

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 85/2025 FILED ON 29<sup>TH</sup> JULY 2025**

**BETWEEN**

**CHINT METERS &  
ELECTRIC KENYA COMPANY LIMITED.....APPLICANT**

**AND**

**THE CHIEF EXECUTIVE OFFICER/MANAGING DIRECTOR,  
KENYA POWER & LIGHTING COMPANY PLC.....1<sup>ST</sup> RESPONDENT  
KENYA POWER & LIGHTING COMPANY PLC.....2<sup>ND</sup> RESPONDENT**

**AND**

**MAGNATE VENTURES LIMITED.....1<sup>ST</sup> INTERESTED PARTY  
HOUSE OF PROCUREMENT LIMITED.....2<sup>ND</sup> INTERESTED PARTY  
ABCOS INDUSTRIAL LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

Review against the decision of the Kenya Power & Lighting Company PLC,  
in relation to TENDER NO. KP1/9A.3/RT/14/24-25 – Supply of Single  
Phase Smart Meters. (Local Manufacturers And Assemblers)

**BOARD MEMBERS PRESENT**

Mr. Joshua Kiptoo

Panel Chairperson

Eng. Lilian Ogombo Member

Mr. Alexander Musau Member

**IN ATTENDANCE**

Ms. Sarah Ayoo Holding brief for the Board Secretary

**PRESENT BY INVITATION**

**APPLICANT CHINT METERS & ELECTRIC KENYA  
COMPANY LIMITED**

Mr. Mwit Kinyua Advocate, Mwit & Partners Advocates LLP

**1<sup>ST</sup> AND 2<sup>ND</sup>  
RESPONDENTS CHIEF EXECUTIVE OFFICER/  
MANAGING DIRECTOR,  
KENYA POWER & LIGHTING  
COMPANY PLC**

Ms. Lynn Owano Advocate, Kenya Power & Lighting Company  
PLC

**1<sup>ST</sup> INTERESTED PARTY MAGNATE VENTURES LIMITED**

Ms. Maureen Wakahia Advocate, Magnate Ventures Limited

**2<sup>ND</sup> INTERESTED PARTY HOUSE OF PROCUREMENT LIMITED**

Mr. Seko Advocate, Seko Minayo & Company  
Advocates LLP

**3<sup>RD</sup> INTERESTED PARTY ABCOS INDUSTRIAL LIMITED**

Mr. Mwangi Githui Advocate, CM Advocates LLP

**OTHER BIDDERS PRESENT**

**SMART METER TECHNOLOGY LIMITED**

Ms. Desma Nungo Advocate, NOW Advocates LLP

**HEXING TECHNOLOGY COMPANY LIMITED**

..... Advocate, Kinyanjui, Kirimi & Company

**BACKGROUND OF THE DECISION**

**THE TENDERING PROCESS**

1. The Kenya Power & Lighting Company Plc, the 2<sup>nd</sup> Respondent and Procuring Entity herein invited sealed tenders in response to Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) (hereinafter referred to as the

“subject tender”). The invitation was through limited tender open to Local Meter Manufacturers and Assemblers and was by way of an advertisement on 4<sup>th</sup> June 2025 on the Procuring Entity’s website [www.kplc.co.ke](http://www.kplc.co.ke) and on the Public Procurement Information Portal (PPIP) website [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the ‘Tender Document’) was available for download. The mode of submission of tenders was electronic through the KPLC’s SAP tendering portal.

2. The tender submission deadline was initially set for 24<sup>th</sup> June 2025 at 10:00 a.m. The Procuring Entity subsequently issued three (3) Addenda to the subject tender, namely Addendum No. 1 dated 13<sup>th</sup> June 2025, Addendum No. 2 dated 16<sup>th</sup> June 2025, and Addendum No. 3 dated 20<sup>th</sup> June 2025. The said Addenda amended the Tender Document and extended the tender submission deadline to 1<sup>st</sup> July 2025 at 10:00 a.m.

### **Submission of Tenders and Tender Opening**

3. According to the Minutes of the tender opening for the subject tender held on 1<sup>st</sup> July 2025 (hereinafter referred to as the “Tender Opening Minutes”), which were signed by members of the Tender Opening Committee and availed to the Public Procurement Administrative Review Board (hereinafter referred to as the “Board”) by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the “Act”), ten

(10) bid securities retrieved from the bid security box were opened and read out.

The Tender Opening Committee recorded that a total of nine (9) tenders had been successfully submitted in the subject tender. It was further noted that the bid by M/s Chint Meters and Electric Kenya Co. Ltd, the Applicant herein, was attached but had not been submitted in the KPLC E-Procurement System, as evidenced by the attached screen print. the Applicant's documents were found in the collaboration folders confirming the system indication that no bid had been submitted by the said bidder. The Tender Opening Committee nonetheless proceeded to read out the Applicant's prices, resulting in a total of ten (10) tenders being opened in the presence of tenderers' representatives in attendance

### **Evaluation of Bids**

4. The Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee"), duly appointed by the 1st Respondent, undertook the evaluation of tenders submitted in the subject tender. The said evaluation is captured in an Evaluation Report dated 15<sup>th</sup> July 2025 and signed by all members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report"), in the following stages:
  - a. Preliminary Evaluation;
  - b. Technical Evaluation –
    - i. Preliminary Technical Evaluation

- ii. Detailed Technical Evaluation
- c. Financial Evaluation.

## **Preliminary Evaluation**

5. At the Preliminary Evaluation stage, the Evaluation Committee was required to examine the tenders for responsiveness in accordance with the criteria set out under Part 1 – Preliminary Evaluation Criteria, Clause 28.2 of the Instructions to Tenderers (ITT) in Section III – Evaluation and Qualification Criteria, at pages 32 to 33 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage in order to proceed to the Technical Evaluation stage.
6. Upon conclusion of the Preliminary Evaluation, all ten (10) tenders were found to be responsive and qualified to proceed to the Technical Evaluation stage.

## **Technical Evaluation**

7. At the Technical Evaluation stage, the Evaluation Committee was required to apply the criteria set out under Part II – Technical Evaluation Criteria, Clause 28.3 of the Instructions to Tenderers (ITT) in Section III – Evaluation and Qualification Criteria, at pages 34 to 38 of the Tender Document. The Technical Evaluation was conducted in two phases, which were categorised in the Evaluation Report as follows:

### **a. Preliminary Technical Evaluation**

8. At Stage I of the Technical Evaluation, referred to as the Preliminary Technical Evaluation, the Evaluation Committee was required to apply the criteria set out under Clause 28.3 of the Instructions to Tenderers (ITT). Upon conclusion of this stage, all ten (10) tenders were found to be responsive and qualified to proceed to the Detailed Technical Evaluation stage.

**b. Detailed Technical Evaluation**

9. At Stage II of the Technical Evaluation, referred to as the Detailed Technical Evaluation, the Evaluation Committee was required to apply the criteria set out under Part II – Detailed Technical Evaluation, Clause 28.3 of the Instructions to Tenderers (ITT). Upon conclusion of this stage, all ten (10) tenders were found to be responsive and qualified to proceed to the Financial Evaluation stage.

**Submitted Samples Testing and Results**

10. The samples submitted by the bidders were presented to the Procuring Entity's Central Meter Laboratory – Ruaraka for testing. The meters were subjected to routine and functional tests as outlined in the specifications and in accordance with IEC 62053-21:2003. All the samples tested were found to be compliant.

**Financial Evaluation**

11. At the Financial Evaluation stage, the Evaluation Committee was required to apply the criteria set out under Part III – Financial Evaluation Criteria, Clause 33.1 of the Instructions to Tenderers (ITT) in Section III – Evaluation and Qualification Criteria, at pages 38 to 39 of the Tender Document. Upon conclusion of this stage, all bidders were found to be responsive, and the Evaluation Committee observed that the bidders had submitted their bids under different categories as follows:

No.	Bidders Company Name
<b>Category 1</b> – Local Manufacturers/Assemblers with ready stocks	<ul style="list-style-type: none"> <li>✓ M/s Smart Meter Technology Ltd</li> <li>✓ M/s Inhemeter Africa</li> <li>✓ M/s Yocean Group Limited</li> <li>✓ M/s East Africa Meter Company</li> <li>✓ M/S Abcos Industrial Ltd</li> </ul>
<b>Category 2</b> – Local Manufacturers/Assemblers who have successfully supplied meters to completion to KPLC or any public entity in Kenya before.	<ul style="list-style-type: none"> <li>✓ M/s Smart Meter Technology Ltd</li> <li>✓ M/s Inhemeter Africa</li> <li>✓ M/s Yocean Group Limited</li> <li>✓ M/s East Africa Meter Company</li> <li>✓ M/s Chartford Limited</li> <li>✓ M/s Hexing Technologies Co Ltd</li> <li>✓ M/s Magnate ventures Ltd</li> </ul>
<b>Category 3</b> – All local meter Manufacturers/Assemblers	<ul style="list-style-type: none"> <li>✓ M/s House of Procurement</li> <li>✓ M/s Chint Meters and Electric Kenya Co. Ltd</li> <li>✓ M/s Chartford Limited</li> <li>✓ M/s Hexing Technologies Co Ltd</li> <li>✓ M/s Magnate ventures Ltd</li> <li>✓ M/s Inhemeter Africa</li> <li>✓ M/s Smart Meter Technology Ltd</li> <li>✓ M/s Yocean Group Limited</li> <li>✓ M/s East Africa Meter Company</li> <li>✓ M/s Abcos Industrial Ltd</li> </ul>

12. The Evaluation Committee conducted a financial comparison of the ten

(10) responsive bidders in accordance with the eligibility requirements and the prescribed mode of award, as follows:

M/s Inhemeter Africa Company Ltd	M/s Smart Meter Technology Ltd	M/s Magnet Ventures Ltd	M/s Hexing Technology Company Ltd	M/s Yocan Group Ltd	M/S East Africa Meter Company Ltd	M/s Chartford Limited	CHI NT	M/s ABC OS	HO P
1	2	3	4	5	6	7	8	9	10
<b>Category 1 – Local Manufacturers/Assemblers with ready stocks</b>									
10,660.00	10,595.00	N/Q	N/Q	10,600.00	<b>7,410.00</b>	N/Q	N/Q	8,190.00	N/Q
<b>Category 2 – Local Manufacturers/Assemblers who have successfully supplied meters to completion to KPLC or any public entity in Kenya before.</b>									
10,530.00	10,660.00	8,462.00	8,200.00	10,600.00	<b>7,410.00</b>	10,491.00	N/Q	N/Q	N/Q
10,530.00	10,660.00	8,631.00	<b>7,800.00</b>	10,600.00	7,410.00	10,686.20	N/Q	N/Q	N/Q
<b>10,530.00</b>	10,660.00	8,803.00	7,400.00	10,600.00	7,410.00	10,650.32	N/Q	N/Q	N/Q
10,530.00	<b>10,400.00</b>	8,980.00	7,400.00	10,600.00	7,410.00	10,686.20	N/Q	N/Q	N/Q
<b>Category 3 – All local meter Manufacturers/Assemblers</b>									
10,820.00	10,660.00	8,462.00	8,200.00	10,600.00	7,410.00	11,000.00	10,096.50	<b>8,190.00</b>	9,971.00

10,82 0.00	10,66 0.00	<b>8,6 31. 00</b>	7,600. 00	10,6 00.0 0	7,41 0.00	11,0 00.0 0	10,5 41.0 0	8,19 0.00	9,97 1.00
10,82 0.00	10,40 0.00	8,98 0.00	7,400. 00	10,6 00.0 0	7,41 0.00	11,0 00.0 0	10,5 41.0 0	8,19 0.00	<b>9,9 71. 00</b>

**Key**

N/Q -No Quote

**Market Survey**

13. According to the Evaluation Report, the Evaluation Committee observed that, notwithstanding changes in market variables, the offered prices compared favourably with the prices at which the items had previously been procured in January 2024. The Committee recorded the following summary comparing the previous prices with the prices recommended for award:

Order number and date	Previous awarded Unit price KSHS VAT Excl	Current recommended Prices per category and lots		
		Category	Lot No	Current recommended Unit price KSHS VAT Excl
3000741 278 of 31/01/20 24	10,725.00	1	1	10,595.00
3000741 280 of 31/01/20 24	10,758.00	2	1	7,410.00
3000741 273 of	11,084.00		2	7,800.00

Order number and date	Previous awarded Unit price KSHS VAT Excl	Current recommended Prices per category and lots		
		Category	Lot No	Current recommended Unit price KSHS VAT Excl
31/01/2024				
3000741 351 of 31/01/2024	10,200.00		3	10,530.00
3000741 480 of 31/01/2024	10,900.20		4	10,400.00
		3	1	8,190.00
			2	8,631.00
			3	9,971.00
<b>Average prices (VAT excl)</b>	<b>10,733.44</b>			<b>9,190.88</b>

## Due Diligence

14. At this stage, the Evaluation Committee had a discretion to conduct due diligence exercise in accordance with Clause 3 – Post-Qualification of Tenderers (Due Diligence) in Section III – Evaluation and Qualification Criteria, at page 39 of the Tender Document.
15. According to the Evaluation Report, the Evaluation Committee determined that it was necessary to conduct due diligence in the following manner:

**a) Verification of Ready stocks**

**The Evaluation Committee noted that Category 1 was to be awarded based on the readily available stocks which were to be supplied within 21 days after the order was issued. The Evaluation Committee, therefore, conducted a factory visit on the bidders who had declared the availability of these ready stocks. Below is a summary of the findings.**

