |

IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding brief for Board Secretary
2. Ms. Christabel Kaunda - Secretariat

PRESENT BY INVITATION

APPLICANT

HENRY KIBET BARNO

T/A BERUR DRIVING SCHOOL

Mr. Anthony Simiyu

Advocate, ASW Law Advocates LLP

RESPONDENTS

THE CHIEF OFFICER,

YOUTH AFFAIRS AND SPORTS,

**COUNTY GOVERNMENT OF UASIN
GISHU,**

COUNTY GOVERNMENT OF UASIN GISHU

Mr. Bonface Cheruiyot

Advocate, County Government of Uasin Gishu

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Uasin Gishu (hereinafter, "the Procuring Entity") invited eligible tenderers to submit tenders in response to Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County (hereinafter, "the subject tender") using an open national method of tendering and by way of an advertisement placed on the Procuring Entity's website (www.uasingishu.go.ke) the IFMIS Tender portal

(www.supplier.treasury.go.ke) and PPIP website (www.tenders.go.ke) on 12th March 2025 with a submission deadline of 26th March 2025 at 10.30 a.m.

Tender Submission Deadline and Tender Opening

2. According to the Tender Opening Minutes, four (4) tenderers participated in response to the tender and were recorded as follows:

Bid No	Name of Bidder
1.	Berur Driving School
2.	Eldoret Technical Training Institute
3.	Kiptash Driving School
4.	Mkombozi Driving School

Evaluation of Tenders

5. A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of the tenders in the following three stages:
- Preliminary Evaluation;
 - Technical Evaluation;
 - Financial Evaluation.

Preliminary Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in the table marked Preliminary Evaluation Checklist of the blank tender document (hereinafter, "the

Tender Document”). Tenders were required to satisfy all the 11 mandatory requirements to proceed for evaluation at the Technical Evaluation Stage.

7. At the end of evaluation at this stage, only two (2) tenders, being those of the Applicant and the Interested Party were found responsive thus proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in the table marked ‘Technical Evaluation Criteria’ of the blank tender document. Tenders were required to attain a pass mark of 70% to proceed to the financial evaluation stage.
9. At the end of technical evaluation, only one (1) tender bid, being that of the Interested Party was determined to be responsive and thus considered to be eligible for financial evaluation.

Financial Evaluation

10. The Evaluation Committee was required to examine tenders using the criteria as set out in the Tender Document where the bidder quoted with the lowest price would be recommended for contract award.
11. It was determined that the Interested Party had quoted the lowest bid price of Kshs. 28,947,281.58.

Recommendation for Award

12. The Evaluation Committee recommended award of the tender to the Interested Party being the lowest evaluated tenderer at the price of **Kenya Shillings Twenty Eight Million Nine Hundred and Forty Seven Thousand Two Hundred and Eighty One Cents Fifty Eight (Kshs. 28, 947,281.58)** inclusive of all applicable taxes.

Professional Opinion

13. In a Professional Opinion dated 14th April 2025 the 2nd Respondent's Head of Supply Chain Management, Ms. Sarah Siambi, agreed with the recommendation by the Evaluation Committee in awarding the tender to the Interested Party.
14. Ms. Siambi confirmed that the Procuring Entity had duly followed the procurement process in accordance with the various relevant provisions of the Public Procurement and Asset Disposal Act 2015 (hereinafter, 'the Act') leading to recommendation of award of tender to the lowest evaluated bidder, which was within available budget. Ms. Siambi further confirmed that the recommended price was competitive and there was sufficient budgetary allocation for the same.
15. However, Ms. Siambi in her professional opinion stated that due diligence had not been conducted on the lowest successful bidder.

Notification of Intention to Award

16. Tenderers were informed of the outcome of the tender evaluation process *vide* correspondence dated 14th April 2025 sent out *vide* their respective email addresses to the effect that the Interested Party had emerged as the lowest responsive bidder as well as reasons as to why their respective bids were not considered for award.

REQUEST FOR REVIEW NO. 48 OF 2025

17. Dissatisfied with the outcome of the tender evaluation process, the Applicant herein, on 23rd April 2025 filed a Request for Review dated 23rd April 2025, seeking the following orders:

- a) A declaration does hereby issue that the Respondents' disqualification of the Applicant's bid at the Technical Evaluation Stage in respect of Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County to the detriment of the Applicant as the lowest evaluated bidder constituted a breach of Sections 80(2) and 86(1) (a) of the Public Procurement and Asset Disposal Act (Cap 412C);*
- b) The Letters of Notification issued by the Respondents to both the successful and unsuccessful bidders in Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County be and are hereby set aside and cancelled;*

- c) The Respondents be and are hereby directed to re-admit the Applicant's bid for evaluation at the Financial Evaluation Stage in Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County alongside the other bids that previously qualified for evaluation at that stage;*
- d) The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of evaluating the Applicant's bid alongside other bids that previously qualified for evaluation at the Financial Evaluation Stage in Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County and complete the evaluation process within 30 Days of the Board's decision;*
- e) The Applicant be and is hereby awarded costs in this Request for Review;*
- f) Any other relief that would serve the interests of justice in the circumstances.*