<b>No</b>	<b>Bidders Name</b>	<b>Quantity of ready stocks declared in the bid documents</b>	<b>Quantity of ready stocks as verified by the Evaluation committee</b>
<b>1</b>	<b>M/s Inhemeter Africa</b>	<b>94,000 Pcs</b>	<b>20,000PCS</b>
<b>2</b>	<b>M/s East Africa Meter Company</b>	<b>100,000.00</b>	<b>Nil</b>
<b>3</b>	<b>M/s Smart Meter Technology Ltd</b>	<b>167000 Pcs</b>	<b>167,000 Pcs</b>
<b>4</b>	<b>M/S Abcos Industrial Ltd</b>	<b>200,000 Pcs</b>	<b>NIL</b>

**Confirmation of ready stock forms attached as Appendix IX.**

**b) Due diligence on new manufacturers/Assemblers and respective OEM.**

**The Evaluation Committee noted that two bidders, namely M/S Abcos Industrial Ltd and M/s House of Procurement, were new local manufacturers and had not supplied meters to KPLC. The committee also noted that their subsequent original equipment manufacturers (OEM) have also not supplied meters to KPLC. The Evaluation Committee visited the two local manufacturers on 11<sup>th</sup> July 2025 and noted that the manufacturers were fully established. The committee also noted the approval to**

**manufacture letters dated 12<sup>th</sup> November 2024 highlighted as follows;**

**(i) As a Legal requirement, KPLC was to conduct further due diligence during the tendering period on the Original Equipment Manufacturers (OEM) to ascertain the following;**

- Product quality on mechanical and electronic components**
- Production process of semi knock down kits.**
- Production capacity.**
- Production and testing equipment's**
- Environmental aspects**

**(ii) The need to conduct a systematic introduction of their meters in the Kenyan market to ensure proper compatibility and integration with the existing software.**

**Further to the above recommendations highlighted during the factory inspection stage and Pursuant to section 83 of the Public Procurement and Asset Disposal Act 2015, the Evaluation Committee noted that it is necessary to conduct further due diligence on the Original Equipment Manufacturers (OEM) as follows;**

	<b>Bidder</b>	<b>Item Description</b>	<b>(Oem) Manufacturer</b>	<b>Location</b>
<b>1</b>	<b>Abcos Industrial Ltd</b>	<b>Single-Phase Smart Meter</b>	<b>Wasion Group Ltd</b>	<b>No. 468 West Tongzipo Road, Changsha, Hunan province, China</b>
<b>2</b>	<b>House of Procurement Ltd</b>	<b>Single-Phase Smart Meter</b>	<b>Qingdao Eastsoft Communication</b>	<b>16A Shangqing Road, Shibe District,</b>

	<b><i>Bidder</i></b>	<b><i>Item Description</i></b>	<b><i>(Oem) Manufacturer</i></b>	<b><i>Location</i></b>
			<b><i>Technology Co., Ltd</i></b>	<b><i>Qingdao, Shandong Province, China</i></b>

### **Evaluation Committee's Recommendation**

16. The Evaluation Committee recommended the award of the subject tender as follows:

(i) Award of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single Phase Smart Meters (Local Manufacturers and Assemblers) at a total cost of **KShs 6,719,723,400.00 (Six Billion Seven Hundred and Nineteen Million Seven Hundred and Twenty-Three Thousand Four Hundred Kenya Shillings Only. (VAT inclusive PPCBL Inclusive)** as tabulated below, subject to successful due diligence on their Original Equipment Manufacturers (OEM) for the two new manufacturers, namely M/S Abcos Industrial Ltd and M/s House of Procurement Limited.

<b>1) M/s Smart Meter Technology Ltd</b>								
category	l o t n o	Cod e	Descri ption	Deliv ery Point	U ni t	Quant ities	Unit Price Kshs (VAT Exclu sive PPCB L Incl)	Total Amount VAT Exclusive PPCBL Incl)
1	1	535 402	Single- phase SMART meter	Meter store	Pc	167,00 0	10,59 5.00	1,769,365,0 00.00

2	4	535 402	Single- phase SMART meter	Meter store	Pc	35,000	10,40 0.00	364,000,00 0.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>2,133,365, 000.00</b>
			<b>Add 16% VAT</b>					<b>341,338,4 00.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>2,474,703, 400.00</b>

<b>2) M/s Inhemeter Africa Company Ltd</b>								
<b>C a t e g o r y</b>	<b>L o t N o</b>	<b>Co de</b>	<b>Descrip tion</b>	<b>Delive ry Point</b>	<b>Un it</b>	<b>Quan tities</b>	<b>Unit Price Kshs (VAT Exclusi ve PPCBL Incl)</b>	<b>Total Amount VAT Exclusive PPCBL Incl)</b>
2	3	535 402	Single- phase SMART meter	Meter store	Pc	50,00 0	10,530.0 0	526,500,00 0.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>526,500, 000.00</b>
			<b>Add 16% VAT</b>					<b>84,240,0 00.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>610,740, 000.00</b>

<b>3) M/s Magnate Ventures Ltd</b>								
<b>cate gory</b>	<b>l o t n o</b>	<b>Co de</b>	<b>Description</b>	<b>deliv ery Point</b>	<b>U ni t</b>	<b>Quan tities</b>	<b>Unit Pric e Kshs (VAT</b>	<b>Total Amount VAT Exclusiv</b>

							<b>Excl usiv e PPC BL Incl)</b>	<b>e PPCBL Incl)</b>
3	2	535 402	Single-phase SMART meter	Meter store	Pc	65,00 0	8,63 1.00	561,015, 000.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>561,015 ,000.00</b>
			<b>Add 16% VAT</b>					<b>89,762, 400.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>650,777 ,400.00</b>

<b>4) M/S East Africa Meter Company Ltd</b>								
<b>cate gory</b>	<b>l o t n o</b>	<b>Co de</b>	<b>Description</b>	<b>Deliv ery Point</b>	<b>U ni t</b>	<b>Qty</b>	<b>Unit Price Kshs (VAT Excl usiv e PPC BL Incl)</b>	<b>Total Amount VAT Exclusiv e PPCBL Incl)</b>
2	1	535 402	Single-phase SMART meter	Meter store	Pc	100, 000	7,410 .00	741,000, 000.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>741,000 ,000.00</b>
			<b>Add 16% VAT</b>					<b>118,560 ,000.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>859,560 ,000.00</b>

<b>5) M/s Hexing Technology Company Ltd</b>								
<b>Cate gory</b>	<b>L o t</b>	<b>Co de</b>	<b>Description</b>	<b>Deliv ery Point</b>	<b>U ni t</b>	<b>Qt y</b>	<b>Unit Price Kshs (VAT</b>	<b>Total Amount VAT Exclusiv</b>

							<b>Excl usiv e PPC BL Incl)</b>	<b>e PPCBL Incl)</b>
2	2	535 402	Single-phase SMART meter	Meter store	Pc	85 00 0	7,800 .00	663,000, 000.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>663,000 ,000.00</b>
			<b>Add 16% VAT</b>					<b>106,080 ,000.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>769,080 ,000.00</b>

#### 6) M/s House of Procurement Limited

<b>cate gory</b>	<b>l o t</b>	<b>Co de</b>	<b>Description</b>	<b>Deliv ery Point</b>	<b>U ni t</b>	<b>Qt y</b>	<b>Unit Price Kshs (VAT Excl usiv e PPC BL Incl)</b>	<b>Total Amount VAT Exclusiv e PPCBL Incl)</b>
3	3	535 402	Single-phase SMART meter	Meter store	Pc	35 00 0	9,971 .00	348,985,0 00.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>348,985 ,000.00</b>
			<b>Add 16% VAT</b>					<b>55,837, 600.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>404,822 ,600.00</b>

#### 7) M/S Abcos Industrial Ltd

<b>ca te</b>	<b>lo t</b>	<b>Code</b>	<b>Descriptio n</b>	<b>Deli very</b>	<b>Un it</b>	<b>Qty</b>	<b>Unit Price</b>	<b>Total Amount</b>
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g o r y	n o			Poin t			Kshs (VAT Exclus ive PPCB L Incl)	VAT Exclusive PPCBL Incl)
3	1	53540 2	Single- phase SMART meter	Mete r store	Pc	100, 000	8,190. 00	819,000,0 00.00
			<b>Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>819,000, 000.00</b>
			<b>Add 16% VAT</b>					<b>131,040, 000.00</b>
			<b>Grand Total Value Kshs (VAT Exclusive PPCBL Incl)</b>					<b>950,040, 000.00</b>

ii) Pursuant to Section 83 of the Public Procurement and Asset Disposal Act 2015; grant approval to the Evaluation Committee to conduct further due diligence exercise on the Original Equipment Manufacturers for the two new local manufacturers namely M/s Abcos Industrial Ltd and M/s House of Procurement Limited based in China as tabulated below; This is because the local assemblers and their Original Equipment Manufacturers have not previously supplied any meters to KPLC.

	<b>Bidder</b>	<b>Item Descripti on</b>	<b>(Oem) Manufacturer</b>	<b>Location</b>
1	Abcos Industrial Ltd	Single- Phase Smart Meter	Wasion Group ltd	No. 468 West Tongzipo Road, Changsha, Hunan province, China
2	House of Procurem ent Ltd	Single- Phase Smart Meter	Qingdao Eastsoft Communication Technology Co., Ltd	16A Shangqing Road, Shibe District, Qingdao, Shandong Province, China

## **Professional Opinion**

17. In a Professional Opinion dated 16<sup>th</sup> July 2025 (hereinafter referred to as the "Professional Opinion"), the General Manager, Supply Chain & Logistics, Dr. John Ngeno, OGW, reviewed the conduct of the procurement process, including the evaluation of tenders, and concurred with the recommendations of the Evaluation Committee regarding the award of the subject tender. The Professional Opinion was thereafter approved as recommended on 17<sup>th</sup> July 2025.

## **Notification to Tenderers**

18. Tenderers were notified of the outcome of the evaluation of the subject tender on 17<sup>th</sup> July 2025.

## **REQUEST FOR REVIEW**

19. On 29<sup>th</sup> July 2025, the Applicant, through the firm of Mwiti & Partners Advocates LLP, lodged a Request for Review dated 27<sup>th</sup> July 2025. The said application was accompanied by a Supporting Affidavit sworn on 27<sup>th</sup> July 2025 by Gan Zemin, deponed therein as the Managing Director of the Applicant. In the Request for Review, the Applicant sought the following orders:

***a) THAT the Public Procurement Administrative Review Board annuls and quashes the impugned procurement***

***proceedings for non-compliance with the cited provisions of the Constitution, the statute, subsidiary law and the tender document.***

***b) THAT Public Procurement Administrative Review Board annuls and quashes the letter of intention to award dated 17.7.2025 and restrains the procuring entity from issuing award letters and contracts to the successful bidders.***

***c) THAT costs be awarded to the Applicant.***

***In the alternative***

***d) THAT the Public Procurement Administrative Review Board be pleased to review or direct the independent re-evaluation of the Applicant's bid by a fresh tender evaluation committee.***

***e) THAT the Public Procurement Administrative Review Board visits the local plants for all the successful bidders and applicant to ascertain that they are local manufacturers and assemblies.***

***f) Such other orders that the Public Procurement Administrative Review Board may deem just and expedient.***

20. In a Notification of Appeal and a letter dated 29<sup>th</sup> July 2025, Mr. James

Kilaka, the then Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 29<sup>th</sup> July 2025.

21. On 4<sup>th</sup> August 2025, the Respondents, through Ms. Lynn Owano, In-House Counsel, filed a Notice of Appointment of Advocate dated 3<sup>rd</sup> August 2025, together with a Memorandum of Response of even date and the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
22. On 4<sup>th</sup> August 2025, the 3<sup>rd</sup> Interested Party filed a Memorandum of Response dated 1<sup>st</sup> August 2025, together with a Notice of Preliminary Objection of even date.
23. On 5<sup>th</sup> August 2025, the Applicant filed a Supplementary Affidavit sworn on 4th August 2025 by Gan Zemin.
24. On 6<sup>th</sup> August 2025, Smart Meter Technology Limited, a bidder in the subject tender, filed a Notice of Appointment of Advocate dated 5<sup>th</sup> August 2025 through the firm of NOW Advocates LLP, together with a Notice of Preliminary Objection of even date.

25. On 7<sup>th</sup> August 2025, Hexing Technology Company Limited, a bidder in the subject tender, filed a Notice of Appointment of Advocate dated 7<sup>th</sup> August 2025 through the firm of Kinyanjui Kirimi & Company Advocates, together with a Replying Affidavit sworn on the same date by Zhou Xinping, the General Manager of the said bidder.
26. On 7<sup>th</sup> August 2025, the 1<sup>st</sup> Interested Party filed a Notice of Appointment of Advocate of even date through Ms. Maureen Wakahia, Advocate, together with a Memorandum of Response of even date.
27. On 8<sup>th</sup> August 2025, Smart Meter Technology Limited filed a Replying Affidavit sworn on the same date by Emmanuel Tongi Oroo, a Director of the said bidder. On the same date, the bidder also filed an Affidavit sworn by Josphat Atanga Nyabate, a holding-over lawyer at the firm of NOW Advocates LLP, the firm on record for the said bidder, as well as an Affidavit sworn by Dennis Muthenya also known as Macheda, an employee of the said bidder.
28. On 8<sup>th</sup> August 2025, the 3<sup>rd</sup> Interested Party filed a Notice of Appointment of Advocate dated 1st August 2025 through the firm of CM Advocates LLP.
29. On 8<sup>th</sup> August 2025, the Board Secretary issued a Hearing Notice dated the same day to the parties, notifying them that the hearing of the Request for Review would be held virtually on 13<sup>th</sup> August 2025 at 11:00 a.m. via the provided link.
30. On 11<sup>th</sup> August 2025, the 2<sup>nd</sup> Interested Party filed a Notice of

Appointment of Advocate dated 8<sup>th</sup> August 2025 through the firm of Seko Minayo & Company Advocates, together with a Replying Affidavit sworn on the same date by Benard Odote, a Director of the 2<sup>nd</sup> Interested Party.

31. On 12<sup>th</sup> August 2025, the Applicant filed its Written Submissions dated 10<sup>th</sup> August 2025, together with a List of Authorities of even date.
32. On 12<sup>th</sup> August 2025, the Respondents filed their Written Submissions dated 3<sup>rd</sup> August 2025, together with a List of Authorities of even date.
33. On 13<sup>th</sup> August 2025, Smart Meter Technology Limited filed its Written Submissions of even date, together with its List and Bundle of Authorities of even date.
34. When the Board convened for the hearing on 13<sup>th</sup> August 2025 at 11:00 a.m., all the parties mentioned above were represented by their respective Advocates on record. Upon perusal of the pleadings, all Counsel confirmed that the documents filed were as captured above and had been duly filed and served upon all parties. The Board thereafter allocated time for the parties to highlight their respective submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

35. The Applicant's Counsel submitted that the Notices of Preliminary

Objection filed by the Respondents challenging the Board's jurisdiction were improperly raised, as they did not disclose pure points of law and sought to rely on contested facts requiring ascertainment, contrary to the settled principles in ***Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd***.

36. Counsel submitted that the objection alleging lack of locus standi under Section 167(1) of the Act was unfounded, as the Applicant was a tenderer in the subject procurement proceedings and had suffered harm, loss and damage as a result of alleged breaches of constitutional, statutory, and tender document requirements by the Procuring Entity. On the objection that the Applicant was not a tenderer within the meaning of Section 167(1), the Applicant submitted that the definition under Section 2 of the Act encompassed any person who submitted a tender pursuant to an invitation by a public entity. The fact that the tender was divided into lots did not transform it into multiple tenders.
37. The Applicant argued that Section 167(1) of the Act and Regulation 203(2) of the Regulations 2020 do not prescribe the manner in which loss and damage should be pleaded, and that whether a party has sufficiently pleaded loss and damage is a matter for the Board's discretion, not a proper subject for a preliminary objection. Counsel further submitted that loss and damage can be expressly pleaded or inferred from the pleadings, and in this case, the Applicant had detailed violations in its Review Application, supporting affidavits, and supplementary affidavit, including failure to apply local manufacturing preference, non-compliance with due diligence requirements, and

award of tenders to higher-priced and ineligible bidders. Without prejudice, Counsel submitted that even if the Board found the pleading of loss and damage unsatisfactory, this would not defeat the claim, as procedural lapses are curable under Article 159(2)(d) of the Constitution.

38. It was urged that the Applicant was not a busybody but an active participant in the tender process who had incurred substantial costs in pursuit of the award, and that the reliefs sought, including annulment of the procurement and fresh evaluation, had a statutory basis under Section 83 of the Act. The Applicant cited ***Republic v PPARB; Lake Victoria North Water Works Development Agency & another; Toddy Civil Engineering Company Limited (Ex parte Applicant)*** to support the proposition that participation in the tender process confers locus standi under Section 167 of the Act.
39. The Applicant contended that the awards across categories were intrinsically linked, arising from the same invitation to tender, product, evaluation criteria, and notification of award, and thus it was entitled to challenge awards beyond the category in which it had directly participated.
40. In response to the objection that the application was time-barred, Counsel submitted that time began to run upon issuance of the Notification of Intention to Award on 17<sup>th</sup> July 2025, as the full extent of the breach only became apparent upon conclusion of the evaluation process. The application was therefore filed within the statutory period. Reliance was placed on ***PPARB v Four M Insurance Brokers Limited & 3 others (Court of Appeal)*** and the persuasive decision

in ***SITA v Manchester Waste Management Authority***, which adopted a “discoverability” test for determining when time starts to run in procurement disputes.

41. On the objection regarding non-joinder of Smart Meter Technology Limited, Counsel submitted that non-joinder is not fatal, and the other successful bidders had been duly notified under Section 170(d) and had participated in the proceedings without suffering prejudice.
42. The Applicant rejected the objection based on alleged defective affidavits, arguing that the Civil Procedure Rules do not apply to Board proceedings, that Regulation 203(2)(b) of the Regulations permits statements in any form, and that there is no mandatory requirement for affidavits or express authority to make them.
43. On the challenge to the bundle of documents filed on 28<sup>th</sup> July 2025, it was submitted that the documents were public records, certified as true copies, and not annexed to any affidavit; hence, the Oaths and Statutory Declarations Act was inapplicable.
44. With respect to the supplementary affidavit filed on 4<sup>th</sup> August 2025, Counsel relied on PPARB Circular No. 2/2020, which permits the filing of supplementary affidavits without leave upon receipt of responses from the procuring entity, and argued that the Respondents had suffered no prejudice.
45. Regarding the allegation of reliance on confidential information, Counsel submitted that the statements in question were matters of belief, that the information relied upon was not confidential under

Section 68(2)(d)(iii) of the Act, and that parts of the evaluation report had already been disclosed by the Respondents.

46. Counsel contended that objections alleging that the application was frivolous, speculative, or made in bad faith did not raise pure points of law and could only be determined after a full hearing on the merits. The Applicant urged the Board to dismiss all the preliminary objections and proceed to hear the substantive dispute.
47. The Applicant's Counsel submitted that its tender under Category 3 was fully responsive within the meaning of Section 79 of the Act and ITT 28 of the Tender Document, having met all mandatory requirements. It was argued that the rejection of the bid on grounds of non-responsiveness and uncompetitive pricing was premature and unlawful, since competitiveness can only be determined at the evaluation stage under Section 80 of the Act.
48. Counsel contended that the notification of intention to award dated 17<sup>th</sup> July 2025 was ambiguous and misleading. The Applicant had in fact submitted competitive pricing, and some of the successful bidders quoted higher prices, rendering the reasons given for rejection unreasonable.
49. It was further submitted that the Respondents failed to furnish the Applicant with the evaluation report despite several requests, contrary to Section 67(3)(c) and 67(4) of the Act. According to the Applicant, this confirmed that its bid was dismissed before any substantive technical or financial evaluation, contrary to ITT 28.1 and Section 79 of the Act.

50. The Applicant's Counsel submitted that the Procuring Entity violated Section 86 of the Act and the tender document by awarding contracts to bidders who were not the lowest evaluated. It was argued that this failure to award to the lowest evaluated bidders undermined the Applicant's legitimate expectation of fair consideration.
51. On discrimination, Counsel contended that the Applicant's bid was unfairly deemed uncompetitive despite being within the range of successful bids. This, it was submitted, amounted to unequal treatment without any legal or factual justification.
52. Regarding cost-effectiveness, Counsel argued that the restriction barring the lowest evaluated bidder from winning more than two lots prejudiced the Applicant and denied the Procuring Entity an opportunity to maximize value for money, contrary to Article 227 of the Constitution.
53. It was further submitted that the Procuring Entity awarded the same product at different prices across categories and lots, a practice that was inconsistent, illogical and unconstitutional. Counsel pointed out that such disparities revealed a flawed evaluation system designed to benefit selected firms.
54. On legality, the Applicant maintained that procurement processes derive constitutional underpinning from Article 227 and Section 3 of the Act, and non-compliance renders them null. Reliance was placed on the decision in ***Republic v PPARB ex parte KPLC; Energy Sector Contractors Association & another*** [2020] eKLR, which emphasized that tender processes must conform to constitutional

principles.

55. Counsel also highlighted that the evaluation criteria under ITT 40 was disregarded, leading to situations where lower bidders were bypassed in favour of higher ones. Firms such as Inhemeter Africa, Smart Meter Technology, Abcos Industries, Magnate Ventures and House of Procurement were cited as beneficiaries of this irregular process.
56. Counsel submitted that the Procuring Entity failed to provide for site visits at the commencement of the process to verify local manufacturing or assembly capacity of bidders. This omission created loopholes for unqualified bidders to be awarded contracts, undermining transparency, fairness and cost-effectiveness. The Applicant therefore sought either fresh evaluation or site visits to verify the successful bidders' factories.
57. It was contended that the Respondents applied double standards in due diligence. Established suppliers were exempted from site visits on the assumption that their past performance proved capacity, while first-time bidders such as the Applicant were subjected to scrutiny. Counsel argued that each procurement process should be evaluated independently and past approvals could not lawfully substitute current due diligence.
58. The Applicant submitted that this selective evaluation was discriminatory and contrary to principles of fairness. By assuming previous suppliers still had capacity, and by failing to verify their factories or disclose the basis of their exemptions, the Respondents created an uneven playing field. Moreover, import documents

presented showed that some bidders imported products despite the tender being restricted to local manufacturers, raising further doubts about the legitimacy of the process.

59. Counsel emphasized that Section 83 of the Act and ITT 40(g)(d) imposed a duty to conduct due diligence before award, including site visits to all successful bidders. The Respondents' failure to conduct such visits, or to undertake full post-evaluation verification, amounted to partial evaluation which the courts have held unlawful.
60. It was submitted that by exempting four successful bidders from proper due diligence while subjecting others to stricter scrutiny, the Respondents engaged in an illegal and discriminatory process. The Applicant maintained that such partial evaluation tainted the procurement with illegality, and that the awards could not stand in law.
61. The Applicant submitted that its request for review was properly lodged under Section 167 of the Act and should be determined solely on the issues raised by the primary parties. It was argued that Interested Parties cannot introduce new issues or seek substantive reliefs beyond the scope of the main application. Reliance was placed on ***Mbithi v Mureithi & another; Nairobi City County (Interested Party) (Environment & Land Case 346 of 2019) [2024] KEELC 3448 (KLR) (23 April 2024) (Ruling)*** which affirmed that the role of Interested Parties is limited, as the core issues for determination remain those framed by the principal parties.

## **Respondents' Submissions**

62. The Respondents' Counsel submitted that the Applicant lacks locus standi under Section 167(1) of the Act, which restricts the right to seek review to a candidate or tenderer who pleads that they have suffered or risk suffering loss or damage due to a breach by the procuring entity. They argued that jurisdiction is conferred strictly by statute, and where an applicant does not meet this threshold, the Board must decline jurisdiction. Reliance was placed on ***James Ayodi t/a Betoyo Contractors & Another v Elroba Enterprises Ltd & Another [2019] eKLR*** and ***Republic v PPARB & 2 others; MFI Document Solutions Ltd [2024] KEHC 9582 (KLR)***, which both held that pleading loss is a jurisdictional prerequisite.
63. It was further contended that in ***Peesam Limited v Kenya Power & Lighting Company Limited PLC & 6 others (HCJRMISC/E069/2025)***, the High Court affirmed this principle in upholding the Board's decision to strike out a review application for failure to plead loss or damage. Counsel argued that the present Request for Review similarly fails to meet this statutory threshold, and that the subsequent Supplementary Affidavit sworn on 4<sup>th</sup> August 2025 cannot cure the defect, since affidavits constitute evidence, not pleadings. The cases of ***Kithome & another v Haile & another [2024] KEELC 6407 (KLR)*** and ***Superior Homes (Kenya) PLC v Water Resources Authority & 9 others [2024] KECA 1102 (KLR)*** were cited in support.
64. Counsel emphasized that parties are bound by their pleadings and cannot introduce new causes of action or issues through affidavits or

submissions. They cited ***Astute Africa Investments & Holding v Spire Bank Kenya Limited & another [2018] eKLR, Matindi & 3 others v The National Assembly & 4 others [2023] KEHC 19534 (KLR)***, and ***Raila Amolo Odinga & another v IEBC & 2 others [2017] KESC 31 (KLR)***, all affirming that pleadings define the scope of a case and prevent parties from springing surprises on the opposing side.

65. The Respondents urged that since the Applicant has not pleaded loss or damage as required under Section 167(1) of the Act, the Request for Review is fatally defective. Jurisdiction, they argued, cannot be conferred by implication, and where the statutory threshold is unmet, the Board must down its tools without proceeding to the merits of the matter.
66. The Respondents' Counsel submitted that Section 80(2), and 86(1) of the Act, and Regulation 77(3) of the Regulations 2020, require evaluation strictly in accordance with the criteria set out in the tender documents, a principle affirmed in ***Minet Kenya Insurance Brokers Limited v PPARB & 2 others; Liaison Healthcare Limited (Interested Party) [2025] KEHC 6478 (KLR)***. It was argued that neither the procuring entity nor the Board may introduce criteria not expressly stated.
67. Counsel pointed to ITT 40 of the Tender Data Sheet read with Appendix 1 of Addendum No. 1 dated 13<sup>th</sup> June 2025, which set out the governing criteria. These included: awards to be based on the lowest evaluated price per lot, prioritization of bidders with ready stock in Category 1,

limitation to one lot per bidder per category in Categories 2 and 3, and award to the lot with the highest quantity where a bidder was lowest in more than one lot. It was their submission that these rules were consistently applied by the Evaluation Committee.