18. Following a hearing of the Request for Review on 12th May 2025, the Public Procurement Administrative Review Board (hereinafter, "the Board"), in exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter, "the Act") issued the following orders in its Decision dated 14th May 2025:

- a) The Notification of Intention to Award dated 14th April 2025 addressed to the successful bidder, the Interested Party herein, and other unsuccessful bidders, including the Applicant with respect to*

Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County be and are hereby nullified and set aside;

- b) The Respondents are hereby directed to re-convene the Evaluation Committee, re-admit, and conduct fresh technical evaluation for all qualifying bids including the Applicant's bid at technical evaluation stage in strict compliance with the provisions of the Tender, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings herein;*
- c) The Respondents are hereby directed to proceed with tender proceedings in Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County to its lawful and logical conclusion within 45(forty-five) days of the date of this decision;*
- d) In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.*

REQUEST FOR REVIEW NO. 77 OF 2025

19. The 1st Respondent in their capacity as Accounting Officer and in line with the Orders of the Board's decision of 14th May 2025 directed that the Procuring Entity's Evaluation Committee be re-convened for purposes of conducting re-evaluation of qualified bids at the technical evaluation stage.

20. *Vide* an Evaluation Report dated 12th June 2025, the Procuring Entity's Evaluation Committee noted that whereas it had reconvened for purposes of re-evaluation of the subject tender's qualified bids at the technical evaluation stage, the vote to charge had insufficient funds thus were unable to proceed with evaluation pursuant to the provisions of Section 63(b) of the Act.
21. The Evaluation Committee recommended to the Head of Supply Chain Management and subsequently to the Chief Officer, Youth and Sports, for further necessary action.
22. In a Professional Opinion dated 12th June 2025 the Head of Supply Chain Management, Ms. Sarah Siambi, agreed with the recommendation by the Evaluation Committee that there were insufficient funds in the vote to charge thus there was no budget to meet the resultant expenditure.
23. Bidders were subsequently informed of the outcome of the tender evaluation process *vide* correspondence dated 12th June 2025 to the effect that the subject tender had been cancelled due to inadequate budgetary provision.
24. Dissatisfied with the outcome, the Applicant herein, on 4th July 2025 filed a Request for Review dated 3rd July 2025 together with a Statutory Statement of even date sworn by Henry Kibet Barno, its Proprietor, through the firm of Messrs. ASW Law Advocates LLP, seeking the following orders:

- a) A declaration does hereby issue that the Respondents' termination of Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County to the detriment of the Applicant as the lowest evaluated bidder constituted a breach of Sections 63(1) and 86(1) (a) of the Public Procurement and Asset Disposal Act (Cap 412C);*
- b) The Letters of Notification dated 12th June 2025 issued by the Respondents to the bidders, terminating Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County be and are hereby cancelled and set aside;*
- c) The 1st Respondents be and is hereby directed to award Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County to the Applicant herein and to conclude with him the procurement contract within 15 days of the Board's decision;*
- d) Further to Prayer (iii) above, in the event the Board directs the doing of anything in respect of Tender No. CGU/Y&S/T/002/2024/2025 Tender for Provision of Driving School Lessons to the Youths in Uasin Gishu County for a period surpassing 29th August 2025, there does issue an Order extending the tender validity period of the subject tender for 60 Days from the date of the Board's decision ;*

- e) The 1st Respondent, more specifically, Ms. Victorine Kapkai, be and is hereby ordered to meet the Applicant's costs in this Request for Review for blatant disregard of the Board's Decision and;*
- f) Any other relief that would serve the interests of justice in the circumstances.*

25. In a Notification of Appeal and a letter dated 4th July 2025, Mr. James Kilaka, the Board Secretary notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 4th July 2025.

26. The Board Secretary thereafter issued a Hearing Notice dated 10th July 2025 inviting the parties herein and all bidders, by extension, to the virtual hearing of the matter scheduled for Wednesday, 16th July 2025 between 1100 and 1300 hours. However, the same did not proceed as scheduled and was adjourned to Monday, 21st July 2025.

27. On their part, the Respondents on 14th July 2025 filed their Memorandum of Response and annexures thereto dated 7th July 2025 and sworn by the 1st Respondent.
28. When the Board convened for the hearing on 21st July 2025 at 2.00 pm, their respective Advocates represented the parties. Noting that the pleadings filed by parties raised a question on its jurisdiction to hear and determine the instant Request for Review, the Board proceeded to give parties directions on the format, order and length of submission before it.
29. Parties were also informed that the Request for Review having been filed on 4th July 2025 was due to expire on 25th July 2025 and that the Board would communicate its decision on or before 25th July 2025 to all parties via email to their respective last known email addresses.