68. On application of these rules, Smart Meter Technology Ltd. was awarded Category 1 for being the only bidder with ready stock at a competitive price; Category 2 was sequentially awarded to East Africa Meter Co. Ltd., Hexing Technology Co. Ltd., Inhemeter Africa Co. Ltd., and Smart Meter Technology Ltd., in line with the one-lot-per-bidder rule; while Category 3 went to Abcos Industrial Ltd., Magnate Ventures Ltd., and House of Procurement Ltd. Counsel stressed that the Applicant did not qualify in Categories 1 and 2, and in Category 3 their bid was non-responsive on account of uncompetitive pricing.
69. The Respondents' Counsel submitted that Section 87 of the Act, read together with Regulation 82 of the Regulations, 2020, obligates the Accounting Officer, upon identifying the successful bidder, to issue written notifications to both successful and unsuccessful tenderers. Such notification must disclose the name of the successful bidder, the tender price, and the reasons for rejection, while also triggering a statutory standstill period of fourteen days during which the procuring entity is barred from executing the contract to enable unsuccessful bidders to seek clarification or pursue remedies.
70. It was submitted that the 1<sup>st</sup> Respondent issued Notifications of Intention to Award on 17<sup>th</sup> July 2025 to both successful and unsuccessful bidders, including the Applicant. These Notifications, it

was argued, met the statutory threshold as they were in writing, contained the names of the successful bidders alongside the awarded prices, and explained the rejection of the Applicant's bid on account of uncompetitive pricing. The Respondents maintained that they fully complied with Section 87 of the Act as read with Regulation 82 of the Regulations, 2020.

71. The Respondents submitted that Section 83 of the Act, read with Regulation 80 of the Regulations, 2020, vests the Evaluation Committee with the mandate to conduct due diligence to confirm the capacity and resources of the successful bidder(s) prior to award, and to prepare a report signed by all its members. They maintained that the Tender Document itself provided that factory inspection would only be mandatory for local manufacturers and assemblers who had not previously supplied meters to the 2<sup>nd</sup> Respondent. According to them, this requirement only applied to Abcos Industrial Ltd. House of Procurement Ltd., and the Applicant, while other bidders who had successfully supplied meters to the 2<sup>nd</sup> Respondent or other public entities in Kenya before were exempt.
72. They further submitted that, in the Applicant's case, the Evaluation Committee was furnished with a Factory Inspection Letter and an Approval to Manufacture issued by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> November 2024. However, since the Applicant was not among the successful bidders, the Committee was under no obligation to conduct further due diligence in its regard after tender evaluation.
73. The Respondents maintained that due diligence was in fact conducted

on Abcos Industrial Ltd and House of Procurement Ltd, who emerged as successful bidders in Category 3 Lots 1 and 3 respectively, as reflected in the Evaluation Report on Due Diligence. In their view, the process was consistent with Section 83 of the Act, Regulation 80 of the Regulations, 2020, and the terms of the Tender Document, and the Applicant's allegations to the contrary were without foundation.

### **1<sup>st</sup> Interested Party's Submissions**

74. The 1<sup>st</sup> Interested Party's Counsel submitted that it was duly notified of the award of the subject tender by the 2<sup>nd</sup> Respondent through a notification of award dated 17<sup>th</sup> July 2025 issued in accordance with Section 87 of the Act. Counsel emphasized that the said award was lawful and properly communicated, and that the 1<sup>st</sup> Interested Party was therefore entitled to the benefits flowing therefrom.
75. Counsel further submitted that the procurement process complied with the law and Tender requirements, and that the award was made to the lowest evaluated responsive bidder. It was urged that under Addendum No. 1, ITT 40, bidders could only be awarded one lot per category, and on this basis the 1<sup>st</sup> Interested Party was awarded Category 3, Lot 2 at a price of KES 561,015,000/= exclusive of VAT, being the lowest bid.
76. The 1<sup>st</sup> Interested Party's Counsel also submitted that the Applicant's bid price for the same lot was KES 685,165,000/=, which was higher than that of the 1<sup>st</sup> Interested Party, rendering its claim of discrimination baseless. It was therefore contended that the award was fair, transparent, cost-effective, and lawful, and that the Request for Review

lacked merit and ought to be dismissed.

## **2<sup>nd</sup> Interested Party's Submissions**

77. The 2<sup>nd</sup> Interested Party submitted that it lawfully participated in the subject tender by bidding for Category 3 Lot 3, and its bid was responsive as it satisfied all mandatory, technical, and financial requirements set out in the tender documents. It was further contended that upon evaluation, the Procuring Entity determined it to be the successful bidder for Category 3 Lot 3, having submitted the lowest evaluated bid. The award was said to have been made strictly in line with the tender criteria, which allowed one lot per bidder per category, with subsequent lots awarded sequentially provided the pricing fell within prevailing market rates.
78. The 2<sup>nd</sup> Interested Party emphasized that due diligence was conducted, and the Procuring Entity confirmed that it had the requisite capacity and facilities to supply the goods. In this regard, it furnished a Factory Inspection Letter, an Approval to Manufacture, and documentary evidence establishing its status as a Local Manufacturer and Assembler, a fact verified by the Procuring Entity on 11<sup>th</sup> July 2025.
79. It was further submitted that the award process fully complied with Articles 10 and 227 of the Constitution, Section 80 of the Act, and Regulation 77 of the Regulations 2020. The Applicant, it was argued, had failed to particularize any violation of the Act by the Procuring Entity, rendering its grounds for review baseless.
80. Counsel further argued that the Request for Review contravenes

Section 167(1) of the Act, as the Applicant had not pleaded that it had suffered loss or damage as a result of the Respondents' alleged breaches of the Act.

### **3<sup>rd</sup> Interested Party's Submissions**

81. Counsel for the 3<sup>rd</sup> Interested Party submitted that the first ground of its Notice of Preliminary Objection had been abandoned. Counsel further stated that he concurred with the submissions made by the Respondents and relied on the 3<sup>rd</sup> Interested Party's Memorandum of Response.

### **SMART METER TECHNOLOGY LIMITED'S SUBMISSIONS**

82. Counsel for Smart Meter Technology Limited (SMTL) submitted that the jurisdiction of this Board can only be invoked through competent pleadings. Without such pleadings, there is no legal basis upon which the Board may act. Counsel emphasized that the Applicant, being a limited liability company under the Companies Act, can only execute documents through its authorized representatives as provided under Section 37(2) of the Companies Act, Chapter 486 of the Laws of Kenya. In addition, under Order 4 Rule 1(4) of the Civil Procedure Rules, a resolution of the board of directors must accompany proceedings instituted on behalf of a company.
83. It was submitted that the Request for Review and accompanying affidavits were signed by one Gan Zemin, who described himself as the Applicant's Managing Director. However, reference was made to a CR12

annexed to the Replying Affidavit, which confirmed that Gan Zemin is neither a director nor shareholder of the Applicant. Counsel argued that the said affidavits contained falsehoods amounting to perjury, thus tainting the entire pleadings with illegality.

84. Reliance was placed on the case of ***James Mulinge v Freight Wings Ltd & 3 others [2016] eKLR***, where the Court held that knowingly filing false affidavits constitutes perjury and an abuse of the court process. It was further submitted that Gan Zemin neither demonstrated authority from the board of directors of the Applicant nor deposed that he was acting on behalf of the Applicant. In the absence of such authority, Counsel argued, the pleadings were incurably defective. Counsel also cited the Board's decision in ***PPARB Application No. 56 of 2024 Spic 'N' Span Cleaning Services Limited v Kenya Development Corporation Limited & Another***, where the Board declined jurisdiction for want of a competent request for review filed without evidence of authority from the applicant's company.
85. Counsel further submitted that the Request for Review was anchored on confidential information contrary to Section 67 of the Act. It was argued that at paragraphs 21 and 28 of its Supporting Affidavit, the Applicant relied on Smart Meter Technology Limited's bid documents and the evaluation report of the tender. Counsel contended that such information, being confidential, could only have been obtained illegally and ought not to be entertained by the Board.
86. Counsel for SMTL submitted that under Section 167(1) of the Act, only a candidate or tenderer who claims to have suffered or is at risk of

suffering loss or damage due to a breach of duty by a procuring entity has locus standi to seek review. It was contended that the Applicant's Request for Review, filed on 29<sup>th</sup> July 2025, did not plead or disclose with specificity any such loss or damage.

87. It was argued that the Applicant's attempt to cure this defect through a Supplementary Affidavit sworn by Gan Zemin was misconceived. Counsel maintained that an affidavit is not a pleading, and cannot be used to introduce new claims that were not contained in the original Request for Review. Reliance was placed on the Court of Appeal decision in ***Superior Homes (Kenya) PLC v Water Resources Authority & 9 Others [2024] KECA 1102***, among others, where it was held that affidavits constitute evidence and not pleadings, and cannot be used to plead damages or loss.
88. It was also submitted that the Applicant was not a tenderer within the meaning of Section 2 of the Act, as it did not submit its bid through the 2nd Respondent's e-procurement portal as required. This fact, Counsel noted, was uncontroverted. Consequently, the Applicant could not claim to have suffered any loss in respect of the tender. Further, it was emphasized that the Applicant only participated in Category 3 of the tender and did not bid for Categories 1 and 2. As such, it had no legitimate grievance regarding those categories and lacked standing to challenge them.
89. Counsel for SMTL submitted that the Applicant fatally failed to join it as a mandatory and necessary party to the Request for Review, contrary to Section 170(c) of the Act. That provision, it was emphasized, requires

that the tenderer notified as successful by the procuring entity must be a party to review proceedings. It was pointed out that by a letter dated 17<sup>th</sup> July 2025, the 1st Respondent expressly notified the Applicant that SMTL had been awarded Lot 1 of Category 1 and Lot 4 of Category 2.

90. Reliance was placed on the Board's own decision in ***PPARB Application No. 47 of 2025, County Guards Limited v Multimedia University of Kenya & Another***, where it was held that review proceedings must necessarily comprise the candidate or tenderer seeking review, the accounting officer of the procuring entity, the successful tenderer, and any other persons the Board may determine. The High Court decision in ***El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 5 Others [2018] eKLR*** was also cited, where the Court held that failure to include a mandatory party under Section 170 of the Act rendered review proceedings incompetent and incapable of being sustained.
91. Counsel for SMTL submitted that the Applicant's challenge related to three elements of the procurement process, namely: the restriction of awards to one lot per category, the allowance of different pricing across awards, and the absence of site visits. It was urged that these were not hidden irregularities but express provisions contained in the Tender Document which the Applicant obtained no later than 1<sup>st</sup> July 2025, being the submission deadline. Accordingly, the Applicant had full knowledge of the alleged breaches by that date.
92. It was contended that Section 167(1) of the Act, read together with Regulation 203(2)(c)(i) of the Regulations 2020, requires an aggrieved

tenderer to seek review within fourteen days of the occurrence of the alleged breach. By operation of Section 57 of the Interpretation and General Provisions Act, the Respondents argued that the deadline lapsed on 15<sup>th</sup> July 2025. The Applicant, however, only moved the Board on 29<sup>th</sup> July 2025, a date clearly outside the statutory window, despite having participated fully in the process.

93. Reliance was placed on the Board's decision in ***Fahimyasin Company Limited v Kenya Urban Roads Authority (PPARB 48 of 2021)***, where it was held that tenderers cannot sit through the procurement process, await the outcome, and thereafter seek to challenge provisions of the tender documents which they never raised at the earliest opportunity. Counsel further cited the Court of Appeal decision in ***Civil Appeal No.E1009 of 2023 Public Procurement Administrative Review Board and Four M Insurance Limited, Sedgwick Kenya Insurance Brokers Limited, The Managing Director, Kenya Pipeline Company Limited, and Kenya Pipeline Company Limited*** for the proposition that the phrase "date of occurrence of the breach" refers to the point when an applicant has either actual or constructive knowledge of the alleged breach, so as to ensure procurement disputes are raised in good time.
94. Counsel submitted that the Applicant had challenged the notification letter of 17<sup>th</sup> July 2025 on the grounds that it irregularly declared its bid non-responsive for being uncompetitive, and that it failed to disclose the lots, unit prices, and quantities awarded to successful bidders. It was submitted that the notification letter expressly indicated that the Applicant was unsuccessful because its price was not competitive,

which meant that its bid had been evaluated against the preliminary, technical, and financial criteria, contrary to the Applicant's claim of arbitrary dismissal. Counsel added that by the Applicant's own admission, it did not participate in Categories 1 and 2 of the tender, and therefore could not allege discrimination when those categories were awarded to another bidder.

95. It was further contended that the Respondents fully complied with Section 87(3) of the Act and Regulation 82 by notifying unsuccessful bidders of their lack of success, the reasons therefor, the identity of the successful bidder, and the bid price. Counsel submitted that in this case the Applicant was duly notified of its lack of success and the reasons therefor. Although the law does not require disclosure of unit prices or quantities at the notification stage, the Applicant nonetheless sought and received this additional information through its letter of 25<sup>th</sup> July 2025, to which the Respondents replied on 28<sup>th</sup> July 2025 with details of successful bidders, their unit prices, and awarded quantities.

96. The Respondents submitted that the Applicant's challenge on the mode of award was misplaced, as the Tender Document expressly restricted bidders to an award of one lot per category in Categories 2 and 3, allowed for award of lots at different prices, and did not provide for site visits at the commencement of the tendering process. They argued that the Applicant, being fully aware of these provisions, nevertheless participated in the process and was thereby deemed to have acquiesced to the system established under the Tender Document. It was their submission that if the Applicant was aggrieved by the absence of site visits or by the mode of award, it ought to have sought clarification

during the tendering stage. Having failed to do so and having submitted a bid, the Applicant was now estopped from challenging those provisions.