PARTIES SUBMISSIONS

Applicant's Submissions

30. Counsel for the Applicant, Mr. Simiyu, placed reliance on the pleadings that the Applicant had filed in furtherance of their case, namely, the Request for Review Application dated 3rd July 2025 and Written Submissions.
31. Mr. Simiyu submitted that the Board had requisite jurisdiction to hear and determine the matter as it could only be divested of the same by virtue of the provisions of Section 167 (4)(b) of the Act and where the

Respondents could prove compliance with the provisions of Section 63 of the Act. Counsel further submitted that a Procuring Entity needed to prove fulfilment of the procedural and substantive requirements and that the substantive requirements had not been proven.

32. Counsel then submitted that in Request for Review Application No. 48 of 2025, the Applicant had adduced evidence to the effect that the subject tender had been awarded to the Interested Party at the sum of Kshs. 28,947,281.58, which sum was greater than the Applicant's quoted bid of Kshs. 28,783,350.
33. Counsel further submitted that the Board, through its Decision of 14th May 2025, found that the Applicant had been erroneously disqualified from the tender and gave directions to the Procuring Entity to have the tender brought to its logical conclusion.
34. Counsel also submitted that subsequently, the Procuring Entity purported to come back with a return indicating that the subject tender had been disqualified on account of inadequate budgetary allocation.
35. The Applicant averred that since the Procuring Entity had previously been ready to award the tender to the Interested Party at a sum higher than the Applicant's bid, the present change of heart could only be taken as efforts at frustrating the Applicant.

36. It averred further with respect to the Respondents' Memorandum of Response as sworn by the 1st Respondent that the same was unsatisfactory for several reasons, as it would address.
37. The Applicant stated with regard to the Notification Letter dated 12th June 2025 that the Appropriation Act relied on by the Respondents had been assented to on 27th June 2025 thus it was apparent that it had been the Accounting Officer's intention from the start to create a scenario where there would not be any funds for completion of the tender.
38. It drew the Board's attention to Paragraph 6 of the Respondents' Memorandum of Response where it was indicated that the subject tender had been listed as a recurrent expenditure rather than a development expenditure, meaning that funds were to be made available on a continuing basis, even in the face of a new financial year.
39. It also pointed out that as per Regulation 39(6) of the Public Finance Management County Regulations, an Accounting Officer was required to indicate in their supplementary budgets whether they had any committed amounts or any amounts with liabilities as at the point of preparation of the supplementary budget noting that the Accounting Officer in the present matter was attempting to outmanoeuvre the Board notwithstanding its previous directions.
40. Mr. Simiyu argued that the Accounting Officer opted to initiate a supplementary budget wherein she proposed that funds that had been

committed specifically for the subject tender be reallocated to other projects.

41. He invited the Board to look at the report placed before the County Assembly which outlined development projects that would be affected by the supplementary budget that had been submitted as part of evidence and specifically Exhibit VK 2, noting that the Procuring Entity was not listed among the Departments whose funding was going to be affected by the supplementary budget.
42. Urging the Board to study Exhibit VK2 in realizing that the County proposed to reallocate certain funds that were associated with driving schools such as driving schools in Kapkures, Tarakwa, Moi's Bridge, Huruma and Kipkenyo Wards and further, the Applicant stated that the subject tender had not been listed as a ward tender but that it was meant to benefit the youth in the entire county.
43. According to the Applicant, there was no distinction as to how much the current tender would be affected and that, to the extent that the report mentioned driving schools in different wards, did not have any bearing on the current tender.
44. Counsel Mr. Simiyu argued that if at all the Board would be inclined to consider the Respondents Exhibits VK 3 and VK4, it would note that the funds affected in the said appropriation touched on the current tender,

demonstrating that the Respondents did not intend to comply with the Board's Orders.

45. Counsel submitted that the Respondents had failed to lay a basis in demonstrating that there was inadequate budgetary provision as at 12th June 2025.

46. Counsel closed his submissions by stating that the Board had been established with a specific responsibility of keeping Accounting Officers in check and further that it did not issue Orders in vain thus it was expected that once the Board made its determination, it would be followed through with compliance.

Respondent's Submissions

47. Counsel for the Respondents, Mr. Cheruiyot placed reliance on the pleadings that the Respondents had filed, namely the Memorandum of Response dated 7th July 2025 and Written Submissions and opposed the Applicant's Request for Review and the prayers thereto in their entirety.

48. Mr. Cheruiyot submitted that pursuant to the directions issued by the Board, the Evaluation Committee on instruction from the 1st Respondent evaluated the qualified tenders at the technical evaluation stage within the 45-day period and that the Respondents had supplied the Board with the said Report, being the second evaluation, signifying compliance on their part.