97. Counsel emphasized that under the Act, both local manufacturers and assemblers were eligible to bid in the subject tender, provided they met the specific conditions set out in the Tender Document. It was submitted that SMTL had fully complied, as shown by its CR12 and other documents evidencing registration in Kenya, operations at Saku Industrial Park in Nairobi, and past supplies to the Procuring Entity where it engages in production and assembling of single phase prepayment meters, single phase smart meters and three phase smart meters. SMTL's bid was therefore properly evaluated and determined to be the lowest evaluated bid for Lot 1 in Category 1 and Lot 4 in Category 2 of the subject tender as the only bidder with ready stocks and the lowest evaluated bidder respectively in accordance with the mode of award provided in Addendum 1 dated 13<sup>th</sup> June 2025.

### **Rejoinder**

98. Counsel for the Applicant submitted that, under Section 86 of the Act, award of a tender must be made to the lowest evaluated bidder. Counsel further submitted that the bundling of a tender into multiple lots must be carried out in accordance with the law.
99. Counsel submitted that Clause 40 of the Instructions to Tenderers (ITT) in the Tender Document mandated the conduct of due diligence. Counsel further submitted that the Respondents' decision to carry out

due diligence on only a select few of the successful bidders was unlawful.

100. Counsel submitted that Interested Parties cannot diverge from the issues raised by the primary parties. On the allegation that the Applicant's affidavits were defective, Counsel contended that the affidavits could be treated as statements and referred the Board to Regulation 203 of the Regulations, 2020. Counsel further argued that the Request for Review is competent on its own, independent of any supporting statement or affidavit.

101. Counsel submitted that the Applicant had pleaded that it stood to suffer loss and damage, as deponed in its Supplementary Affidavit. Counsel further submitted that the Request for Review was filed within the statutory timelines, computed from the date the Applicant became aware of the alleged breaches by the Respondents, in line with Section 167(1) of the Act.

## **CLARIFICATIONS**

102. The Board sought clarification from Counsel for the Respondents on what was meant by the assertion that the Applicant's bid prices were not competitive, and whether this implied that the prices were outside the prevailing market range. In response, Counsel clarified that the issue was not that the Applicant's prices fell outside the market price range, but rather that, in respect of all three lots in Category 3 which the Applicant bid for, its bids price was not the lowest. Counsel referred the Board to Clause 40 of the Instructions to Tenderers (ITT) in the

Tender Document.

103. The Board further sought clarification from Counsel for the Respondents on whether, pursuant to Section 86 of the Act which provides that the lowest evaluated bidder should be awarded the tender, East Africa Meter Company ought to have been awarded all the categories. In response, Counsel submitted that Section 86 of the Act should not be read in isolation, but in conjunction with Section 80(2) of the Act, which requires that evaluation be undertaken in accordance with the criteria set out in the tender document. For the purpose of the subject tender, Counsel referred to Addendum No. 1 as having provided the applicable criteria.

104. The Board sought clarification from Counsel for the Respondents on whether a market survey had been undertaken. In response, Counsel confirmed that a market survey was indeed conducted.

### **BOARD'S DECISION**

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

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

**B. Whether the mode of award adopted in the subject**

**tender, together with its application, was consistent with the requirements of the law.**

**C. Whether the Letters of Notification of Intention issued in the subject tender complied with Section 87 of the Act.**

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

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

106. This matter could easily rival a legal chess match, as it attracted a multitude of preliminary objections, each predicated on various provisions of the law. In response, the Applicant contended that none of the grounds relied upon in the preliminary objections were sufficient to justify the striking out of the Request for Review.

107. The effect of the above grounds in the preliminary objection, if established, would deprive the Board of jurisdiction to entertain the present Request for Review. Consequently, given the preliminary and jurisdictional nature of the grounds, they must be addressed as a matter of priority.

108. The Board is mindful of the well-established legal principle that courts and decision-making bodies may only adjudicate matters that fall within their jurisdiction. Where a question of jurisdiction arises, it must be addressed as a threshold issue before any further proceedings can be undertaken.

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

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

***On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In [R v Karisa Chengo \[2017\] eKLR](#), that jurisdiction is that which grants a court authority to decide matters by holding;***

***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be***

***either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”***

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

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

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

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

113. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings.

Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline the Board's powers in handling such proceedings.

114. In light of the foregoing, the Board must first determine the question of its jurisdiction by considering the various grounds raised in the preliminary objections.

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

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

116. The Board understands the above *locus classicus* case law to mean that a Preliminary Objection is a legal device that challenges the legal sufficiency of a case without delving into factual disputes. It must be based solely on a clear point of law and assumes, for purposes of the objection, that all the facts presented by the opposing party are true. A Preliminary Objection is therefore inappropriate where the Court would

need to examine or verify facts or where the issue raised calls for the Court's discretion rather than a strict legal determination.

117. Before delving into the merits of the grounds raised in the notices of preliminary objection, the Board notes that it must first assess whether the said grounds satisfy the legal threshold of what constitutes a Preliminary Objection. The guiding principles for such an assessment were clearly laid out in the ***Mukisa Biscuit*** case cited above, which set out the parameters of what amounts to a valid Preliminary Objection.

118. In determining this issue, the Board begins with the ground raised in the Respondents' Notice of Preliminary Objection, namely, that the Applicant lacked locus standi on account of not pleading any loss occasioned by the Respondents' actions, contrary to Section 167(1) of the Act. The Board observes that this ground is anchored purely on a point of law, requiring no evidentiary proof, since its determination turns solely on the Applicant's pleadings as framed.

119. The Board next considered the 3rd Interested Party's Notice of Preliminary Objection. It notes that the first ground was abandoned during the hearing, leaving the second and third grounds premised on Section 172 of the Act. The Board finds that these do not raise pure questions of law, as their determination requires factual analysis to ascertain whether the Request for Review was made in bad faith or lacked cogent factual specificity. Consequently, they fall short of the threshold of a preliminary objection and are dismissed at this stage.

120. The Board next turns to the grounds raised by Smart Meter Technology

Limited in its Notice of Preliminary Objection. The first ground similarly challenges the Applicant's locus standi under Section 167(1) of the Act, a matter already addressed and determined in the foregoing paragraphs.

121. The remaining ground concerns whether the Applicant qualifies as a tenderer in respect of Categories 2 and 3 under Section 167(1) of the Act. The Board finds that this is a pure question of law, requiring no evidentiary proof, as it is determinable from the face of the pleadings whether the Applicant participated as a tenderer in Categories 1 and 2.

122. Another ground raised concerns the alleged failure to include Smart Meter Technology Limited (SMTL) as a party to the proceedings in accordance with Section 170(c) of the Act. The Board finds that this is a pure question of law, as its determination requires no evidence beyond reviewing the parties formally listed as Interested Parties in the pleadings.

123. Another ground raised concerns the alleged defect in the Request for Review, premised on the claim that the person who swore the Supporting Affidavit lacked authority to act on behalf of the Applicant. The Board finds that this is not a pure question of law, as its determination necessitates examining evidence to establish whether such authority existed. Indeed, in advancing this ground, Smart Meter Technology Limited (SMTL) relied on the Applicant's CR-12, demonstrating reliance on evidentiary material. Consistent with the Board's approach of distinguishing pure questions of law from issues requiring evidence, this ground does not meet the threshold of a pure

point of law and therefore cannot be determined at the preliminary objection stage.

124. Another ground concerns whether the Request for Review is time-barred, particularly in challenging the tender document with respect to the award criteria applied and the omission to provide for site visits at the commencement of the procurement process. The Board finds that the issue of lapse of time is a pure question of law, as its determination requires no evidence beyond the date on which the Request for Review was filed as stated in the pleadings.

125. Another ground concerns whether the Request for Review as a whole, and specifically paragraphs 21 and 28 of the Supporting Affidavit, relies on confidential information in contravention of Section 67 of the Act. The Board finds that this is a pure question of law, as its determination requires only a comparison of the information contained in the said paragraphs against the provisions of the cited section.

126. In light of the foregoing, the Board will proceed to determine whether it has jurisdiction in respect of the properly raised grounds of preliminary objection. However, before addressing these grounds, the Board must first consider whether it has jurisdiction to entertain the issues raised by the Interested Parties, as well as by Smart Meter Technology Limited and Hexing Technology Company Limited.

**Whether the Board has jurisdiction to entertain the issues raised by the Interested Parties, Smart Meter Technology Limited, and Hexing Technology Company Limited.**

127. The Board considered it prudent to determine this issue at the outset, noting that the Interested Parties, together with Smart Meter Technology Limited and Hexing Technology Company Limited, who joined these proceedings pursuant to an invitation under Section 170(d) of the Act, made extensive contributions to the preliminary objections raised. It is therefore necessary to first establish whether their participation is proper before addressing the objections they canvassed, being the very grounds of preliminary objection referred to herein.

128. During the hearing, the Applicant contended that certain parties who were not primary parties had introduced new issues beyond those raised by the primary parties. Counsel maintained that the Request for Review ought to be determined solely on the basis of the issues advanced by the primary parties.

129. The Board observes that the foregoing issue was not specifically addressed or rebutted by the Respondents, the Interested Parties, or by Smart Meter Technology Limited and Hexing Technology Company Limited.

130. In determining this issue, the Board starts by stating what Section 170 of the Act provides:

***170. Parties to review***

***The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity; and***

***(d) such other persons as the Review Board may determine.***

131. The Board understands the above provision of the law to mean that the Act makes a mandatory prescription as to who qualifies to be a party to a review before this Board. The use of the word "*shall*" denotes compulsion and leaves no discretion on the part of the Board to exclude the persons expressly listed under paragraphs (a), (b) and (c). In other words, the requester of the review, the accounting officer of the procuring entity, and the tenderer notified as successful must, as a matter of law, be parties to every review application. Further, paragraph (d) introduces a limited discretion, allowing the Board to join "*such other persons*" as it may determine necessary for the just and fair determination of the matter. However, this discretion cannot override the mandatory inclusion of the parties expressly named under paragraphs (a), (b) and (c). The statutory language therefore draws a clear line between those who are automatically parties and those who may, at the Board's discretion, be enjoined.

132. Guided by Section 170 of the Act, the Board narrows its focus to paragraphs (c) and (d), which directly relate to the Interested Parties and the two bidders, Smart Meter Technology Limited and Hexing Technology Company Limited. The Board notes that, pursuant to Section 170(d), it invited all bidders to join the proceedings, which led

to the participation of Smart Meter Technology Limited and Hexing Technology Company Limited. The key question, however, remains the extent of participation of these parties in the present proceedings.

133. The Board observes that the Applicant placed reliance on the decision in ***Mbithi v Mureithi & another; Nairobi City County (Interested Party) (ELC Case No. 346 of 2019) [2024] KEELC 3448 (KLR) (Ruling of 23 April 2024)*** to argue that the Interested Parties had introduced new issues which ought not to be considered. However, the Board notes that the Applicant did not identify with specificity the alleged new issues said to have been raised.

134. In addressing the scope of their participation, the Board finds that the said parties qualify as mandatory parties within the meaning of Section 170 of the Act. Nonetheless, their role does not extend to introducing new factual issues or seeking substantive remedies in the proceedings.

135. In the present Request for Review, the Board observes that the said parties did not introduce new factual issues nor seek substantive remedies. Their participation was therefore proper, being expressly sanctioned by law. What the Applicant perceived as new matters were in fact legal issues on the jurisdiction of the Board, which cannot be excluded on that account.

136. Consequently, the Board holds that it retains jurisdiction to consider the legal issues raised by the Interested Parties, including those advanced by Smart Meter Technology Limited and Hexing Technology Company Limited, subject to the limitation that they cannot introduce fresh

factual matters or seek remedies beyond those sought by the Applicant.

**Whether the Applicant is a tenderer of the subject tender under the lots in Category 1 and 2.**

137. Counsel for SMTL contended that the Applicant was not a tenderer within the meaning of Section 2 of the Act in respect of Category 1 and Category 2 of the subject tender, as it had not submitted a bid for any lots under those categories by the tender submission deadline of 1<sup>st</sup> July 2025 pursuant to the 2<sup>nd</sup> Respondent's invitation.

138. In response the Applicant's Counsel argued that the definition under Section 2 of the Act encompassed any person who submitted a tender pursuant to an invitation by a public entity. The fact that the tender was divided into lots did not transform it into multiple tenders. Counsel contended that the awards across categories were intrinsically linked, arising from the same invitation to tender, product, evaluation criteria, and notification of award, and thus it was entitled to challenge awards beyond the category in which it had directly participated.

139. In determining this issue, the Board begins by noting the provisions of Section 167(1) of the Act, which state as follows:

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek***

***administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

140. The Board interprets the above legal provision to mean that the right to seek administrative review before this Board is expressly reserved for *candidates* and *tenderers* participating in a procurement or disposal process. The language of Section 167(1) of the Act confines standing to these two categories of persons, thereby excluding any other third parties or stakeholders who may not have participated in the tendering process.

141. By so providing, the law intended to ensure that only those directly engaged in the procurement proceedings, and who may suffer actual or potential loss arising from a breach by the procuring entity, are clothed with the legal capacity to invoke the Board's jurisdiction. This interpretation is reinforced by the deliberate use of the words "*a candidate or a tenderer*" which limits access to the review mechanism to the parties who submitted bids or were otherwise eligible to participate in the tender.

142. The Board further notes that Section 2 of the Act defines the terms "*candidate*" and "*tenderer*" in the following manner:

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;***

143. Guided by the foregoing provisions, the Board now turns to consider whether the Applicant qualified as a tenderer in respect of the lots comprised under Category 1 and Category 2 of the subject tender.