49. He submitted further that upon evaluating the bids, it emerged that there was inadequate budgetary allocation as indicated in several documents filed by the Respondent such as the Report from the County Assembly indicating several re-appropriations.
50. He pointed to an extract of the recurrent expenditure vote book of the Department of Youth & Sports for May 2025 in submitting that the funds for subject tender were to be secured from a vote line, titled 'Contracted Technical Services', which originally had Kshs. 29,500,000, an amount sufficient for the tender.
51. He added that upon appropriation, funds were reduced by the County Assembly to the effect that the remaining funds could not be utilized in satisfying the needs of the subject tender, with the only option remaining being cancelling the subject tender.
52. Counsel Mr. Cheruiyot submitted that as per the provisions of Section 63 of the Act, the Accounting Officer only needed to satisfy procedural and substantive compliance. Counsel then submitted that procedural compliance was done since the Accounting Officer notified all bidders and the Authority of the cancellation as evidenced by the extracts in the confidential report showing notification to all tenderers and an extract of the PIP portal.
53. On substantive compliance Counsel submitted that the Respondents had availed to the Board the Report dated 28th May 2025, the vote

balances before and after initiation of the procurement process as well as the Uasin Gishu County Appropriations Act 2025, which was a supplementary budget, and a result of re-appropriations done by County Assembly.

54. Counsel Mr. Cheruiyot averred that whereas the Board was clothed with the mandate to make Orders as it deems fit, in the current circumstances the same would have been an exercise in futility and that the Order would be neither practical nor enforceable given that the effect of re-appropriation was no sufficient budgetary allocation to sustain the contract effectively nullifying the procurement process.
55. He averred further that whereas the County Assembly had the mandate to re-appropriate funds by virtue of the provisions of the Public Finance Management Act, the Accounting Officer was clothed with the mandate to terminate the procurement process as per the provisions of Section 63 of the Act when there were no budgetary allocations.
56. Counsel, on the issue of recurrent versus development expenditure, submitted that the funds were held in recurrent expenditure accounts, which was allowed in law. He added that recurrent expenditure had to be re-appropriated towards the end of the financial year and that unspent recurrent expenditure would not roll over and remain as unutilized funds.
57. Counsel therefore urged the Board to dismiss the Applicant's Request for Review as the same was not merited and further, given that the

Respondents had demonstrated substantive and procedural compliance with the provisions of Section 63, the Board did not have the jurisdiction to determine the instant Request for Review Application.

APPLICANT'S REJOINDER

58. In rejoinder thereto, Counsel Mr. Simiyu for the Applicant submitted on the issue of supplementary budgets by reiterating the provisions in Regulation 39(6) of the Public Finance Management County Government Regulations that the Accounting Officer had a duty to specifically disclose current commitments as well as liabilities with regard to their budgets.
59. He pointed to the Respondent's Exhibit marked VK4 in reiterating that as per the extract, the only line item affected by reduction for the Procuring Entity was the line item with respect to the subject tender only.
60. He submitted further that there were Orders issued by the Board in Application Number 48 of 2025 and by virtue of those Orders, the funds that had been set aside for the current tender were committed funds and not available for re-allocation.
61. Counsel further reiterated with respect to the Respondents' annexure marked VK1, a Gazette Notice showing County Appropriation, that the date of assent on the same was 27th June 2025 whereas the current Notification of Award showing there were no funds was dated 12th June 2025.

62. The Applicant contended that it was evident that the Accounting Officer had planned everything to ensure no funds would be available for the tender and ought to be held personally liable for any inconvenience occasioned to parties and urged the Board to allow the Request for Review.

CLARIFICATIONS

63. The Board inquired from Counsel for the Respondents Mr. Cheruiyot whether the evaluation was done in line with the Orders granted in Application No. 48 of 2025 and what were the results thereof to which Mr. Cheruiyot responded that there was an Evaluation Report in place but that it would have been pointless aggregating scores when there was no budgetary provision and further that since there was a recommendation, the same constituted complete evaluation.

64. Asked at what point the procurement plan was revised given that the Appropriation Act was assented to on 27th June 2025 and yet the Professional Opinion by the Head of Procurement predated it, Counsel for the Respondents submitted that there was a document called a vote balance evidencing availability of funds and that the same could be reprinted, indicating the available funds for every vote layer. He stated that the Report to the County Assembly was dated 27th May 2025 whereas the Opinion of the Head of Procurement was dated 12th June 2025.

65. Counsel added on the query of the Head of Procurement giving an opinion that nothing in law precluded them from doing so and that an

Evaluation Report went to the Head of Procurement who then gave their opinion to the Accounting Officer. Counsel further added that the Head of Procurement did not say terminate the tender but merely forwarded the Evaluation Report to the Accounting Officer whose decision to terminate the tender carried the day.

66. The Board then queried parties whether the issue of adequate budgetary allocation was ever presented before the Evaluation Committee at any point in the procurement process and secondly, when the issue of inadequate budgetary allocation arose to which Mr. Cheruiyot submitted that the issue of inadequacy of budgetary provision had been disclosed to the Evaluation Committee as evidenced by an extract of the Report of the Finance, Budget and Appropriations Committee and further, that the issue surfaced at the time of evaluation.

67. The Board also inquired on an annual procurement plan which financial year the subject tender was part of in view of the provisions of Section 53(8) of the Act. Mr. Cheruiyot stated that the subject tender had been part of the 2024-2025 financial year. Counsel also submitted with respect to the provisions of Section 53(8) that for original procurement file supplied to the Board, there was an extract of the vote balances showing available funds.

68. Mr. Cheruiyot for the Respondents further added that the Accounting Officer had similarly satisfied herself as to the availability of funds in the

instant matter through the decision made, knowing that there no longer were funds, thus she could not have been said to be in breach of the Act.

69. The Board in further follow up wanted to know whether the initial award was still in the 2024-2025 financial year to which Counsel responded in the affirmative adding that had the contract been signed in April when the Board gave orders, there would have been works done and some funds utilised since as at the time, the County had not re-appropriated the same.

70. Counsel for the Applicant Mr. Simiyu in response thereto submitted that the Applicant's view regarding the provisions of Section 53(8) of the Act was that the Accounting Officer ought to have ensured that the funds were available and remained available until the tender was brought to its logical conclusion. Counsel further added that it was not the place of any Accounting Officer to occasion any inadequate budget and thereafter raise it as a defence.

BOARD'S DECISION

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

- i. Whether the Board has jurisdiction to hear and determine the instant Request for Review;*

In answering this question, the Board shall make a determination on whether the subject tender's procurement proceedings were properly terminated in line with the provisions of Section 63 of the Act.

Depending on the determination of issue (i) hereinabove

- ii. Whether the Procuring Entity failed to comply with the Board's Orders in its Decision of 14th May 2025 in PPARB No. 48 of 2025;*
- iii. Whether the Procuring Entity failed to declare the Applicant the successful tender being the lowest evaluated bidder, thereby acting in breach of the provisions of Section 86(1) of the Act;*
- iv. What orders should the Board grant in the circumstances?*

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

As to whether the Board has jurisdiction to hear and determine the instant Request for Review

84. The Board finds it imperative to address itself at the onset on the issue of whether it is clothed with requisite jurisdiction to hear and determine the instant Request for Review as the question of jurisdiction goes to the root of the matter and where a judicial, or quasi-judicial body as is the case of this Board, finds that it does not have the said jurisdiction, it has no option other than downing its tools.

85. The Board is of the considered view that whereas the issue of jurisdiction was not raised directly by parties it surmises that the major contention between parties is the termination of procurement proceedings by the Respondent *vide* Notifications of Award dated 12th June 2025.

86. The Board notes that the afore-stated contention and resultant question on jurisdiction both fall under the ambit of the provisions of Section 167(4)(b) of the Act that holds as follows:

"(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
(a);
(b) A termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
(c)"

87. It is settled law that that courts, tribunals or such duly constituted decision-making bodies can only act in cases where they have jurisdiction over. When a question on the same arises, the said Court, tribunal or such duly constituted decision-making body must, as a matter of forethought, look into it before doing anything concerning such a matter in respect of which it is raised.

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

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

89. The celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** traversed the issue of jurisdiction at length therein where Nyarangi J.A. (as he then was) held that:

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

90. In more recent times, The Supreme Court of Kenya in its decision in **Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment)** on the same further held as follows:

"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."

91. Put differently, the question of jurisdiction is central to determination of dispute(s) presented before a court or quasi-judicial body for its tribunal. Where doubts are raised as to whether the said court or quasi-

judicial body is jurisdictionally competent to make a determination on a matter, it must, preliminarily, satisfy itself that is clothed with the requisite jurisdiction to do so before proceeding to substantively delve into the matter.

92. The Board notes that the question on jurisdiction turns on whether the procurement proceedings relating to the subject tender were properly terminated in accordance with the general provisions of Section 63 of the Act. The Board is further aware of the position in ***Republic v Public Procurement & Administrative Review Board & 2 others Ex parte Applicant Dar-Yuksel-Ama [2022] KEHC 1172 (KLR)*** where the Trial Court held at paragraph 53 of its decision as follows:

"53 The pertinent question when a dispute over a procurement arises, and specifically the question whether the procuring entity was within the ambit of section 63 when terminating the process, is then, by who and at what stage would the determination be made. In my view section 63 of the Act, if left unchecked, is prone to abuse by rogue accounting officers or procurement entities leading to erosion of the long fought for ethos of accountability in public procurement envisaged under Article 227 of the constitution. Where it is disputed whether the termination was proper, the Board must rise to the occasion and resolve the question within its mandate under Section 167 of the Act. Anything to the contrary would be a carte blanche to

procuring entities to seek refuge in section 63 even when not deservedly so."

93. The Board is equally aware of the finding in ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, further buttressing the position, wherein the High Court affirmed that the Board had jurisdiction to first establish whether the preconditions for termination under section 63 of the Act had been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted..."

94. Turning to the issue of termination of procurement proceedings, the Board notes that Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel

procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”

95. The Board thus gathers from the foregoing that for a Procuring Entity to be said to have terminated procurement proceedings in accordance with the law, demonstrating substantive and procedural compliance thereto, the following needs to happen:

- i) The termination must be based on any of the grounds under section 63(1) (a) to (i) of the Act;
- ii) The Accounting Officer must give a Written Report to the PPRA within 14 days of termination giving reasons for the termination; and
- iii) The Accounting Officer must, within 14 days of termination, give a written notice to the tenderers in the subject tender communicating the reasons for the termination.