144. In addressing this issue, the Board examined all documents on record, including the confidential file specifically Addendum 1 dated 13<sup>th</sup> June 2025, and observed that the subject tender was structured into three categories: Category 1, restricted to local manufacturers/assemblers with ready stocks; Category 2, reserved for local manufacturers/assemblers who have successfully supplied meters to completion to the 2nd Respondent or any other public entity in Kenya before; and Category 3, open to all local meter manufacturers/assemblers.

145. The Board notes that the Applicant submitted its bid exclusively under Category 3 and did not tender for any lots in Categories 1 or 2. The Board further observes that the Applicant did not mount any specific challenge to the said Categories 1 and 2.

146. Arising from the foregoing, the Board finds that the Applicant was not a tenderer in respect of any lot under Categories 1 and 2. Consequently, the Board shall confine its determination to Category 3, where the Applicant participated as a tenderer, and shall accordingly down its tools with respect to Categories 1 and 2. Notwithstanding this, the

substantive issue in the instant Request for Review concerns the application of the mode of award, which links Categories 1, 2 and 3 in terms of how they were applied. To this extent, the Board retains jurisdiction to examine the mode of award as it pertains Categories 1, 2 and 3, insofar as their application is interrelated. To this extent the Board relies on its previous decision in **PPARB Application No.59 of 2025 Tramex Mediquip Ltd v Chief Executive Officer, Kenya Medical Supplies Agency and 3 others** where the Board at paragraph 136 thereof held that while two lots originate from the same tender, they remain distinct and separate.

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

147. The Respondents submitted that the Applicant lacked the requisite locus standi under Section 167(1) of the Act to institute or sustain the administrative proceedings. Counsel argued that the Applicant had neither pleaded nor demonstrated that it had suffered, or was at risk of suffering, any loss or damage arising from an alleged breach of a duty imposed on the procuring entity under the Act or the Regulations, 2020.

148. The 2nd and 3rd Interested Parties, together with Smart Meter Technology Limited, associated themselves with the Respondents' contention that the Applicant neither pleaded nor demonstrated any loss or risk of loss arising from the alleged breach. They adopted the arguments of the Respondents' Counsel and advanced submissions in similar terms.

149. In responding to the above, the Applicant argued that Section 167(1)

of the Act and Regulation 203(2) of the Regulations 2020 do not prescribe the manner in which loss and damage should be pleaded, and that whether a party has sufficiently pleaded loss and damage is a matter for the Board's discretion, not a proper subject for a preliminary objection. Counsel further submitted that loss and damage can be expressly pleaded or inferred from the pleadings, and in this case, the Applicant had detailed violations in its Review Application, supporting affidavits, and supplementary affidavit, including failure to apply local manufacturing preference, non-compliance with due diligence requirements, and award of tenders to higher-priced and ineligible bidders. Without prejudice, Counsel submitted that even if the Board found the pleading of loss and damage unsatisfactory, this would not defeat the claim, as procedural lapses are curable under Article 159(2)(d) of the Constitution.

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

***167. Request for a review***

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

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

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

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

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

152. Superior courts have consistently addressed the requirement to plead loss or damage under Section 167(1) of the Act. This Board takes cognizance of the Court of Appeal's decision in ***James Ayodi t/a Betooyo Contractors & Another v Elroba Enterprises Ltd & Another*** [2019] eKLR, Mombasa Civil Appeal No. 131 of 2018 (hereinafter "the *James Ayodi* case"). In that matter, the Court considered an appeal challenging the High Court's finding that the Review Board ought to have held the appellants lacked locus standi, having failed to demonstrate that they had suffered, or were likely to suffer, loss. The Court of Appeal offered clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

**" ..... It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;....**

**...It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. ....**

**.....The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]**

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

154. In the present Request for Review, the central issue for determination

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

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

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

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

***...a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.***

157. The import of the above holdings is that *locus standi* refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack *locus standi*, it cannot be heard, regardless of whether its case has merit. This issue alone may lead to the preliminary dismissal of the

Request for Review without delving into its substantive aspects.

158. In addressing this issue, the Board observes that Counsel for the Applicant did not draw its attention to any specific paragraph of the pleadings wherein the risk of loss or damage was pleaded as contemplated under Section 167(1) of the Act. Nevertheless, in order to conclusively determine the matter, the Board undertook a review of the pleadings and noted that at paragraphs 9 and 10 of the Request for Review, the Applicant stated as follows:

***9. THAT by lumping together successful bidders for different categories without disclosing which bidder won which lot in the different categories has greatly prejudiced the Applicant's ability to build a case in violation of Articles 47 and 50 of the Constitution of Kenya, 2010, since it is not clear which bidders were his competitors having bid under all the three lots in category three of the third (3) addendum to the tender document.***

***10. THAT by setting up a procurement system where the lowest evaluated bidder cannot be awarded a tender/contract in more than two lots they bid in, the procuring entity failed to set up a system that is cost-effective in compliance with Article 227 of the Constitution and prejudiced the Applicant.***

159. The Board notes the above paragraphs to mean that the Applicant contends it suffered prejudice as a result of the manner in which the

Respondents conducted the procurement process. In particular, the Applicant asserts that the failure to disclose the allocation of successful bidders to specific lots undermined its ability to know its competitors and thereby hindered the preparation of a proper case, which amounts to a denial of fair administrative action and fair hearing under Articles 47 and 50 of the Constitution. Further, the Applicant avers that the restriction limiting the lowest evaluated bidder from being awarded more than two lots created a system that was not cost-effective, contrary to Article 227 of the Constitution, thereby causing it prejudice. The Board understands the reference to prejudice in this context to mean that the Applicant suffered or stood to suffer loss and damage as a result of the said actions.

160. In arriving at this conclusion, the Board is guided by the Court of Appeal decision in *James Ayodi*, which acknowledged that a party may plead loss or damage in an attempt to meet the statutory requirement. On the basis of the foregoing analysis, the Board is satisfied that the Applicant sufficiently met the threshold under Section 167(1) of the Act in pleading loss or damage attributable to the Respondents. Consequently, the Applicant has established locus standi to properly appear before the Board.

**Whether the Request for Review is barred by time under Section 167(1) of the Act.**

161. Counsel for SMTL urged that the Applicant's challenge related to three elements of the procurement process, namely: the restriction of awards to one lot per category, the allowance of different pricing across

awards, and the absence of site visits. It was urged that these were not hidden irregularities but express provisions contained in the Tender Document which the Applicant obtained no later than 1<sup>st</sup> July 2025, being the submission deadline. Accordingly, the Applicant had full knowledge of the alleged breaches by that date.

162. It was contended that Section 167(1) of the Act, read together with Regulation 203(2)(c)(i) of the Regulations 2020, requires an aggrieved tenderer to seek review within fourteen days of the occurrence of the alleged breach. By operation of Section 57 of the Interpretation and General Provisions Act, the Respondents argued that the deadline lapsed on 15<sup>th</sup> July 2025. The Applicant, however, only moved the Board on 29<sup>th</sup> July 2025, a date clearly outside the statutory window, despite having participated fully in the process.

163. In response to the above, the Applicant's Counsel submitted that time began to run upon issuance of the Notification of Intention to Award on 17<sup>th</sup> July 2025, as the full extent of the breach only became apparent upon conclusion of the evaluation process. The application was therefore filed within the statutory period. Reliance was placed on ***PPARB v Four M Insurance Brokers Limited & 3 others (Court of Appeal)*** and the persuasive decision in ***SITA v Manchester Waste Management Authority***, which adopted a "discoverability" test for determining when time starts to run in procurement disputes.

164. The Board notes that the resolution of this issue rests entirely on the interpretation of the prevailing facts in light of the provisions of Section 167(1) of the Act, which provides as follows:

**167. Request for a review**

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

165. Regulation 203(2)(c)(i) of the Regulations 2020 similarly reinforces the fourteen (14) days timeline in the following terms:

***Request for a review***

***1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***

***2) The request referred to in paragraph (1) shall—***

***a. state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***b. be accompanied by such statements as the applicant considers necessary in support of its request;***

***c. be made within fourteen days of—***

***i. the occurrence of the breach complained of, where the request is made before the making of an award;***

***ii. the notification under section 87 of the Act; or***

***iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder***

166. The Board's interpretation of the above provisions is that an applicant seeking its intervention in procurement proceedings must file the Request for Review within the prescribed statutory period of fourteen (14) days. Any Request for Review filed outside this timeframe is time-barred and, as a result, the Board lacks jurisdiction to entertain it. The provisions further establishes two benchmark events for the commencement of the statutory timeline: the date of notification of the award or the date of occurrence of the alleged breach.

167. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR***, the High Court provided guidance on the commencement of the statutory timeline, stating as follows:

***66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach.***

168. Turning to the instant Request for Review, the Board notes that the determination of this issue rests on when the Applicant became aware of the alleged breaches.

169. The Board notes that Counsel for SMTL categorized the Applicant's Request for Review into three elements of the procurement process, namely: the restriction of awards to one lot per category, the allowance of different pricing across awards, and the absence of site visits at the commencement of the tendering process. In light of this categorization and the Board's own review of the Request for Review, the Board finds that the Applicant's grounds can be consolidated into two core issues: (i) the mode of award and its application, and (ii) the absence of site visits at the commencement of the tendering process. Accordingly, the Board shall address the question of when the Applicant became aware of the alleged breaches based on this summary of the grounds.

170. With respect to the first part of the grounds in the Request for Review concerning the award criteria and its application, the Board finds that determining when the Applicant became aware of the alleged breaches is closely linked to the Notification of Intention to Award letters issued on 17<sup>th</sup> July 2025. It is only upon receipt of these letters that the Applicant became aware of the manner in which the mode of award were implemented.

171. In line with the above finding that the Applicant became aware of the alleged breaches relating to the first category of grounds, as summarized above, the Board finds and holds that the statutory time

for filing the Request for Review commenced on 17<sup>th</sup> July 2025.

172. In assessing whether the Request for Review was time-barred under Section 167(1) of the Act, the Board notes that the Request for Review was filed on 29<sup>th</sup> July 2025. Having established that time commenced on 17<sup>th</sup> July 2025, the issue is whether the 14-day statutory period had elapsed at the time of filing. The Board finds that, as the Request for Review was filed on or about the 12<sup>th</sup> day from the commencement of the statutory period, it was filed within time and is therefore not time-barred.

173. In light of the foregoing analysis, the Board finds that, to the extent the Request for Review challenges the application of the award criteria, it is not time-barred and has been filed in compliance with Section 167(1) of the Act.

174. Turning to the grounds in the Request for Review concerning the absence of site visits at the commencement of the tendering process, the Board finds that the Applicant became aware of this issue upon accessing the Tender Document. As the precise date of access was not provided, the Board assumes, for the sake of argument, that the Applicant became aware on the tender opening date, 1<sup>st</sup> July 2025. In these circumstances, the Board finds that the Request for Review, filed on 29<sup>th</sup> July 2025, was time-barred, as the 14-day statutory period under Section 167(1) of the Act had already elapsed. The filing, occurring near the end of the month, clearly exceeded the allowable period from the date the Applicant became aware of the matter.

175. Accordingly, based on the foregoing findings, the Board holds that the

Request for Review is time-barred to the extent that it challenges the issue of the absence of site visits at the commencement of the tendering process.

### **Whether the Request for Review is pegged on confidential information**

176. Counsel for SMTL argued that the Request for Review was anchored on confidential information contrary to Section 67 of the Public Procurement and Asset Disposal Act. It was argued that at paragraphs 21 and 28 of its Supporting Affidavit, the Applicant relied on Smart Meter Technology Limited's bid documents and the evaluation report of the tender. Counsel contended that such information, being confidential, could only have been obtained illegally and ought not to be entertained by the Board.

177. In response to the above, the Applicant's Counsel argued that the statements in question were matters of belief, that the information relied upon was not confidential under Section 68(2)(d)(iii) of the Act, and that parts of the evaluation report had already been disclosed by the Respondents.

178. 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. Section 67 provides as follows:

***(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.***

179. It is evident from the above that the Act upholds the confidentiality of public procurement proceedings and related information. Specifically, a procuring entity, its officers, agents, and any other person are prohibited from disclosing procurement information that:

- (i) would be contrary to the public interest;
- (ii) could prejudice the legitimate commercial interests of tenderers;
- (iii) pertains to the evaluation and comparison of tenders; or
- (iv) reveals the contents of tenders. Any unauthorized disclosure of such procurement information constitutes an offense, attracting criminal sanctions, as well as debarment and prohibition from working

with any government entity, or entities where the government holds a share, for a period of 10 years.

180. Notably, all communication and inquiries between parties in procurement proceedings must be in writing, as mandated by Section 64(1) of the Act. It follows that a tenderer must formally request, in writing, that the accounting officer provide a summary of the proceedings related to the evaluation and comparison of tenders, among other procurement records. Such information can only be disclosed by the accounting officer of the procuring entity.

181. In the present Request for Review, the Interested Party referred the Board to paragraph 21 and 28 of the Supporting Affidavit that was filed together with the Request for Review.

182. The Board has perused the aforementioned paragraphs and proceeds to reproduce the relevant portion for clarity. Paragraph 21 and 28 of the Supporting Affidavit states as follows:

***21. THAT from the bid documents presented by these companies, the labour costs and electricity costs to produce large quantities of the single phase meters required to be supplied in the contracts would be humongous and would be reflected in the estimate of the expenses to be incurred.***

***28. THAT from the evaluation report that should form a part of the Respondent's record, we offered the most reasonable price for a local manufacturer.***

183. The Board notes that the Applicant did not annex any document that can be deemed confidential within the meaning of the Act and the Regulations, 2020. In the absence of such documentation, the Applicant's assertions may only be regarded as speculative.