96. The import of the foregoing is that essentially, the Accounting Officer of a Procuring Entity is under obligation to provide sufficient reasons and evidence to justify, support the ground of termination of the procurement process under challenge, and ensure that procedurally, they have adhered to the relevant provisions of the law.

97. Turning to the matter at hand, from the confidential information shared to it by the 1st Respondent in line with the relevant provisions of Section 67 of the Act, the Board notes that the Respondents and/or Procuring Entity were procedurally compliant insofar as notifying bidders of the intended termination and thereafter filing the same with the

Authority. The Board is therefore satisfied with the Respondents' conduct in that regard.

98. The Board now turns to address the Respondents' compliance with the substantive requirements surrounding the impugned termination of the subject tender. Specifically, the Board will look into the soundness of the reason advanced by the Respondents for termination of the tender.
99. The Board gathers from the Respondents' case that the reason for termination of the subject tender was inadequacy of funds following re-appropriation of the available funds for the project. The Board further gathers that according to the Respondents, the County Assembly in its prerogative and wisdom deemed it fit to pass the County Appropriation Act, which in essence redistributed funds to other causes.
100. The Board understands the Respondents' case that issue of inadequacy of budgetary provision had been disclosed to the Evaluation Committee at the point of evaluation as evidenced by an extract of the Report of the Finance, Budget and Appropriations Committee.
101. The Board further understands the Respondents' case that the Uasin Gishu County Appropriations Act 2025, which was a supplementary budget and a result of re-appropriations done by County Assembly, had significantly reduced the available budget for completion of the subject tender thus continuing its process would essentially have been an exercise in futility.

102. Contrarily, the Board understands the Applicant's case to be that as per Regulation 39(6) of the Public Finance Management County Regulations, an Accounting Officer was required to indicate in their supplementary budgets whether they had any committed amounts or any amounts with liabilities as at the point of preparation of the supplementary budget.

103. The Board further understands the Applicant's case to be that because the Respondents had earlier on, specifically on 14th April 2025, awarded the subject tender to the Interested Party herein before the same was challenged *vide* **PPARB Application No. 48 of 2025**, a sum greater than the Applicant's bid, that essentially the said funds which had been confirmed to be available for the procurement process then were to be considered committed amounts.

104. The Board further understands the Applicant's case to be that because the said funds were committed, they were not available for re-appropriation thus the Respondents ought to have proceeded to bring the subject tender to its logical conclusion in finding it as the lowest evaluated successful bidder thus ripe for award of the tender.

105. The Board must therefore interrogate the circumstances leading to the reduction in allocated budget to satisfy itself on whether the same fly in the face of the provisions of Section 63(1)(b) of the Act.

106. The Board, with the privilege of having interacted with the confidential documents shared with in ***PPARB Application No. 48 of 2025***, the predecessor to the instant Request for Review Application, notes that the allocated budget for the subject tender as confirmed in the Professional Opinion of 14th April 2025 was Kshs. 29,700,000 as per Vote Line: 0-4326-4338000301-3111002--00001001-0215014310-143100001.

107. However, the Board notes that as per the subsequent Professional Opinion dated 12th June 2025, the allocated budget for the subject tender was set as Kshs. 7,500,000 as per Vote Line: 1-4326-4338000301-2211311-00001001-0215014310-143100001.

108. The Board understands the Respondents explanation for the same to be that *vide* the Report to the County Assembly dated 28th May 2025 and marked Exhibit VK2 as well as the extract marked as Exhibit VK4, the budget under the subheading 'Contracted Technical Services' had been reduced by Kshs. 22,200,000 from Kshs. 29,700,000 to Kshs. 7,500,000 following re-appropriation of recurrent expenditure as the financial year 2024-2025 came to a close.

109. The Board has however had a look at the Respondents' own Exhibit, marked Exhibit VK1 and being the Uasin Gishu Appropriation Act, 2025 and assented into on 27th June 2025, and has not found any line heading relating to the subject tender featuring amongst the recurrent expenditure items as stated by the Respondents.

110. The Board notes that the only document evidencing some form of change in the budgetary allocation is an undated, unexecuted or unwitnessed extract of a document marked Exhibit VK4 to the Respondents' Memorandum of Response of 7th July 2025. However, seeing that the same is not dated nor is it executed, witnessed or acknowledged in any way, shape or form, the Board cannot ascertain its veracity for purposes of placing reliance upon it.

111. Furthermore, the Board notes that had it been the case that indeed there was some budgetary re-allocation and or re-appropriation, it would have bode well for the Respondents' case had they availed further documentation such as Report prepared by the County Executive Committee to that effect essentially corroborating their position.

112. The Board equally notes that as per the provisions of Section 53(2) of the Act, all Accounting Officers are mandated to prepare an annual procurement plan within the approved budget prior to the commencement of each financial year.