184. In view of the foregoing, the Board finds that the Applicant did not rely on any confidential document as contemplated under Section 67 of the Act.

185. Accordingly, the Board finds that it has jurisdiction to hear and determine the Request for Review. This determination confers upon the Board the requisite authority to proceed with consideration and determination of the substantive issues raised.

**Whether the Request for Review is defective for failing to join Smart Meter Technology Limited as an Interested Party.**

186. Counsel for SMTL argued that the Applicant fatally failed to join it as a mandatory and necessary party to the Request for Review, contrary to Section 170(c) of the Act. That provision, it was emphasized, requires that the tenderer notified as successful by the procuring entity must be a party to review proceedings. It was pointed out that by a letter dated 17<sup>th</sup> July 2025, the 1st Respondent expressly notified the Applicant that SMTL had been awarded Lot 1 of Category 1 and Lot 4 of Category 2.

187. In response, Counsel for the Applicant argued that the non-joinder is not fatal, and the other successful bidders had been duly notified under Section 170(d) and had participated in the proceedings without suffering prejudice.

188. The Board notes that Section 170 (c) of the Act provides as follows:

***170. Parties to review***

***The parties to a review shall be—***

***(a) ...***

***(b) ...***

***(c) the tenderer notified as successful by the procuring entity; and***

***(d) ...***

189. Based on the foregoing legal provision, the Board observes that a tenderer notified as successful by the Procuring Entity must be a party to a Request for Review. The provision is framed in mandatory terms, indicating that inclusion of the successful tenderer as a party is required.

190. Turning to the present Request for Review, the Board notes that the tender was divided into three categories, as outlined in the preceding paragraphs. Based on the prior analysis, the Board further observes that the focus of this Request for Review is confined to Category 3, the category in which the Applicant submitted its bid.

191. Having narrowed the focus to Category 3, the main question for determination is whether Smart Meter Technology Limited falls within the description set out in Section 170(c) of the Act. Upon review of all

documents filed before the Board, it is noted that Smart Meter Technology Limited was not a successful tenderer in any of the lots under Category 3. The successful tenderers under this category were, however, duly joined as Interested Parties.

192. In light of the foregoing analysis, the Board finds and holds that the non-joinder of Smart Meter Technology Limited as an Interested Party is not fatal, given that it was not a successful tenderer under Category 3.

**Whether the mode of award adopted in the subject tender, together with its application, was consistent with the requirements of the law.**

193. The Board notes that this issue is intrinsically linked to whether the evaluation of the Applicant's bid was conducted in accordance with the law, given that such evaluation required the application of the award criteria currently under scrutiny. Accordingly, the Board shall address both issues concurrently.

194. The Applicant's Counsel argued that its tender under Category 3 was fully responsive within the meaning of Section 79 of the Act and ITT 28 of the Tender Document, having met all mandatory requirements. It was argued that the rejection of the bid on grounds of non-responsiveness and uncompetitive pricing was premature and unlawful, since competitiveness can only be determined at the evaluation stage under Section 80 of the Act.

195. The Applicant's Counsel, further contended that the Procuring Entity violated Section 86 of the Act and the tender document by awarding contracts to bidders who were not the lowest evaluated. It was argued that this failure to award to the lowest evaluated bidders undermined the Applicant's legitimate expectation of fair consideration.

196. In response, the Respondents' Counsel argued that Section 80(2) of the Act, Section 86(1), and Regulation 77(3) of the Regulations 2020 require evaluation strictly in accordance with the criteria set out in the tender documents. Counsel pointed to ITT 40 of the Tender Data Sheet read with Appendix 1 of Addendum No. 1 dated 13<sup>th</sup> June 2025, which set out the governing criteria. These included: awards to be based on the lowest evaluated price per lot, limitation to one lot per bidder per category in Categories 2 and 3, and award to the lot with the highest quantity where a bidder was lowest in more than one lot. It was their submission that these rules were consistently applied by the Evaluation Committee.

197. The Respondents' Counsel argued that on application of these rules, Smart Meter Technology Ltd was awarded; Category 2 was sequentially awarded to East Africa Meter Co. Ltd., Hexing Technology Co. Ltd., Inhemeter Africa Co. Ltd., and Smart Meter Technology Ltd., in line with the one-lot-per-bidder rule; while Category 3 went to Abcos Industrial Ltd., Magnate Ventures Ltd., and House of Procurement Ltd. Counsel stressed that the Applicant did not qualify in Categories 1 and 2 and in Category 3 their bid was non-responsive on account of uncompetitive pricing.

198. The 1<sup>st</sup> Interested Party's Counsel argued that the procurement process complied with the law and Tender requirements, and that the award was made to the lowest evaluated responsive bidder. It was urged that under Addendum No. 1, ITT 40, bidders could only be awarded one lot per category, and on this basis the 1st Interested Party was awarded Category 3, Lot 2 at a price of KES 561,015,000/= exclusive of VAT, being the lowest bid. Counsel also submitted that the Applicant's bid price for the same lot was KES 685,165,000/=: which was higher than that of the 1st Interested Party, rendering its claim of discrimination baseless. It was therefore contended that the award was fair, transparent, cost-effective, and lawful, and that the Request for Review lacked merit and ought to be dismissed.

199. Counsel for the 2nd Interested Party argued that it lawfully participated in the subject tender by bidding for Category 3 Lot 3, and its bid was responsive as it satisfied all mandatory, technical, and financial requirements set out in the tender documents. It was further contended that upon evaluation, the Procuring Entity determined it to be the successful bidder for Category 3 Lot 3, having submitted the lowest evaluated bid. The award was said to have been made strictly in line with the tender criteria, which allowed one lot per bidder per category, with subsequent lots awarded sequentially provided the pricing fell within prevailing market rates.

200. Counsel for the 3rd Interested Party and Counsel for Smart Meter Technology Limited adopted the submissions made by the Respondents' Counsel.

201. The starting point in determining this issue is Article 227 of the Constitution, which outlines the objective of public procurement, ensuring the provision of quality goods and services within a framework that upholds the principles enshrined therein. Article 227 states as follows:

***227. Procurement of public goods and services***

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

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

***a...***

***b...***

***c...***

***d...***

202. The above section of the law provides that, inter alia, when a State

organ or public entity procures goods or services, the process must adhere to specific standards, one of which is competitive fairness. In this context, competitive fairness means that the procurement process must offer all qualified suppliers an equal opportunity to compete for the contract. It ensures that no bidder is unfairly advantaged or disadvantaged and that selection is based on objective criteria. This fosters integrity, value for money, and public trust in the procurement system.

203. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 80 of the Act provides guidance on the evaluation and comparison of tenders by a Procuring Entity as follows:

***80. Evaluation of Tender***

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act shall evaluate and compare the responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,...***

***(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

**(a) The criteria shall, to the extent possible, be objective and quantifiable;**

**(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**

**(4) .....**

204. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document. The Board interprets a fair evaluation system as one that ensures equal treatment of all tenders based on transparently defined criteria in the Tender Document.

205. Section 86 (1) of the Act provides as follows:

**86. Successful tender**

**(1) 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) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;**

***(c) the tender with the lowest evaluated total cost of ownership; or***

***(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:***

***Provided that the provisions of this subsection shall not apply to **section 141** of this Act.***

206. The Board interprets the above legal provision to mean that the law prescribes, in mandatory terms, the criteria upon which a successful tender shall be determined, strictly as specified in the tender documents. The procuring entity is bound to award the tender only to the bidder who emerges successful under one of the four methods outlined in the section, namely: the lowest evaluated price, the highest combined technical and financial score under the Request for Proposals method, the lowest evaluated total cost of ownership, or the highest technical score where professional charges are regulated by statute. The use of the word "*shall*" underscores that the procuring entity has no discretion to depart from these legally sanctioned methods, save for exceptions expressly provided under the Act, such as section 141.

207. The Board observes that the Respondents contended that the evaluation of tenders was undertaken in accordance with ITT 40 of the Tender Document as read together with Addendum No. 1. For clarity, ITT 40 stipulates as follows:

### ***Award Criteria***

***KPLC shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender in accordance with procedures in Section 3: Evaluation and Qualification Criteria.***

208. The Board understands the above section of the tender document to mean that the award of the contract by KPLC is not premised solely on the lowest quoted price but on the tender that, after being subjected to the evaluation and qualification procedures set out under Section 3 of the tender document, emerges as the lowest evaluated. In other words, the successful tenderer must first satisfy the prescribed evaluation and qualification criteria, and only thereafter will the contract be awarded to the bidder offering the lowest evaluated price.

209. The Board further notes that Addendum No. 1 which amended the tender document set out, in part, the evaluation criteria to be applied in the following terms:

ITT Reference	Initial Particulars Of Appendix To Instructions To Tenders	Amended Particulars Of Appendix To Instructions To Tenders
ITT 40	<p><b>Mode of award shall be in accordance with the following:</b></p> <p>a) Award shall be to the tenderer(s) with the lowest evaluated price based on their eligibility as stated in ITT 3.6 and subject to (b) and (c) below.</p> <p>b) Bidders with ready stock will be considered for award as long as their bid price is within the market price.</p> <p>c) In case the verified ready stocks are more than the total requirements, the award shall be prorated depending on price and ready stocks, and in case the verified ready stocks are less than the total quantity required, the award shall be on prorata basis based on the pricing; declared delivery period and the production capacity.</p> <p>d) Only bidders who meet the Delivery period and minimum capacity will qualify for award.</p> <p>e) Notwithstanding (a) above, if the price of the lowest bidder exceeds the market price, the item shall not be awarded but recommended for retendering.</p> <p>f) In case of a tie, the award will be split amongst the bidders.</p> <p>g) KPLC shall also take into consideration the following:</p> <p>a. Delivery capability as per information given in the Capacity Declaration form.</p> <p>b. The monthly production capacity.</p> <p>c. Timely Delivery as per the delivery schedule in the previous order and satisfactory performance as per the provided delivery Schedule or at least 50% delivery on previous orders.</p> <p>The outcome of the due diligence visit.</p>	<p><b>Mode of award shall be in accordance with the following:</b></p> <p>a) Award shall be to the tenderer(s) with the lowest evaluated price per lot based on eligibility as stated in ITT 3.6 .</p> <p>b) Bidders with ready stock will be considered for award under category one (1) and any other category as long as their bid price is within the market price. Bidders may quote for all or as many items in the various lots as per their eligibility as stated in ITT 3.6 above.</p> <p>c) In case the verified ready stocks are more than the total requirements, the award shall be prorated depending on price and ready stocks, and in case the verified ready stocks are less than the total quantity required, the award shall be on prorata basis based on the pricing; declared delivery period and the production capacity.</p> <p>d) Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.</p> <p>e) Consequently, the subsequent lots shall be awarded sequentially following (d) above until all the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price.</p> <p>f) In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lot, notwithstanding (e) above.</p> <p>g) In case of a tie, the award will be split amongst the bidders.</p> <p><b>KPLC shall also take into consideration the following:</b></p> <p>a) Delivery capability as per information given in the Capacity Declaration form;</p> <p>b) The monthly production capacity;</p> <p>c) The outcome of the due diligence.</p> <p>d) Timely Delivery as per the delivery schedule in the previous order and satisfactory performance as per the provided delivery Schedule or at least 50% delivery on previous orders.</p>

210. The Board understands the above section of the Addendum No. 1 to mean that the mode of award was designed to be structured and sequential, taking into account both price and eligibility under ITT 3.6. In particular, the provision clarifies that the award of the contract is to

be made to the tenderer with the lowest evaluated price per lot, subject to the condition that the bidder meets the eligibility requirements.

211. The Board further understands the Addendum No. 1 to provide that for Categories 2 and 3, the award is limited to one lot per successful bidder, with the lot containing the highest quantity being prioritized where a bidder qualifies for more than one lot. The subsequent lots are to be allocated sequentially, provided that the price of the next qualifying bidder falls within the prevailing market price. Where there is no subsequent qualified bidder for a given lot, the award is to revert to the lowest evaluated tenderer for that lot. Finally, in the event of a tie, the award is to be shared among the tied bidders.