113. Section 53(5) of the Act holds that all procurement planning shall be based on indicative or approved budgets, which shall be integrated with applicable budget processes, and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

114. Section 53(8) of the Act holds that an Accounting Officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

115. In view of the foregoing, the 1st Respondent as Accounting Officer was under duty to prepare an annual procurement plan based on indicative or approved budgets and further that she was not to commence any procurement proceedings until she was satisfied that sufficient funds to meet the obligations of the resulting contract were reflected in the Procuring Entity's approved budget estimates.

116. During the hearing, Counsel Mr. Cheruiyot for the Respondents confirmed that the subject tender was for the financial year 2024-2025. It therefore follows that the 1st Respondent ought to have factored the same in within her annual procurement plan and thereafter ensured that there was sufficient budgetary for the same **PRIOR** to commencement of procurement proceedings in the subject tender.

117. Were the Board inclined to believe that for whatever reason there was a budgetary shortfall, the least the Accounting Officer ought to have done would have been to draw up a revised Procurement Plan indicating the same. Having gone through the confidential documents shared with it by the 1st Respondent, the Board notes that the Respondents never provided any revised Procurement Plan.

118. Furthermore, the Board is not satisfied with the timelines and sequence of events as narrated by the Respondents with respect to the alleged re-appropriation of funds and the termination of the procurement proceedings with respect to the subject tender. The Board has difficulty with the argument advanced by the Respondents that the Uasin Gishu Appropriation Act, 2025, assented to on 27th June 2025, and commencing on 1st July 2025 had any bearing on the termination of procurement proceedings *vide* Notification dated 12th June 2025.

119. The Board further notes that during the hearing, Counsel Mr. Cheruiyot for the Respondents confirmed to it that hypothetically had the subject tender not been challenged *vide* **PPARB Application No. 48 of 2025**, that there was a likelihood that the awarded party then, being the Interested Party, would have proceeded to execute the resultant contract for works, thus inadvertently confirming that the Procuring Entity by then had sufficient budgetary allocation.

120. The upshot of the foregoing is that the Respondents failed to convince beyond peradventure that there was inadequate budgetary allocation with respect to the subject tender as of 12th June 2025. Accordingly, the Respondents substantively failed to adhere to the provisions of Section 63 of the Act, essentially nullifying their termination claim the result of which is a determination that the subject tender is still alive.

121. The Board thus finds the termination of procurement proceedings by the Respondents improper, as a result of which it further finds the

Respondents cannot rely on the provisions of Section 167(4)(b) of the Act and that it does have jurisdiction to hear and determine the instant Request for Review on its merits.

As to whether the Procuring Entity failed to comply with the Board's Orders in its Decision of 14th May 2025 in PPARB No. 48 of 2025

122. Having found that it has jurisdiction to delve into the merits of and thereafter make a substantive determination over the Applicant's Request for Review Application of 3rd July 2025, the Board moves to address itself on the next issue in question; whether the Procuring Entity complied with the Board's Decision of 14th May 2025 in ***PPARB Application No. 48 of 2025***.

123. The Board is cognizant of the Supreme Court's decision in ***Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR*** where the court observed;

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

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule

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

[27] Ojwang, J (as he then was) in B. V. Attorney General [2004] 1 KLR 431 that:

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

124. This Board, consequently, as a quasi-judicial body and in exercise of powers conferred upon it by Section 173 of the Act finds that it does not do so in vain.

125. In its Decision of 14th May 2025 in ***PPARB Application No. 48 of 2025***, the Board held as follows:

- i) *The Notification of Intention to Award dated 14th April 2025 addressed to the successful bidder, the Interested Party herein, and other unsuccessful bidders, including the Applicant with respect to Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County be and are hereby nullified and set aside;*
- ii) *The Respondents are hereby directed to re-convene the Evaluation Committee, re-admit, and conduct fresh technical evaluation for all qualifying bids including the Applicant's bid at technical evaluation stage in strict compliance with the provisions of the Tender, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings herein;*
- iii) *The Respondents are hereby directed to proceed with tender proceedings in Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County to its lawful and logical conclusion within 45(forty-five) days of the date of this decision;*
- iv) *In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.*

126. Accordingly, as per the said Decision, the Procuring Entity was expected to:

- i) annul and set aside the initial Notification Letters of 14th April 2025;

- ii) reconvene an Evaluation Committee, re-admit, and conduct fresh technical evaluation for all qualifying bids including the Applicant's bid at technical evaluation stage in strict compliance with the provisions of the Tender, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings herein; and
- iii) thereafter legally and lawfully, conclude the procurement proceedings within 45 days.

127. The Board is of the considered view that the critical orders in view of the foregoing were re-evaluation of qualified bids being done as directed as well as lawful and logical conclusion of the procurement proceedings within 45 days.

128. The Board finds that whereas there was partial compliance with respect to the said Orders of 14th May 2025 insofar as annulling and setting aside of the Notification Letters of 14th April 2025 as well as re-admission of qualified bids were concerned, the Procuring Entity, as determined elsewhere in this decision, had not seen the procurement process through to its lawful and logical conclusion on account of the irregular termination in contravention of the relevant provisions of Section 63 of the Act.

129. The Board ultimately finds the Procuring Entity non-compliant with its Directions of 14th May 2025 and proceeds to allow this ground of the Request for Review.