212. Guided by the foregoing criteria, the Board undertook an analysis of its application in respect of Categories 2 and 3, noting that the same criteria was applied concurrently to both categories. In so doing, the Board made the following observations:

**Category 2 – Local Manufacturers/Assemblers who have successfully supplied meters to completion to KPLC or any public entity in Kenya before.**

1	<p><b>The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s East Africa Meter Company Ltd, at Ksh. 7,410.00, who was properly awarded in accordance with Section 86(1) of the Act and the prescribed mode of award.</b></p> <p><b>Applicant No. 85 of 2025, M/s Chint, did not submit a quotation in this lot.</b></p>
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<p>2</p>	<p><b>The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s East Africa Meter Company Ltd at Ksh. 7,410.00. However, the mode of award, as provided in the addendum, limits a successful bidder to one lot per category for Categories 2 and 3, unless the bidder has the highest quantity, in which case a trade-off may be allowed. Consequently, East Africa Meter Company Ltd was ineligible in this category for any subsequent lots (Lots 2, 3, and 4).</b></p> <p><b>The next lowest evaluated bidder pursuant to Section 86(1) of the Act was M/s Hexing Technology Company Ltd, which was awarded the lot at Ksh. 7,800.00, in compliance with the mode of award outlined in the addendum.</b></p> <p><b>The Applicant in Application No. 85 of 2025 did not quote for this lot.</b></p>
<p>3</p>	<p><b>The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s Hexing Technology Company Ltd at Ksh. 7,400.00, followed by M/s East Africa Meter Company Ltd at Ksh. 7,410.00. However, the mode of award, as stipulated in the addendum, limits a successful bidder to one lot per category for Categories 2 and 3, unless the bidder has the highest quantity, which would allow for a trade-off. Consequently, both Hexing Technology Company Ltd and East Africa Meter Company Ltd were ineligible in this category for any subsequent lots (Lots 3, and 4) unless they met the highest quantity requirement for trade-off consideration.</b></p>

The next lowest evaluated bidder pursuant to Section 86(1) of the Act was M/s Magnate Ventures Ltd, at Ksh. 8,803.00, with a Lot 3 quantity of 50,000 pieces. In the following Category 3 Lot 2, 65,000 pieces were required, and Magnate Ventures Ltd's price of Ksh. 8,631.00 was the lowest, making them eligible for award in accordance with the mode of award provision, which states: *"If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity."*

Therefore, the next lowest evaluated bidder in Category 3 Lot 3 was M/s Inhemeter Africa Company Ltd, at Ksh. 10,530.00, which complied with the mode of award and had not been awarded in any other category.

The Applicant in Application No. 85 of 2025 did not quote for this lot.

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The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s Hexing Technology Company Ltd at Ksh. 7,400.00, followed by M/s East Africa Meter Company Ltd at Ksh. 7,410.00. However, the mode of award, as provided in the addendum, limits a successful bidder to one lot per category for Categories 2 and 3, unless the bidder has the highest quantity, in which case a trade-off may be allowed. Consequently, both Hexing Technology Company Ltd and East Africa Meter Company Ltd were ineligible in this category for any subsequent lots (Lots 2 and 3) unless they met the highest quantity requirement for trade-off consideration.

**The next lowest evaluated bidder, pursuant to Section 86(1) of the Act and in line with the mode of award, was M/s Smart Meter Technology Ltd at Ksh. 10,530.00.**

**The Applicant in Application No. 85 of 2025 did not quote for this lot.**

**Category 3 – All local meter Manufacturers/Assemblers**

**1 The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s East Africa Meter Company Ltd at Ksh. 7,410.00. However, the mode of award, as provided in the addendum, limits a successful bidder to one lot per category for Categories 2 and 3, unless the bidder has the highest quantity, in which case a trade-off may be allowed. Accordingly, East Africa Meter Company Ltd was ineligible in this category for any subsequent lots (Lots ) unless it met the highest quantity requirement for trade-off consideration.**

**The next lowest evaluated bidder pursuant to Section 86(1) of the Act was M/s ABCos Ltd, which was awarded at Ksh. 8,190.00, consistent with the mode of award in the addendum. The Applicant's quoted quantity for this lot was 110,000 pieces.**

**2 The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and lot was M/s East Africa Meter Company Ltd, at Ksh. 7,410. However, in accordance with the mode of award set out in the addendum, a successful bidder is limited to one lot per category for Categories 2 and 3. As such, East Africa Meter Company Ltd was ineligible for award in this category for any subsequent lots (Lots 2 and 3),**

**unless it held the highest quantity to allow for a trade-off.**

**The next lowest evaluated bidder pursuant to Section 86(1) of the Act was M/s HOPS, awarded at Ksh. 9,971.00, which was consistent with the mode of award in the addendum.**

**The Applicant quoted for this lot at ksh.11,000/piece.**

213. From the foregoing analysis, the Board finds that the mode of award applied in respect of the said categories lacked transparency, in that it remained confined to the minds of the Evaluation Committee without being expressly discernible to the tenderers. This opacity is further demonstrated by the absence of a detailed summary of the evaluation and comparison of tenders prepared and availed in line with the prescribed evaluation criteria.

214. In arriving at the foregoing conclusion, the Board observed that the mode of award applied was unpredictable and inconsistent, thereby failing to guarantee a transparent procurement process. By way of illustration, the lowest evaluated bidder was not assured of award in any given lot, owing to the contradictory and convoluted nature of the mode of award, which rendered the outcome uncertain and incapable of objective prediction.

215. The Board notes that the mode of award envisaged under Section 86 of the Act is designed to foster transparency and consistency in the making of awards, in consonance with Article 227 of the Constitution, which mandates that public procurement be conducted in a system that

is fair, equitable, transparent, competitive, and cost-effective.

216. In view of the foregoing analysis, the Board finds that the system applied in the subject procurement undermined the constitutional value of transparency and, more critically, failed to meet the requirement of cost-effectiveness envisaged under Article 227 of the Constitution. Moreover, by departing from the mode of award set out under Section 86 of the Act and read with Addendum 1 dated 13<sup>th</sup> June 2025, the Evaluation Committee adopted a process that was neither predictable nor lawful. Consequently, the Board finds and holds that the mode of award applied in respect of Categories 2 and 3 was unlawful.

217. The Board further notes that reliance on market surveys based on previous supplies, and applying the same as a basis for comparison to inform award decisions, may at times result in non current market dynamics. The Board emphasizes the need for more robust approaches when undertaking future market surveys. Additionally, the Board notes from the Evaluation Committee's report that certain remarks and observations were made in respect of due diligence for category 2 and 3, which, however, was not actioned.

218. Based on the foregoing findings, and turning to the evaluation of the Applicant's bid, the Board finds that the evaluation was unlawful to the extent that the application of the mode of award was unlawful. Further, upon review of the Applicant's letters of notification of intention to award, the Board notes that the reasons given for the Applicant's unsuccessfulness were not specific to the award criteria set out in ITT 40 and Addendum No. 1 dated 13<sup>th</sup> June 2025.

219. In view of the foregoing, the Board finds and holds that the mode of award applied to Categories 2 and 3 were unlawful. Consequently, all awards issued using these mode of award with respect to Category 2 and 3, are rendered unlawful.

**Whether the Letters of Notification of Intention issued in the subject tender complied with Section 87(3) of the Act.**

220. The Applicant contended that the letters of notification of intention to award failed to disclose key information, namely: that the tender was restricted to three (3) categories comprising a total of eight (8) lots, without providing details of the successful and unsuccessful bidders for each lot; the unit prices of successful bidders for each lot across the different categories, as required by the tender document, were not disclosed; and the awarding quantities for each successful bidder were not indicated.

221. The Applicant's Counsel argued that the practice of lumping together successful bidders across different categories, without disclosing which bidder was awarded which lot, constitutes an attempt to evade accountability and scrutiny.

222. In response to the above, the Respondents' Counsel argued that the 1<sup>st</sup> Respondent issued Notifications of Intention to Award on 17<sup>th</sup> July 2025 to both successful and unsuccessful bidders, including the Applicant. These Notifications, it was argued, met the statutory threshold as they were in writing, contained the names of the successful bidders alongside the awarded prices, and explained the rejection of the

Applicant's bid on account of uncompetitive pricing.

223. In response, all Interested Parties, including Smart Meter Technology Limited, adopted and aligned themselves with the submissions made by the Respondents.

224. Section 87(3) of the Act provides as follows:

***87. Notification of intention to enter into a contract***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

225. The Board interprets the above legal provision to mean that once a successful tenderer has been notified, the accounting officer of the procuring entity is under a mandatory duty to inform all other tenderers in writing that their bids were unsuccessful. The use of the word "*shall*" emphasizes that this is a compulsory obligation, not discretionary, and requires disclosure of the identity of the successful tenderer where appropriate, as well as the reasons for non-selection. This ensures transparency in the procurement process and provides unsuccessful tenderers with information necessary to assess the fairness of the evaluation.

226. In determining whether the letters of notification of intention to award

complied with the law by providing reasons for disqualification and identifying the specific successful tenderers for each lot, the Board carefully examined the said letters to ascertain the correct position, having regard to the diametrically opposed submissions made by the parties.

227. Upon examination of the letters, the Board notes that while the successful tenderers were disclosed, the unit prices for each lot awarded were not provided.

228. In view of the foregoing, the Board finds that the absence of such details rendered the notifications inconsistent with the requirements of Section 87(3)(b) of the Act. In reaching this conclusion, the Board is guided by its earlier findings on the evaluation criteria, which demonstrate that, for each category and lot, there were distinct reasons why certain bidders, including those with the lowest prices, were not awarded, contrary to the expectations under Section 86(1) of the Act.

229. Consequently, the failure to clearly communicate lot-specific outcomes in the letters of notification of intention to award resulted in a lack of transparency and compounded the opacity previously noted. The Board therefore finds that the said letters violated the provisions of the law.

230. Before concluding on this issue, the Board notes the matter of partial application of due diligence raised during the hearing. The Applicant contended that due diligence was conducted selectively, contrary to the law, while the Respondents maintained that it was carried out in accordance with the provisions of the Tender Document. In this regard, the Respondents submitted that due diligence was only required for the

2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, and none was conducted on the Applicant, given that it was not a successful bidder.

231. In determining this issue, the Board perused the confidential files and the documents filed by the parties and observed that the 1<sup>st</sup> Interested Party, despite being among the entities awarded in Category 3, had no record of due diligence having been conducted on it. Coupled with the findings highlighted in the preceding paragraphs, this demonstrates that the evaluation of tenders in Categories 2 and 3 was opaque and lacked the transparency required by law. The absence of explanations in the tender records for such gaps reinforces the Board's conclusion on the lack of transparency as noted above.

232. A transparent procurement system, as envisaged by the law, would ordinarily require that due diligence be conducted on entities with no prior record of supply with the Procuring Entity. In the present case, several entities with no history of dealings with the Procuring Entity were not subjected to any due diligence. This reinforces the Board's finding that the procurement process lacked both transparency and consistency.

233. In view of the foregoing, the Board finds and holds that the letters of notification of intention to award contravened Section 87(3) of the Act. Similarly, the due diligence conducted in the subject tender was unlawful, having been applied selectively and inconsistently.

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

234. Upon careful consideration of the parties' submissions and a thorough evaluation of all evidence on record, the Board finds that it has jurisdiction over Category 2 to the extent that the mode of award in Category 2 were applied hand in hand with Category 3 and the Board's jurisdiction extends correspondingly to Category 3 in that regard only.

235. Further, the Board finds and holds that it has jurisdiction over the issues raised by the Interested Parties, Smart Meter Technology Limited, and Hexing Technology Company Limited, to the extent that they are mandatory parties under Section 170 of the Act, being successful tenderers, as well as having been invited by the Board pursuant to Section 170(d) of the Act. In the same vein, the Board finds and holds that the non-joinder of Smart Meter Technology Limited is not fatal, as it was not a successful tenderer in respect of Category 3, which is the primary focus of this Request for Review.

236. The Board further finds that it lacks jurisdiction over the Request for Review to the extent that it challenges the issue of site visits prior to commencement of the tendering process, as this ground is time barred under Section 167(1) of the Act. However, the Board has jurisdiction to consider the application of the mode of award, as this aspect is not time barred. Additionally, the Board finds that the Applicant satisfied the requirement to plead loss and damages arising from the Respondents' alleged violations, and therefore has locus standi before the Board.

237. With regard to the objection concerning the alleged reliance on confidential information in contravention of Section 67 of the Act, the Board finds and holds that the Request for Review does not rely on any

confidential information, as no such information was presented or exhibited.

238. Regarding the application of the evaluation criteria and the assessment of the Applicant's bid, the Board finds and holds that the mode of award was applied in a manner that contravenes Section 86 of the Act read with Addendum 1 dated 13<sup>th</sup> June 2025, undermines transparency, and consequently rendered the awards in Categories 2 and 3 inconsistent and unlawful.

239. On the issue of the letters of notification of intention to award, the Board finds and holds that the same contravened Section 87(3) of the Act. Further, the due diligence conducted was carried out in a selective manner undermining transparency required in any lawful tendering process to the extent of bidders who benefited from category 3 on quantities in category 2 i.e Magnate ventures and further note the evaluation committee recommended that due diligence be carried out on Abcos Industrial Ltd and HOPS Ltd manufacturers in China .

240. The Board equally notes that with respect Category 1, Lot 1, the net effect of the impugned mode of award, which was applied interchangeably across all categories, impacted the fairness of the entire procurement process . To create a level playing field, it is only fair that the said category be subjected to a re-tender process, so as to ensure that the principles of equity and fairness envisaged under Article 227 of the Constitution are upheld.

241. Consequently, the Request for Review dated 29<sup>th</sup> July 2025, in respect of TENDER NO. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers And Assemblers), is hereby allowed to the extent of the following specific directions outlined in the Final Orders section of this decision.

## **FINAL ORDERS**

242. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 29<sup>th</sup> July 2025:

- 1. The award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2<sup>nd</sup> Respondent is hereby cancelled and set aside.**
  
- 2. The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers And Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd and Smart Meter Technology Ltd respectively by the 2<sup>nd</sup> Respondent be and is hereby cancelled and set aside.**
  
- 3. The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single**

**Phase Smart Meters. (Local Manufacturers And Assemblers) issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively by the 2<sup>nd</sup> Respondent be and is hereby cancelled and set aside.**

**4. The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers And Assemblers) with respect to Category 1, 2 and 3 be and is hereby cancelled and set aside.**

**5. The 1<sup>st</sup> Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.**

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

**Dated at NAIROBI, this 19<sup>th</sup> day of August 2025.**



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**PANEL CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**