As to whether the Procuring Entity failed to declare the Applicant the successful tender being the lowest evaluated bidder, thereby acting in breach of the provisions of Section 86(1) of the Act

130. The next issue for the Board’s determination is whether the Procuring Entity evaluated the Applicant’s tender but failed to find that it was the lowest evaluated bidder contrary to the provisions of Section 86(1) of the Act. The said Section states as follows:

"The successful tender shall be the one who meets any one of the following as specified in the tender document
—
(a) The tender with the lowest evaluated price;
(b)
(c)
(d)"

131. The Board understands the process of tender evaluation to entail a systematic assessment of bids received by a Procuring Entity in response to a tender to identify the most suitable supplier or contractor for a specific project or contract.

132. The Board further understands the process to involve comparing offers against pre-defined criteria, considering factors like price, quality, experience, and other relevant aspects, to determine the "best value" bid, which process ensures a fair and transparent selection of a provider that best meets the Procuring Entity's needs and objectives.
133. The Board also understands that results of the afore-described activity are thereafter captured in an Evaluation Report indicating the same in detail.
134. The Board has had an opportunity to scrutinize the Evaluation Report dated 12th June 2025 as well as consider oral submissions made by Counsel Mr. Cheruiyot for the Respondents to the effect that it would have been a pointless affair aggregating scores when there was no budgetary provision.
135. From the said Evaluation Report of 12th June 2025, the Board notes the following at page vii under Observation and Recommendation thereof:

"Following successful appeal by Berur driving school through application No. 48/2025 of 23rd April, 2025 to the Public Procurement Administrative Review Board on driving school lessons tender number CGU/T/Y&S/002/2024-2025, and the

Board's orders of 14th May, 2025, the evaluation committee met for re-evaluation of the driving school tender as directed.

That the Evaluation committee noted that the vote to charge had insufficient funds and therefore they couldn't proceed with technical evaluation pursuant to Section 63(b) of the PPADA 2015.

The committee recommends to the Head of Supply Chain Management and Subsequently to the Chief Officer Youth and Sports for further necessary action."

136. The Board notes from the foregoing that by the Respondents own admission; they could not proceed with technical evaluation of, *inter alia*, the Applicant's submitted bid. Having found that the reason for termination of procurement proceedings was invalid, it is the Board's respectful view that the Respondents unjustifiably failed to evaluate the Applicant's tender at the technical evaluation stage.

137. In terms of the wording of Section 86(1) (a) of the Act, a successful tender is the tender with the lowest evaluated price. For a tender to be determined to have the lowest evaluated price, it ought to have passed through all the stages of the evaluation process. In the tender subject of this Request for Review, the three stages of the evaluation process are preliminary, technical and financial.

138. The Board directed, in its decision dated 14th May 2025 in PPARB No. 48 of 2025 that the Applicant's tender be readmitted in the tender process and re-evaluated at the technical evaluation stage alongside other qualifying bidders. The import of the order is that the Applicant had been evaluated at the preliminary stage. For it to be determined as the successful bidder it remained to be evaluated at the technical stage and, if found responsive, to be evaluated at the financial stage.

139. The Board notes that by the Respondents own admission; they did not proceed with the technical evaluation of the Applicant's tender but instead opted to terminate the whole tender. Automatically, the Applicant was not evaluated at the financial stage. The implication of the Applicant not having been evaluated at the technical and financial stages is that it could not be declared the lowest evaluated bidder and thus could not be the successful bidder.

140. Accordingly, the Applicant's tender was not found to be the lowest evaluated bidder pursuant to Section 86 (1) of the Act. This ground of review therefore fails and is disallowed.

As to what orders the Board should grant in the circumstances

141. The Board finds that it has jurisdiction to hear and determine the instant Request for Review dated 3rd July 2025 and filed on 4th July 2025.

142. The Board further finds that the Procuring Entity did not comply with its orders in the Decision of 14th May 2025 in ***PPARB Application No. 48 of 2025.***

143. The Board also finds that the Applicant was never evaluated nor found to be the lowest evaluated bidder pursuant to the provisions of Section 86(1) of the Act.

144. The upshot of these findings is that the instant Request for Review succeeds in terms of the final following orders:

FINAL ORDERS

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

1. The Notification Letters dated 12th June 2025 addressed to all tenderers and the Public Procurement Regulatory Authority purporting to terminate Tender No. CGU/Y&S/T/002/2024/2025 for Provision of Driving School Lessons to the Youths in Uasin Gishu County be and are hereby nullified and set aside;

2. The Procuring Entity is hereby directed to revert to the findings of the Board in its Decision of 14th May 2025 with

respect to PPARB Application No. 48 of 2025 and comply with the same in full.

3. For avoidance of doubt the re-evaluation of bids and conclusion of the procurement process ordered in PPARB No. 48 of 2025 shall be completed within 21 days from the date of this decision;

4. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 25th day of July 2025.

.....
PANEL CHAIRPERSON
PPARB

.....
SECRETARY
PPARB